IN THE SUPREME COURT OF FLORIDA

TIMOTHY ALEXANDER ROBINSON,

Appellant,

vs. CASE NO. 74,945

THE STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT IN AND FOR ESCAMBIA COUNTY, FLORIDA

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

The Appellant has previously made his statement of the case and statement of facts in his Initial Brief and shall rely on the same as though fully set forth herein.

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SUMMARY OF ARGUMENT

Appellant asserts that the trial court improperly overrode a jury recommendation of life which was the result of a 6-6 vote. This vote indicates that reasonable men could differ as to the appropriate sentence imposed. There was sufficient non-statutory mitigating factors which could and apparently were considered by the jury, including Appellant's upbringing, family ties, intellect, personality, history of family violence, education and emotional development to sustain the jury's recommendation. The trial court erred in overriding the jury's recommendation of life.

Appellant further asserts that the trial court improperly admitted the results of DNA testing, having failed to conduct a evidentiary hearing prior to admission of the evidence to determine the reliability of that evidence. Additionally, the trial court failed to provide Appellant a reasonable opportunity to prepare a defense to the DNA testing when the trial court refused to grant Appellant a continuance, in light of the fact that Appellant did not receive the results of the DNA testing, the experts' notes or report until immediately prior to trial.

As to the other points raised on Appeal, Appellant relies on the Summary of Argument as to Points III through VIII as stated in his Initial Brief.

ARGUMENT

I

THE TRIAL COURT IMPROPERLY IMPOSED THE DEATH PENALTY THEREBY OVERRIDING THE JURY'S RECOMMENDATION OF LIFE WHEN THE JURY HAD A REASONABLE BASIS FOR ITS RECOMMENDATION.

Appellee asserts that the record reflects that the jury provided a "non-conclusive 6-6 vote". (Appellee's Brief at page 29.) Appellant argues that a 6-6 vote is by its very nature non-conclusive, and indicates that reasonable men could differ as to an appropriate sentence. Appellee then argues that there is no reasonable basis upon which the jury could have made a life recommendation, after reviewing the very factors which could have been considered by the jury in making its recommendation of life. Appellant again asserts that the trial court can conduct its own examination of the evidence and the record, plus specifics of Appellant's character, only if there is no basis for the jury recommendation in the record. In the case at bar, the jury could have considered the fact that Appellant had close family ties and was supportive of his mother; was raised in an impoverished area of Liberty City, Miami; had a poor relationship with his father; was a witness to his father repeatedly beating his mother during Appellant's childhood; had immediately prior to the instant offenses received news of the violent death of his brother; had a history of

difficulty in school; had been evaluated by child psychologists while in school; had a borderline IQ; had experienced a chaotic childhood; was in the opinion of DR. LARSON "somewhat immature"; was aged 22 at the time of the alleged offenses; the background and involvement of the victims; and the fact that the State failed to provide substantial competent evidence to the effect that the murders were committed to prevent Appellant's lawful arrest.

In Hallman v. State, 460 So.2d 223 (Fla. 1990), this Court held that the jury's life recommendation in a first degree murder prosecution could be reasonably explained and should have been adopted by the trial court even though none of the statutorily enumerated mitigating circumstances applied. In Hallman, the defendant produced considerable testimony regarding non-statutory mitigation, and this Court found that the jury could reasonably have found that the defendant should be spared because of the circumstances of the shooting, and could also have decided that some of the aggravating factors proven were entitled to little weight. The Hallman Court concluded that the trial court did not give the jury's recommendation the great weight that Tedder v. State, 322 So.2d 907 (Fla. 1975) deserves.

