IN THE SUPREME COURT OF FLORIDA

KENNETH KOENIG,

Appellant,

v.

Case No. 75,019

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Your appellee accepts the Statements of the Case and Facts set forth by appellant as substantially accurate recitations of the proceedings below.

SUMMARY OF THE ARGUMENT

As to Issue I: Appellant entered a no contest plea after validly waiving his constitutional rights. All prerequisites for a valid plea have been satisfied in this case and, indeed, appellant at several points acknowledged his guilt. Appellant executed a valid written waiver of rights and the trial court was assured that appellant had knowingly and voluntarily waived his rights. Additionally, appellant did not file a motion to withdraw before the trial court and, therefore, appellate relief is precluded.

As to Issue II: The trial court properly considered the Pennsylvania conviction and a Canadian conviction as prior violent felonies committed by appellant. Both prior convictions were "final" and any challenge to them must be made in the proper forum, not in the State of Florida. With respect to appellant's Canadian conviction, the record reveals that this conviction was, indeed, a robbery and must be considered as such.

As to Issue III: The trial judge did have written findings prepared and placed in the record. These written findings were incorporated within the judgment and sentence entered and signed by Judge Smith on August 28, 1989. These findings enable this Honorable Court to adequately and completely review this cause.

As to Issue IV: Appellant's prior convictions for the robberies in Canada and Pennsylvania were properly considered and weighed by the trial court. Remoteness is not a consideration when discussing this aggravating circumstance and robberies, being serious offenses, are entitled to proper weight.

The state established beyond a reasonable doubt that appellant killed the victim to avoid or prevent arrest. Appellant specifically stated that he would have to kill in order to get away with the crime. This evidence is sufficient to support this aggravating factor.

The trial court's order, when taken in context, clearly reflects that the court was considering the non-statutory circumstances proposed by appellant. Additionally, the record reveals that the trial judge considered all such non-statutory mitigating evidence and, therefore, the imposition of a death sentence in this case was proper based upon the weighing of the aggravating and mitigating circumstances.

As to Issue V: There is no reason to remand this cause where the trial judge sentenced appellant to the same sentence on each of the non-capital counts. The trial court properly scored the "prior record" on the scoresheets. An offense punishable in Canada by life imprisonment should not be scored as a misdemeanor in Florida.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY ACCEPTING A NO CONTEST PLEA PREDICATED UPON A KNOWING AND VOLUNTARY RELINQUISHMENT BY APPELLANT OF HIS CONSTITUTIONAL RIGHTS.

As his first point on appeal, appellant presents a two-fold argument concerning the circumstances surrounding the entry of his plea. He first contends that a plea of "no contest" is unacceptable as a basis for the imposition of the death penalty. Secondarily, appellant contends that the record does not reveal that he knowingly and voluntarily waived his constitutional right in connection with the entry of his plea. For the reasons expressed below, appellant's first point is totally belied by the record and should be rejected by this Honorable Court.

In his brief, appellant "notes" that a plea of "no contest" is not a plea which a defendant may enter (appellant's brief at page 22). This Court has, however, stated that "A nolo plea means 'no contest' . . . ." Garron v. State, 528 So.2d 353, 360 (Fla. 1988). Indeed, it was defense counsel who advised the court that the defendant would be entering a plea of "no contest" to the charges (R 261). To suggest on appeal that the plea entered by appellant should have no legal efficacy as a basis for a sentence of death after counsel represented to the trial judge that the defendant "understands completely that this could mean he would receive the death penalty" (R 261), is akin to a

"gotcha" maneuver which is criticized by many courts. See, e.g., McKinnon v. State, 547 So.2d 1254, 1257 (Fla. 4th DCA 1989) (Garrett, J., concurring in part and dissenting in part); Brown v. State, 483 So.2d 743, 746, n. 3 (Fla. 5th DCA 1986); Pollock v. Bryson, 450 So.2d 1183, 1186 (Fla. 2nd DCA 1984); State v. Belien, 379 So.2d 446 (Fla. 3d DCA 1980). Apparently, appellant seeks relief based upon a matter that was not presented at trial by defense counsel and this "invited error" should not be condoned by this Court. Cf. McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971).

In any event, the circumstances of the instant case reveal beyond a doubt that the plea entered by appellant has all the indicators of a valid basis for the imposition of a death sentence. Indeed, before correcting himself, the trial judge asked the defendant if he wanted to enter a plea of "guilty" and the defendant immediately answered in the affirmative (R 263 - 264). This is certainly not surprising in that the written Acknowledgment and Waiver of Rights expressly states that "1. I am pleading Guilty as Charged to: Count I -- FIRST DEGREE MURDER . . . " (R 372). Of course, the Acknowledgment and Waiver of Rights was signed by the defendant and his attorney (R 372). Also, immediately prior to the imposition of sentence upon him, appellant stated that he nothing coming his way and that is the reason he pled guilty (R 270).

