IN THE SUPREME COURT OF APPEAL OF FLORIDA

CASE NO. 73,687

JESUS SCULL,

Appellant/Cross-Appellee,

vs.

THE STATE OF FLORIDA,

Appe11ee/Cross-Appe1lant.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

INITIAL BRIEF OF APPELLANT/CROSS-APPELLEE

CALIANNE P. LANTZ, ESQUIRE
Special Assistant Public Defender
9100 South Dadeland Boulevard
Suite 512
Miami, Florida 33156
(305) 670-1992
Florida Bar No.: 301671

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES AND OTHER PROVISIONS:

INTRODUCTION

The appellant/cross-appellee, Jesus Scull, was the defendant in the trial court. The appellee/cross-appellant, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appear before this court. The symbol "R" will be used to refer to the record on appeal and transcript of proceedings. The appendix to this brief will be referred to by the letters "App." followed by a page number. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The appellant/cross-appellee, Jesus Scull, was charged by an indictment filed in the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, on January 19, 1984, with two counts of first degree murder and with first degree arson, armed burglary and unlawful possession of a weapon. (R.27-30A). Mr. Scull was tried by a jury and convicted as charged. The trial judge subsequently sentenced him to death for the alleged murders of Miriam Mejides and Lourdes Villegas.

Appellant Scull then appealed to this Court from the judgment of conviction for the murders and a sentence of death. Scull v. State, 533 So.2d 1137, 1138 (Fla. 1988). (App. 1-8). The Court considered the following facts pursuant to said appeal. The bodies of two female victims were found on Thanksgiving evening of 1983 in the burning house of one victim. Both women had apparently been beaten to death. Evidence at trial indicated that the victims may have been beaten with a baseball bat and that both women had died before the fire. Appellant Scull's fingerprint was found on a bat in the women's bedroom and on the inside of one of the victim's car. Scull gave a statement to the police indicating that he was involved in a cocaine deal with the women and that they had loaned him the car, but denied killing the women. Id. (App. 2).

On September 8, 1988, this Court filed an opinion affirming Scull's conviction(s), vacating the death sentence and

remanding the case to the trial court on the grounds that the sentencing order was "so replete with error." This cause was remanded to the trial court so that it could conduct proceedings without a jury and render a new sentencing order consistent with the Court's opinion. Scull v. State, supra at 533 So.2d 1143-1144. Rehearing was denied on December 5, 1988.

Scull immediately filed an Emergency Motion For Stay of Mandate in order to file a Petition for Writ of Certiorari in the Supreme Court of the United States. This Court denied Appellant Scull's Motion. A Petition for Writ of Certiorari was filed in the United States Supreme Court on February 9, 1988. (See, Certificate of Service, App. 9)

The initial resentencing hearing took place on December 28, 1988, only three weeks after this Court's denial of rehearing. (R.46-76). The resentencing hearing was repeated on December 30, 1988, because the trial court had not actually received a mandate from this Court on December 28, 1988. (See, R. 77-85). Scull's counsel, Robin H. Greene, Esquire, requested a continuance or a stay on various grounds. Counsel intended to file a petition for writ of certiorari in the United States Supreme Court as to the convictions in question and did not expect for a resentencing proceeding to be scheduled so quickly, even before the official receipt of this Court's mandate by the Clerk of the Circuit Court. (R. 43).

Counsel was unsure whether or not she would be representing Mr. Scull on resentencing because she did not believe that the initial conflict with the Office of the Public Defender continued to exist and feared that she may have rendered Appellant Scull ineffective assistance of appellate counsel. In addition, counsel had just returned from a vacation in Colorado and had packed the necessary transcripts and record on appeal in order to relocate her office on December 30, 1988. She did not have adequate time to prepare for the hearing or conduct further research in light of this court's ruling to the effect that the trial court's former sentencing order was "so replete with error.'' Additionally, counsel had not been able to communicate with Mr. Scull until minutes before the December 28, 1988 hearing due to problems in obtaining an interpreter. (R. 43-44; 48-53).

Appellant/Cross-Appellee Scull filed a Verified Motion and Incorporated Affidavits for Disqualification on December 30, 1989, prior to the hearing where the Court resentenced Scull to death (after receipt of the mandate). The motion set forth appropriate grounds for the trial judge's recusal and contained incorporated affidavits of Jesus Scull and Robin H. Greene, Esquire. (R. 41-45). The trial court denied the motion. (R. 77-85; See also: R. 53-55).