In Cochran v. State, 547 So.2d 928 (Fla. 1989), this Court considered the very factors that Appellee now urges this Court in the case at bar to disregard. Specifically, the Cochran Court held that the trial court's

override of the jury's recommendation was not warranted despite the trial court's consideration of evidence that the defendant had previously been convicted of murder, which fact was unknown to the jury. Additionally, mitigating evidence presented was extensive, including evidence of the defendant's long-standing mental deficiency, severe learning disability, remorse, young age, and depression. The Court held that the facts of the case, including the defendant's prior conviction of a capital felony, were not so clear and convincing that no reasonable person could differ that death was the appropriate penalty. See also Holsworth v. State, 522 So.2d 348 (Fla. 1988), wherein this Court held that for purposes of sentencing in capital murder cases, childhood trauma constitutes a recognized mitigating factor.

Similarly, in Burch v. State, 522 So.2d 810 (Fla. 1988), this Court found that the trial court improperly overrode the jury's advisory recommendation where although the Judge found only one of the mitigating factors on which the defendant relied, the jury could very well have found all three factors and concluded that mitigation outweighed aggravation. Included in the mitigating factors considered by the Burch jury was a family history of physical and drug abuse, and the defendant's early sentence as an adult for crimes committed as a juvenile.

Appellee cites Thompson v. State, 553 So.2d 153 (Fla.1989), in support of its position. In Thompson a jury

override was sustained by this Court on the basis that there were five valid aggravating circumstances, no statutory mitigating circumstances, and very little non-statutory mitigating evidence. The case at bar is distinguishable, in that the statutory mitigating circumstance in Thompson was the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The two cases are factually dissimilar.

Appellee further cites Torres-Arboledo v. State, 534 So.2d 403 (Fla. 1988) in support of its position. The Torres-Arboledo Court found that the evidence supported the trial court's override of the jury's recommendation of life although a clinical psychologist testified the defendant was "very intelligent" and an excellent candidate for rehabilitation. The Court held that those factors were not of such weight that reasonable people could conclude they outweighed the proven aggravating factors, particularly in light of a prior conviction for a California homicide committed subsequent to the commission of the offense for which the defendant was being sentenced. In the case at bar, the testimony was in fact that Appellant is not "very intelligent" but is borderline intellectually. Additionally, Appellant has not raised as a nonstatutory mitigating factor a potential for rehabilitation.

Appellee cites Brown v. State, 473 So.2d 1260 (Fla. 1985) for the proposition that Appellant was a main actor,

fully aware of what was transpiring. In fact, this Court in Brown stated that where there is nothing in mitigation to provide reasonable support for the jury's recommendation of a life sentence, the trial court acted properly in overruling the life recommendation. In the case before this Court there were in fact several factors presented in mitigation, any one of which could have easily formed a basis for the jury's recommendation and which were not overcome by any aggravating factors.

Appellant asserts that the facts of this case are substantially close to those of Freeman v. State, 547 So.2d 125 (Fla. 1989) concerning intellectual capacity. In Freeman this Court found that the fact that the Defendant was 22 years of age at the time of the murder and was of dull-normal intelligence, scoring at approximately the fourth grade performance level, coupled with a psychologist's testimony of a history of abuse during the defendant's childhood provided sufficient mitigating evidence to support the jury's recommendation of life imprisonment. Likewise, Appellant was 22 years of age at the time of the murders and was tested at a low IQ level. Additionally, family history was presented from a psychologist as well as Appellant's family that Appellant witnessed abuse during his childhood, perpetrated by his father against his mother. The jury could well have arrived at its recommendation based on these facts alone. See also Scull v. State, 533 So.2d 1137 (Fla. 1988), wherein

this Court held that a Court could consider that a Defendant has a low emotional age. DR. LARSON testified in the case at bar that Appellant was "immature". (R-2000-2001)

Appellee asserts that the trial court's finding of an aggravating circumstance that the murders were heinous, atrocious or cruel and were committed in a cold, calculated and premeditated manner is supported by competent evidence. In McKinney v. State, 16 FLW S 300, (May 10, 1991), this Court noted that the fact that the victim died as a result of multiple gunshot wounds, without more, does not mandate a finding of heinous, atrocious or cruel circumstances; and further that the murder was not cold, calculated and premeditated where the murder resulted from chance encounter. Reiterating that "only in torturous murders - those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another", is the death penalty appropriate, citing Cheshire v. State, 568 So.2d 908 (Fla. 1990) and Lewis v. State, 398 So.2d 432 (Fla. 1981). In Lewis, this Court stated "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious or cruel." In the case at bar, the jury apparently considered and rejected the aggravating factors found by the trial court.

