IN THE SUPREME COURT OF FLORIDA

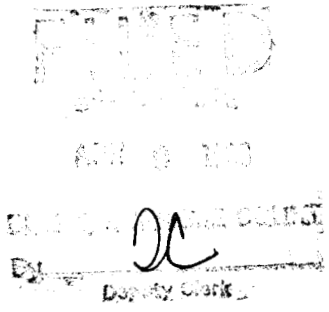
JAMES CURTIS McCRAE,

Appellant,

v. Case No. 74,685

STATE OF FLORIDA,

Appellee



BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

The trial court considered all the evidence offered by appellant in mitigation. The court, however, found that the evidence offered as mitigating was too speculative to outweigh the three aggravating circumstances already found to exist. The trial court's findings are supported by the record, and the imposition of death does not constitute an abuse of discretion.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IN LIGHT OF THE EVIDENCE OFFERED IN MITIGATION?

Appellant challenges the propriety of his death sentence and he contends that the trial court erred in overriding the jury's recommendation of life in light of the substantial evidence offered in mitigation. The state disagrees.

During the hearings below, appellant sought to establish the statutory mitigating factors of "extreme mental and emotional disturbance" and "substantial impairment" under *section 921.141(6)(b)* and *(f), Florida Statutes (1987).* To this end, appellant called Doctor Machler, a psychiatrist, who testified that at the time of the offense, appellant was having a seizure resulting from his affliction with temporal lobe epilepsy. (R 240) Machler testified that a person suffering from such a seizure is not rational thinking because their behavior is not purposeful or goal-directed. (R 209) Extreme violence by those afflicted is a common finding, along with amnesia of events which occurred during the seizure. (R 207, 210) Machler concluded that one suffering from such a seizure would have an extreme mental or emotional disturbance, and that they would neither be aware of their of conduct, nor have an ability to conform that conduct to the standards of law. (R 211)

On cross-examination, however, Machler stated that it was only his assumption that appellant was having a seizure during

the murder. (R 245) Machler admitted that he never interviewed appellant, nor did he have the actual results of appellant's EEG. (R 223) Machler also admitted that two different doctors could disagree on the interpretation of the same EEG. (R 224) When asked about appellant's statement to another doctor that this offense involved an accidental shooting of a woman in a pool hall, Machler replied that the statement is "not related to amnesia." (R 237 - 239) Lastly, Machler testified that his finding of temporal lobe epilepsy was inconsistent with Dr. Haber's conclusion that appellant "was a person who didn't like whites." (R 218)

In its written order sentencing appellant to death,[1] the trial court considered, but did not find the mitigating evidence sufficient to prove that appellant was acting under an "extreme mental or emotional disturbance," or that he was "substantially impaired." Specifically, the court found:

> The Defendant has urged that he was under the influence of extreme mental or emotional disturbance at the time the crimes were committed. In the original proceeding the Defendant presented the testimony of Dr. Clarence Shilt M.D., a psychiatrist, who testified that at the time of the crime the

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[1] The sentencing order was not included in appellant's Directions to the Clerk (R 619 - 620); thus, it is not included in the instant record on appeal. Appellee will therefore attach a copy of the order as an Appendix A-1 to its Answer Brief pursuant to *Rule 9.220, Fla. R. App. P. (1989)*. Also, appellee will forthwith move the Clerk of the lower court to supplement the record with the Order pursuant to *Rule 9.200(f)(1), Fla. R. App. P.*

Defendant's thinking may or could have been impaired. In addition the Defendant has presented the testimony of Dr. Theodore Mackler who theorized that the Defendant could have been suffering from temporal lobe epilepsy during that period of time. He felt that condition could in part account for some of the Defendant's previous violent behavior resulting in misdemeanor batteries and his previous conviction for assault with intent to commit murder when the Defendant brutally beat Mrs. Gertner and shot Mr. Smith. Dr. Mackler testified that the onset of an episode involving temporal lobe epilepsy including symptomatology of an explosive personality characterized by furor and rage can be precipitated by the use of alcohol. There is no testimony that at the time the Defendant committed this crime that he was drinking or using drugs. The theory concerning the possible existence of temporal lobe epilepsy as a mitigating factor invites the Court to engage in speculation since there is no evidence tending to establish that condition has been linked to this crime or was a cause of this crime. The violent or rageful behavior characteristic of temporal lobe epilepsy is not purposeful or goal directed. However, the Defendant's behavior during the commission of this crime was decidedly purposeful and goal directed.