The Court resentenced Appellant Scull to the death penalty as a result of the hearings held on December 28 and 30,

1988.(R. 46-85). Without the benefit of additional consideration, the trial judge found the following aggravating circumstances pursuant to Section 921.141, Florida Statutes:

> 1. The murders were in fact committed while the defendant was engaged in, or was an accomplice in the commission of, or an attempt to commit, or in the flight after committing, or attempting to commit a burglary, robbery or kidnapping.
>
> 2. The capital felony was particularly heinous, atrocious and cruel with regard to the victim Lourdes Villegas.
>
> (R.39)

The Court also found two mitigating circumstances to be applicable:

> 1. There appears to be no known significant prior history of criminal activity; and
>
> 2. The defendant's age at the time of sentencing may be a mitigating circumstance.
>
> (R.39)

The Court went on to order that it was imposing the death penalty because the two aggravating factors taken individually or together, so far outweigh the mitigating factors. (R.39).

This appeal follows from the trial court's resentencing order. Appellant/ Cross-appellee Jesus Scull respectfully reserves the right to raise additional pertinent facts in the argument portion of this brief.

POINTS ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT/CROSS-APPELLEE'S MOTION AND INCORPORATED AFFIDAVITS FOR DISQUALIFICATION?

II

WHETHER TRIAL COURT ERRED IN DENYING APPELLANT/CROSS-APPELLEE'S ORE TENUS MOTION(S) FOR CONTINUANCE OF THE CAPITAL RESENTENCING PROCEEDING?

III

WHETHER THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY IN RESENTENCING APPELLANT-CROSS/APPELLEE JESUS SCULL?

SUMMARY OF THE ARGUMENT

I

The trial Court committed reversible error in denying the Verified Motion and Incorporated Affidavits for Disqualification filed by Mr. Scull prior to the hearing where the Court resentenced Scull to death (after receipt of the mandate). The motion set forth appropriate grounds for the trial judge's recusal and contained incorporated affidavits. The motion filed in the instant case contained an actual factual foundation for the alleged fear of prejudice. The facts asserted in the motion were clearly reasonably sufficient to create a well founded fear in the mind of Mr. Scull that he would not receive a fair hearing at the hands of the trial judge.

II

Appellant/Cross-Appellee Scull submits that the trial Court committed reversible error in denying Appellant Scull's ore tenus motions and requests for continuance of the capital resentencing procedure. The trial court's denial of the requested continuance constituted an abuse of discretion and had the effect of violating Scull's due process rights under the Fourteenth Amendment of the United States Constitution and Article I, Section 9 of the Florida Constitution by rendering the proceeding unfair. Furthermore, Scull's Sixth Amendment

right to effective assistance of counsel was abridged by the posture in which the trial court placed Scull's court appointed appellate counsel. The instant sentencing order should therefore be vacated and the cause remanded for a new resentencing hearing.

III

Appellant/Cross-appellee Jesus Scull respectfully submits that the trial court erred in resentencing him to the death penalty for the murders of Lourdes Villegas and Miriam Mejides. The trial court's Order Imposing the Death Penalty Pursuant to Florida Statute 921.141 does not contain sufficient, requisite findings of fact to justify the imposition of the death penalty where the Court found two aggravating factors and two mitigating factors applicable to comply with the provisions of Section 921.141(3), Florida Statutes. The statute requires that in each case in which the court imposes the death sentence, the determination of the court shall be supported by <u>specific written findings</u> ~~of fact~~ [emphasis supplied] based upon the aggravating and mitigating circumstances and upon the records of the trial and sentencing proceedings. Furthermore, the Court's Order does not recite its factual basis for finding existence of the two aggravating factors. The trial court's oral pronouncements indicate that the trial court still took into account non-

statutory aggravating factors as a controlling factor in its weighing process. As such, the application of this State's capital sentencing statute in such a manner surely constitutes cruel and unusual punishment within the parameters of the Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT

I
THE TRIAL COURT ERRED IN DENYING APPELLANT/CROSS-APPELLEE'S MOTION AND INCORPORATED AFFIDAVITS FOR DISQUALIFICATION.

Appellant/Cross-Appellee Scull submits that the trial Court committed reversible error in denying the Verified Motion and Incorporated Affidavits for Disqualification filed by Mr. Scull on December 30, 1989, prior to the hearing where the Court resentenced Scull to death (after receipt of the mandate). The motion set forth appropriate grounds for the trial judge's recusal and contained incorporated affidavits of Jesus Scull and Robin H. Greene, Esquire. (R. 41-45).