Appellant's reliance upon Garron v. State, supra is totally misplaced. In Garron, this Court was concerned with the

application of a prior conviction of a violent felony. This Court held that where a capital defendant had previously pled nolo contendere to a prior charge of aggravated assault and where adjudication of guilt was withheld, the aggravating factor was not shown because there was no "conviction" for the purposes of capital sentencing proceedings. Garron, supra, 528 So.2d at 360. In the instant case, however, we are not concerned whether or not there was a prior "conviction". Indeed, there can be no doubt that appellant was adjudicated guilty of the first degree murder charge (R 422). The adjudication of guilt which occurred on July 7, 1989, was more than a valid basis for the imposition of a death sentence on August 28, 1989 (R 423, 424, 427).

Your appellee submits, therefore, that the plea entered by the defendant was more than a sufficient basis to support the imposition of a sentence of death. Indeed, appellant knew when he entered the plea that the ultimate penalty was a distinct possibility in his case. There is no ambiguity apparent in the plea entered in the instant case which would support the notion that the death sentence imposed subsequent to the plea is unreliable.

Appellant next contends that the record does not clearly establish that appellant knowingly and voluntarily relinquished his constitutional rights consequent to his entry of the plea. Nothing could be further from the truth. Apparently, appellant complains because the trial court did not specifically ask the

questions provided under *Florida Rule of Criminal Procedure 3.172(c)*. Appellant does acknowledge that the trial court ascertained that appellant voluntarily was "waiving certain rights" (Appellant's brief at page 28). However, appellant contends that the trial court reversibly erred by failing to mention the specific rights being waived under both the Rule of Criminal Procedure and those addressed in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Your appellee submits, however, that the circumstances in the instant case compel affirmance on this point.

During the plea colloquy, the trial court specifically asked appellant whether he understood everything contained in his written Acknowledgment and Waiver of Rights (R 263). The Court also assured himself that appellant and defense counsel had discussed every provision of the Acknowledgment and Waiver of Rights (R 263). The Acknowledgment and Waiver of Rights specifically provided, inter alia:

* * *

> 2. I understand that I have the right to be represented by an attorney at every stage of the proceeding and, if necessary an attorney will be appointed to represent me. I have the right to a jury trial and have the right to an attorney's help at that trial. I have the right to compel attendance of witnesses on my behalf, the right to confront and cross-examine witnesses against me, and the right not to testify or to incriminate myself. By pleading guilty or nolo contendere, I understand that I am waiving my right to a trial.

3. I understand that by pleading guilty or nolo contendere, unless I expressly reserve the right to appeal prior ruling of the court, I give up the right to appeal all matters relating to the Court's judgment, including my guilt or innocence.

4. I understand that if I plead guilty or nolo contendere, the judge may ask me questions about the charges, and if I answer these questions under oath, on the record, and in the presence of my lawyer, those answers could be used in any later prosecution for perjury. I understand I am waiving my right to have a presentence investigation and recommendation.

5. I admit that there is a factual basis for the charges to which I am pleading, and I feel my plea to be in my best interests.

6. I understand that if the Court accepts my plea to the charge(s) listed in paragraph one, my sentence will be determined by the Court at a sentencing hearing scheduled for July 24, 1989.

7. Other than the proposed sentence set out in paragraph six, no one has threatened me, made any promises or guarantees to me, nor in any way forced me to enter this plea. I am doing this freely and voluntarily.

8. I am represented by the undersigned attorney, I have discussed my case with him, and any questions I have had about my case have been answered to my satisfaction. I feel my attorney has represented me to the best of his/her ability, and I am satisfied with this representation.

9. I understand I have the right to appeal the judgment and sentence of the court within thirty (30) days from the date of sentence. I understand that if I wish to take an appeal and cannot afford an attorney to help me in my appeal, the court will appoint an attorney to represent me for that purpose.

* * *

> 11. I understand that if I am not a United States citizen, the plea may subject me to deportation pursuant to the laws and regulations governing the United States Naturalization and Immigration Service. (R 372)

A comparison of the Acknowledgment and Waiver of Rights as set forth above with the provisions of *Rule 3.172(c)* and *(d)* reveals that they are substantially the same and the defendant was informed of all necessary matters prior to tendering the plea.