This Court further noted in McKinney that the circumstance of cold, calculated, and premeditated murder is generally only found in planned or contract or execution-style murders, where there is evidence of heightened premeditation, citing Pardo v. State, 563 So.2d 77 (Fla. 1990). In Pardo this Court stated that the evidence must prove beyond a reasonable doubt that the Defendant planned or arranged to commit murder before the crime began. The circumstances of this case do not warrant the trial court's finding that the murders were heinous, atrocious or cruel, or that they were cold, calculated or premeditated. See also Shere v. State, 16 FLW S 246 (Fla. Supreme Court, April 12, 1991).

Finally, Appellee argues that there was sufficient evidence presented to sustain that the murders were committed to avoid or prevent lawful arrest. In Dufour v. State, 495 So.2d 154 (Fla. 1986), this Court held that the trial court erroneously found that the murder had been committed for the purpose of avoiding a lawful arrest, since the evidence failed to establish the requisite proof of an intent to avoid arrest or detection through the killing. The Court stated that no showing was made that the dominant or sole motive for the murder was the elimination of witnesses. See also Bates v. State, 465 So.2d 490 (Fla. 1985) and Riley v. State, 366 So.2d 19 (Fla. 1978). The trial court improperly overrode the jury's recommendation of life.

II

THE TRIAL COURT IMPROPERLY ADMITTED THE RESULTS OF DNA TESTING.

Appellee asserts that Appellant is entitled to no relief for the trial court's improper admission of the results of DNA testing on the basis that the blood sample taken from Appellant was not drawn until March 7, 1989, which fact should have placed Appellant on notice that he should obtain his own expert to dispute the potential results should they be unfavorable to Appellant. Appellant argues that he was not placed on notice of the necessity of obtaining an independent expert until such time as he received the results from the State's expert. Appellant was entitled to a reasonable period of time in which to conduct his own investigation of the standards and practices used by Cellmark after obtaining written results of Cellmark's testing, which opportunity Appellant was denied by the trial court.

Additionally, Appellant again argues that the trial court erred in failing to conduct an evidentiary hearing prior to admission of the evidence, as required. In support thereof Appellant would cite Commonwealth v. Curnin, Mass.Sup.Jud.Ct., reported at BNA Rptr 1476 (January 24, 1991), wherein the Massachusetts Supreme Judicial Court overturned a defendant's rape conviction January 24, 1991 based on its conclusion that the testing laboratory used a questionable method to calculate the statistical probability

that the defendant's DNA matched that of the rapist. The Court ruled that the defendant's conviction must be reversed because the prosecution's evidence failed to establish that Cellmark Diagnostics followed a "generally accepted or obviously logical procedure" in their findings. The State's expert could not guarantee that the unique genetic components upon which the testing procedure focuses behave in standard ways in the general population as the Cellmark computation assumes they do. The results could therefore not be deemed reliable and it was upon this basis that the Court declared the admission of the DNA results prejudicial err. Appellant not being allowed an evidentiary hearing to challenge the validity of Cellmark Diagnostics' results, Appellant was precluded from effectively challenging Cellmark's findings. The trial court abused its discretion and denied Appellant his due process rights to a fair trial by refusing to continue Appellant's trial for a sufficient period of time to allow Appellant to conduct a reasonable investigation of the DNA results as well as by the court's refusal to grant an evidentiary hearing.

As to Points III through VIII, Appellant relies on his Initial Brief as though fully set forth herein.

CONCLUSION

Based on the foregoing Appellant respectfully requests that his convictions be vacated and that this cause be remanded for a new trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to Carolyn Snurkowski, Esquire, Assistant Attorney General, State of Florida, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 13 day of May, 1991.

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