This Court has made it clear that there are four separate expressions concerning the disqualification of a judge at the trial court level. First, the substantive right to seek disqualification of a trial judge is enumerated in Section 38.10, Florida Statutes. Second, the procedure to be followed in criminal cases is enumerated in Rule 3.230(d), Florida Rules of Criminal Procedure. Third, the process followed in civil cases is governed by Rule 1.432, Florida Rules of Civil Procedure. The fourth expression is found in the Code of Judicial Conduct Canon 3-C(1), stating that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned..." Livingston v. State, 441 So.2d 1083 (Fla. 1983). See, also: Fischer v. Knuck, 497 So.2d 240 (Fla. 1986).

In accordance with these expressions, to disqualify a judge, a motion and two or more affidavits must be timely filed in writing. Once the appropriate motion has been filed, the judge has no discretion to contest the veracity of the affidavits. Crosby v. State, 92 So.2d 181 (Fla. 1957); State ex rel. Aguiar v. Chappell, 344 So.2d 925 (Fla. 3d DCA 1977). A judge who is presented with the proper motion and supporting affidavits "shall not pass upon the truth of the facts alleged nor adjudicate the question of disqualification." Jenkins v. Fleet, 530 So.2d 993 (Fla. 1st DCA 1988). The function of a trial judge when faced with a motion to disqualify himself is solely to determine if the affidavits present legally sufficient reasons for disqualification. Dragovich v. State, 492 So.2d 350, 352 (Fla. 1986), citing to Fla.R. Crim.P. 3.230 (d). Any attempt to look beyond the legal sufficiency of the motion and refute the charges in the motion exceeds the court's authority. Bundy v. Rudd, 366 So.2d 440 (Fla. 1978).

Although the motion in the cause sub judice was not filed ten days prior to the hearing, good cause was shown for the delay in filing the motion in accordance with the provisions of Rule 3.230(c), Florida Rules of Criminal Procedure. The hearing was held only three weeks after this Court's denial of rehearing, during the middle of the winter holiday season, only days after Scull's counsel's return from Colorado. (R. 42, 43, 77). Furthermore, counsel was scheduled to move to a new office on the

date of the resentencing and had packed the necessary record on appeal and transcripts. **(R. 44).** The delay in filing the motion was also attributable to Scull's counsel's difficulty in obtaining an interpreter to consult with her client as to this matter. **(R.43,44).** Thus, it is clear that the motion in question conformed sufficiently to the rule and was facially sufficient.

Appellant/Cross-Appellee Scull further submits that the motion filed in the instant case contained an actual factual foundation for the alleged fear of prejudice. The facts asserted in the motion were clearly reasonably sufficient to create a well founded fear in the mind of Mr. Scull that he would not receive a fair hearing at the hands of the trial judge. See, Livingston v. State, supra, and Fischer v. Knuck, supra. The focus of the inquiry is not how the judge feels, but rather it is a question of what feeling resides in the affiant's mind and the basis for such feeling. Livingston v. State, supra: Suarez v. Dugger, 527 So.2d 1900 (Fla. 1988).

As a factual foundation, Scull's motion in the instant case sets forth statements made by the trial judge in sentencing him to death on May 6, 1986, at the original sentencing, characterizing Scull as a "psychopathic killer" and as "a complete and total psychopath" where there was no evidence that Scull met the criteria established by the American Psychiatric Association for "a complete and total psychopath", namely an individual with Antisocial Personality Disorder. (R. 41-42). In addition, Scull's fear of prejudice was compounded by events occurring prior to his re-sentencing. According to Scull's counsel, when she returned to her office from vacation on December 27, 1988, she called the prosecutor, prior to having the benefit of speaking to her client and inquired as to why the State was rushing to resentence Scull. The prosecutor told Scull's counsel

that the Court was "adamant" about not "dumping" this case on another judge. The remarks of the prosecutor led counsel to believe that the Court had an ~~ex~~ parte conversation with the prosecutor, prejudicing Scull's substantive rights to a fair capital sentencing proceeding before an impartial judge. (R. 42-43). The motion further asserts that the Court's insistence on the immediate resentencing of Scull despite counsel's request for a continuance and for a one day stay to file a petition for writ of prohibition in this Court, caused Scull to fear that the Court was not going to conduct a fair hearing and was biased in favor of the State. (R. 43-44).