Therefore it does not logically follow that every act of violence by an epileptic person is due to that particular condition. Extensive psychiatric examinations were conducted during the course of this case and consideration was given to every possible aspect of the Defendant's mental condition including the theorizing after the fact by Dr. Mackler. The Court finds that the opinions of Dr. Mackler are simply too speculative to establish mental or emotional disturbance as a mitigating factor to overcome to any degree the three aggravating factors.

* * *

The court has also considered all of the testimony and evidence presented which might

> tend to establish that the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as set for under Section 921.141(6)(f). Dr. Mackler has theorized that the Defendant could have been suffering from temporal lobe epilepsy and that he could have been experiencing seizures which could have taken the form of violent, explosive behavior characterized by furor and rage. In order to accept this theory and reach the conclusion that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law could have been substantially impaired, one would have to speculate that he was suffering such a seizure and acting out in a purposeless rage at the precise moment he committed this crime.
>
> However, it is abundantly clear the Defendant was acting brutally and inhumanely toward this helpless woman and there is no evidence that it was due even in part to temporal lobe epilepsy except for abstract theorizing in response to a question involving a hypothetical situation. While the possible existence and effect of temporal lobe epilepsy does not need to be proven to any reasonable degree of medical certainty, there must nonetheless be some competent evidence to support this conclusion without resorting to subjective manipulation of the evidence to produce the desired result.

(Appendix to Answer Brief, pp. 4 - 6)

The trial court's findings are supported by the record and other learned treatise. Indeed, the treatise *Synopsis of Psychiatry*[2] states that complex partial epilepsy (also known as temporal lobe epilepsy) is the most common form of epilepsy in adults, and that

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[2] Kaplan & Sadock, M.D.'s, *Synopsis of Psychiatry* (5th Ed. 1988).

the ictal event (or seizure) is characterized by brief, disorganized and inhibited behavior. Violence is very rare during a complex partial epileptic attack. There may be an increased incidence of interictal violence among patients with complex partial epilepsy. The episodes of violence, however, are often planned and remembered by the patient.[3]

The trial court found that appellant's behavior was decidedly purposeful and goal directed. This finding is supported by the record, for the *Williams* rule testimony found proper in McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1980), indicates that appellant utilized "a common scheme or plan to gain admittance to the victims' homes." Indeed, the Williams rule testimony contrasts sharply with Machler's testimony that appellant's actions would be irrational.

Where, as here, a trial court considers, but does not find significant, evidence of substantial impairment or emotional disturbance to support these factors in mitigation, the trial court's finding is proper, and it must be accorded deference on appeal. *See* Jennings v. State, 512 So.2d 169 (Fla. 1987); Johnson v. State, 497 So.2d 863 (Fla. 1986); Kokal v. State, 492 So.2d 1317 (Fla. 1986).

As for appellant's assertion that the trial court erred in failing to consider all the nonstatutory evidence offered in

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[3] *Id.* at 59 - 61 (Attached as Appendix A-2)

mitigation; namely, that appellant has a good potential for rehabilitation as he can participate meaningfully in society, that he feels a deep sense of remorse and that he has found religion, the state contends that where, as here, "all the evidence is considered, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion." Hill v. State, 549 So.2d 179, 183 (Fla. 1989). Also, mere disagreement with the force to be accorded such mitigating evidence is an insufficient basis to challenge a death sentence. Rose v. State, 472 So.2d 1155, 1158 (Fla. 1985).

Sub judice, the trial court heard and considered all the evidence offered by appellant in mitigation, but concluded that the evidence did not rise to a sufficient level to be weighed as mitigating circumstances, or to overcome the three aggravating already found proper by this Court. As such, no error can be shown, or now complained of. *See* Straight v. Wainwright, 772 F.2d 674 (11th Cir. 1985); Thompkins v. State, 502 So.2d 415 (Fla. 1987).

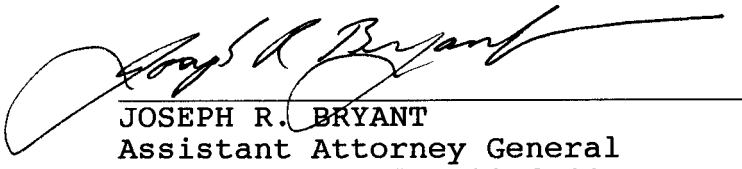
Appellant's sentence of death must, therefore, be affirmed.

CONCLUSION

WHEREFORE, based on the foregoing facts, arguments and citations of authority, appellant's conviction and sentence of death must be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robet H. Dillinger, Esq., Dillinger & Swisher, P.A., 5511 Central Avenue, St. Petersburg, Florida 33710, this 6th day of April, 1990.

OF COUNSEL FOR APPELLEE.

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APPENDIX TO BRIEF OF THE APPELLEE