Florida Rule of Criminal Procedure 3.172(i) provides that the failure to follow any of the procedures in *Rule 3.172* shall not render a plea void absent a showing of prejudice. It is abundantly clear, therefore, that no prejudice ensued to appellant when he had reviewed the written plea agreement with his attorney at least one day prior to entering the plea in open court.

The Acknowledgment and Waiver of Rights was signed by appellant and his attorney on July 6, 1989, the day prior to entry of the plea in open court (R 372). Based upon appellant's representation that he understood everything in the agreement and based upon the fact that appellant had reviewed his waiver of rights with counsel, the function of *Rule 3.172* had been effected in that the court was able to satisfy himself that the plea was voluntarily entered. The instant record, therefore, is wholly sufficient to show appellant was aware of all of the consequences of his plea.[1]

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[1] The record also reveals that appellant was knowingly and voluntarily waiving his right to a jury recommendation at the penalty stage. First, his written waiver was signed on the day

Additionally, it must be noted that appellant made no motion to withdraw his guilty plea before the trial court. Appellant consistently reaffirmed his plea and wished to proceed in accordance with that plea. There is no indication in the instant record that the plea was entered in any manner but freely and voluntarily with full knowledge of its contents. Inasmuch as a guilty plea is never a substitute for a motion to withdraw plea, Robinson v. State, 373 So.2d 898 (Fla. 1979), appellant is not entitled to seek withdrawal of his plea on appeal. In Tillman v. State, 522 So.2d 14 (Fla. 1988), this Court held that it would not permit a defendant to request withdrawal of a plea on appeal where no motion to withdraw the plea was ever filed before the trial court. Indeed, in the instant case as in Tillman, there is simply no indication that appellant wished to do anything but proceed in accordance with the terms of his plea. Therefore, this Honorable Court should reject this appellate claim.

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of the plea colloquy (R 363). Additionally, his attorney advised the Court that appellant was submitting a signed waiver of jury recommendation and it is clear that appellant understood the significance of his waiver. He acknowledged to the trial court that "I would have you be my judge and jury" (R 264).

ISSUE II

WHETHER THE TRIAL COURT ERRED BY CONSIDERING IN AGGRAVATION CERTAIN PRIOR CONVICTIONS FOR VIOLENT FELONIES COMMITTED IN PENNSYLVANIA AND CANADA.

As his next point on appeal, appellant challenges the trial court's use of two prior convictions of a felony involved in the use or threat of violence as aggravating factors in the instant case. Appellant challenges the use of a prior conviction for robbery entered in York, Pennsylvania in 1967, and a conviction for armed robbery entered in the province of Ontario, Canada in 1976. In Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977), this Honorable Court observed that:

> . . . the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge.

Based upon this general proposition, the trial court did not err by considering the prior out-of-state convictions.

Appellant does not dispute the fact that a conviction for armed robbery was entered in Canada in 1976. Rather, appellant contends that because the records do not reveal that United States constitutional guarantees were afforded appellant in Canada, the Canadian conviction cannot be used in aggravation of his death sentence. However, your appellee submits that the Canadian conviction has never been attacked, much less overturned, and is therefore a valid prior conviction to be

considered by a trial court when weighing aggravating and mitigating circumstances. Merely because appellant alleges that his Canadian conviction may have been uncounseled, no proof of this fact has ever been presented and, indeed, the proper forum to contest these allegations would be in Canada. Having failed to challenge the validity of the Canadian conviction, the trial judge in the instant case was permitted to consider this violent crime when assessing the character of the defendant.[2]

Appellant also attacks the Canadian conviction on the grounds that the offense charged in Canada would not constitute robbery in Florida. Although appellant's motion to preclude prior conviction as aggravating circumstance indicated that the Canadian conviction did not meet necessary criteria in order to constitute an aggravating circumstance (R 332), no reasons for this conclusion were given in the written motion. In fact, at the oral argument concerning this motion, no mention was made of the now-asserted appellate claim that the Canadian robbery might not be equated with a robbery in the State of Florida. The only argument espoused before the trial court was the claim that appellant's United States Constitutional guarantees may not have been afforded appellant in Canada (R 509 - 512). Having failed

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[2] In his brief, appellant contends that it is unclear whether court below took judicial notice of the Canadian conviction (Appellant's brief at page 32). However, the record reveals that the trial court admitted the conviction into evidence thereby obviating the question of whether judicial notice was being employed (R 87).

to assert the ground relied upon in his brief before the trial court, appellant is precluded from appellate review on this point. Cf. Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979). In any event, there is no contention by appellant that the crime committed in Canada was anything but an armed robbery. Indeed, in the State of Florida a perpetrator who enters a store and steels money while armed with a sawed off shotgun would be charged with armed robbery. Apparently the Canadian statutes provide that anyone who steals money with a sawed-off shotgun presumptively uses or threatens to use violence and, therefore, a robbery charge is proper. This Honorable Court has previously held that "*any* robbery is, as a matter of law for purpose of the capital penalty aggravating circumstance, a felony involving the use or threat of violence." Clark v. State, 443 So.2d 973, 978 (Fla. 1983), citing Simmons v. State, 419 So.2d 316 (Fla. 1982). The Canadian armed robbery conviction was properly considered by the trial court in the instant case when assessing appellant's character.