Appellant/Cross-Appellee Scull therefore submits that the trial Court committed reversible error in denying his motion for recusal. The record clearly demonstrates (R. 46-85) that the Court's statements and rulings reflected a bias or prejudice. Where the judge is conscious of any bias or prejudice which might influence his official action against any party to a litigation, he should decline to officiate whether challenged ~~or not~~ [original emphasis]. In this case there was a valid challenge. Reversal is therefore warranted.

II

THE TRIAL COURT ERRED IN DENYING APPELLANT/CROSS-APPELLEE'S ORE TENUS MOTION(S) FOR CONTINUANCE OF THE CAPITAL RESENTENCING PROCEEDING.

Appellant/Cross-Appellee Scull submits that the trial Court committed reversible error in denying Appellant Scull's ore tenus motions and requests for continuance of the capital resentencing procedure. (R. 46-75). The trial court's denial of the requested continuance constituted an abuse of discretion and had the effect of violating Scull's due process rights under the Fourteenth Amendment of the United States Constitution and Article I, Section 9 of the Florida Constitution by rendering the proceeding unfair. Furthermore, Scull's Sixth Amendment right to effective assistance of counsel was abridged by the posture in which the trial court placed Scull's court appointed appellate counsel. The instant sentencing order (R. 39) should therefore be vacated and the cause remanded for a new resentencing hearing.

The initial resentencing hearing took place on December 28, 1988, only three weeks after this Court's denial of rehearing. (R.46-76). The resentencing hearing was repeated on December 30, 1988, because the trial court had not actually received a mandate from this Court on December 28, 1988. (See, R. 77-85). Scull's counsel, Robin H. Greene, Esquire, requested a

continuance or a stay on various grounds. Counsel intended to file a petition for writ of certiorari in the United States Supreme Court (and did subsequently file said petition) as to the convictionsin question and did not expect for a resentencing proceeding to be scheduled so quickly, even before the official receipt of this Court's mandate by the Clerk of the Circuit Court. (R. 43).

Furthermore, counsel was unsure whether or not she would be representing Mr. Scull on resentencing because she did not believe that the initial conflict with the Office of the Public Defender continued to exist and feared that she may have rendered Appellant Scull ineffective assistance of appellate counsel. In addition, counsel had just returned from a vacation in Colorado and had packed the necessary transcripts and record on appeal in order to relocate her office on December 30, 1988. She did not have adequate time to prepare for the hearing or conduct further research in light of this court's ruling to the effect that the trial court's former sentencing order was "so replete with error." Additionally, counsel had not been able to communicate with Mr. Scull until minutes before the December 28, 1988 hearing due to problems in obtaining an interpreter. (R. 43-44; 48-53).

This Court has specifically acknowledged that the requirements of due process of law apply to all three phases of a

capital case in the trial court: 1) The trial in which the guilt or innocence of the defendant is determined ; 2) the penalty phase before the jury ; and 3) the final sentencing process by the judge. Engle v. State, 438 So.2d 803, 813 (Fla. 1983), Accord: Walton v. State, 481 So.2d 1197, 1200 (Fla. 1988). Although a defendant has no substantive right to a particular sentence within the range authorized by statute, sentencing is a critical stage of the criminal proceeding. Engle v. State, supra. Due to the fact that the death penalty is permanent and irrevocable, unlike other punishments for crimes, the procedures by which the decision to impose capital punishment is made require the consideration of constitutional limitations not present in other sentencing decisions. Proffitt v. Wainwright, 685 F.2d 1227, 1252-1253 (11th Cir. 1982). The facts of the instant case clearly demonstrate that the expediting of Appellant's resentencing resulting in his being sentenced to death violated his state and federal constitutional rights to due process of law and that the actions of the trial judge constituted an abuse of discretion. Valle v. State, 394 So.2d 1004, 1009 (Fla. 1981).

Likewise, Appellant Scull's counsel was rendered ineffective, by being denied the adequate opportunity to properly consult with her client and prepare for the resentencing hearing. Defense counsel must have reasonable time to prepare for both the trial and sentencing phases in capital cases. See, Valle v. State, supra at 394 So.2d 1008. Due to the expedited

proceedings, counsel's assistance fell below a threshold level of competence, resulting in the Appellant's resentencing to the death penalty. See, Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The trial court's sentencing order should not be upheld in light of the foregoing reasons.

III

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY IN RESENTENCING APPELLANT-CROSS/APPELLEE JESUS SCULL.

Appellant/Cross-appellee Jesus Scull respectfully submits that the trial court erred in resentencing him to the death penalty for the murders of Lourdes Villegas and Miriam Mejides. The trial court's Order Imposing the Death Penalty Pursuant to Florida Statute 921.141 (R. 39) does not contain sufficient, requisite findings of fact to justify the imposition of the death penalty where the Court found two aggravating factors and two mitigating factors applicable to comply with the provisions of Section 921.141(3), Florida Statutes. The statute requires that in each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings ~~of fact~~ [emphasis supplied] based upon the aggravating and mitigating circumstances and upon the records of the trial and sentencing proceedings.

The Court's order without enumerating specific findings of fact finds the following aggravating circumstances:

> 1. The murders were in fact committed while the defendant was engaged in, or was an accomplice in the commission of, or an attempt to commit, or in the flight after committing, or attempting to commit a burglary, robbery or kidnapping.
>
> 2. The capital felony was particularly heinous, atrocious and cruel with regard to the victim Lourdes Villegas.

(R.39)

The Court also found two mitigating circumstances to be applicable:

> 1. There appears to be no known significant prior history of criminal activity; and
>
> 2. The defendant's age at the time of sentencing may be a mitigating circumstance.

(R.39)

The Court went on to order that it was imposing the death penalty because the two aggravating factors taken individually or together, so far outweigh the mitigating factors. (R.39).

The Court's Order does not recite its factual basis for finding existence of the two aggravating factors. Furthermore, there is no basis for using, at least implicitly, the heinous, atrocious or cruel factor in sentencing Appellant as to the murder of Miriam Mejides (R. 39), as the State conceded on the previous appeal that her murder did not fall into this category. Scull v. State, supra at 533 So.2d 1142.

This Court has made it clear that no defendant can be sentenced to death unless the aggravating factors outweigh the mitigating factors. Alvord v. State, 322 So.2d 533, 540 (Fla.1975). Although it is within the trial court's province to decide whether a mitigating circumstance has been proven and the weight to be given it, Scull v. State, supra; Teffeteller v. State, 439 So.2d 840, 846 (Fla.1983); Riley v. State, 413 So.2d

1173 (Fla. 1982), absence the requisite factual findings as to the aggravating factors the validity of the trial court's " weighing" process is not supported by the Court's Order.

Furthermore, Scull submits that the trial court's oral pronouncements indicate that the trial court still took into account non-statutory aggravating factors as a controlling factor in its weighing process. When confronted with his prior statements calling Scull a "psychopath ¨ the Court stated, "Well, what's wrong with that..."(R.53-54). In Miller v. State, 373 So.2d 882, 885 (Fla. 1979), this Court reversed an imposition of the death penalty where the judge considered as an aggravating factor the defendant's alleged incurable and dangerous mental illness. The use of the non-statutory aggravating factor as a controlling circumstance tipping the balance in favor of the death penalty was held improper because the aggravating circumstances specified in the statute are exclusive. The Court's Order imposing the death penalty on the facts of this case, clearly takes into account this factor. As such, the application of this State's capital sentencing statute in such a manner surely constitutes cruel and unusual punishment within the parameters of the Eighth and Fourteenth Amendments to the United States Constitution.

For the reasons enumerated above, Appellant Scull submits that the resentencing order sentencing him to death is erro-

neous to the extent to require reversal and a new sentencing hearing. See, Scull v. State, supra: Elledge v. State, 346 So.2d 998, 1002-03 (Fla. 1977).

CONCLUSION

Based upon the foregoing reasons and citations of authority, Appellant/Cross-Appellee respectfully submits that the death sentence(s) imposed by the trial court be vacated and the case remanded to the trial court for new proceedings.

Respectfully sumbitted,

CALIANNE P. LANTZ, ESQUIRE
Special Assistant Public Defender
9100 South Dadeland Boulevard
Suite 512
Miami, Florida 33156
(305) 670-1992
Fla. Bar No. 301671

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was served by mail upon RALPH BARREIRA, Assistant Attorney General, 401 N. W. Second Avenue, Suite N-921, Miami, Florida 33128 on this 28th day of July, 1989.

CALIANNE P. LANTZ, ESQUIRE