Appellant also challenges his Pennsylvania conviction in that the record of the Pennsylvania proceedings does not necessarily show that the plea was entered knowingly and voluntarily. As asserted above, however, the State of Florida is not the proper forum within which to attack an out of state conviction. The conviction must be presumed to have been entered validly and legally. In fact, appellant candidly acknowledges that the habeas corpus petition filed in the Pennsylvania federal

court was dismissed (appellant's brief at page 34, fn. 3.). In Ruffin v. State, 397 So.2d 277 (Fla. 1981), this Honorable Court held that a prior conviction of a violent felony may be used by the state even where that conviction is on appeal. This is because the conviction is presumed to be correct. In the instant case, the Ruffin holding is more than satisfied where the Pennsylvania conviction is not on appeal, but rather the claim was that it may be susceptible to collateral attack. However, even that collateral attack has been dismissed and the Pennsylvania conviction is final and was, therefore, properly considered by the trial judge when assessing the character of the defendant herein.

The Canada and Pennsylvania prior violent felony convictions were rightfully considered by the trial judge in this case when he weighed the aggravating and mitigating circumstances. These convictions were certainly reliable to serve as indicators of the character of the defendant.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY FAILING TO AFFIX HIS SIGNATURE TO HIS WRITTEN FINDINGS IN SUPPORT OF THE DEATH SENTENCE IMPOSED IN THE INSTANT CASE.

As his third point on appeal, appellant contends that the trial judge erred by failing to set forth in writing his findings upon which the sentence of death is based. This claim is specious and should be rejected by this Honorable Court.

The gist of appellant's complaint appears to be that the trial court's signature is not affixed to the actual written "Sentence of Kenneth Koenig" (R 416 - 419). Appellant does not contend that those written findings are any different from those orally pronounced by the trial court at the sentencing hearing (R 270 - 274). Appellant does, however, speculate and opines that it is unclear who prepared the findings and when they were prepared. The answer to these queries is clear where it is observed that the written "Sentence of Kenneth Koenig" was filed on August 28, 1989, the same date as the sentencing proceedings and the entry of judgment and sentence (R 268, 427). As appellant acknowledges, the written "Sentence of Kenneth Koenig" mirrors the oral pronouncement of the trial judge at the time of the sentencing. It cannot be clearer that these findings were those of the trial judge himself.

In Van Royal v. State, 497 So.2d 625, 628 (Fla. 1986), this Court held as follows:

> . . . We appreciate that the press of trial judge duties is such that written sentencing

> orders are often entered into the record after oral sentence has been pronounced. Provided this is done on a timely basis before the trial court loses jurisdiction, we see no problem. (Emphasis supplied)

It is also clear that, in accord with this Court's decision in Grossman v. State, 525 So.2d 833 (Fla. 1988), the written order in the instant case was filed concurrently with the pronouncement of sentence.

Albeit in a different context, i.e., the sentencing guidelines, this Honorable Court has held that although written reasons for departure are required of the judge, that requirement is satisfied by a notation upon the score sheet written by the clerk at the trial court direction. Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988). The written findings of the trial court sub judice are included in the record even if they were made contemporaneously with the oral pronouncement. The procedure employed by the trial judge in the instant case comports with the requirement that this Honorable Court be afforded the opportunity to engage in meaningful review of the trial court's findings. Thus, where it is not expressly required that the trial judge sign the written findings, and where as here it is undisputed that written findings are included in the record which comport with the oral pronouncement, the trial judge did not err.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY IMPOSED THE SENTENCE OF DEATH BASED UPON THE WEIGHING OF THE AGGRAVATING AND MITIGATING FACTORS PRESENT IN THIS CASE.

In his fourth claim, appellant contends that the trial court improperly applied the provisions of *Florida Statute 921.141* in sentencing appellant to death. He contends that the trial court found improper aggravating circumstances and failed to completely consider mitigating factors. Your appellee, however, asserts that the trial court correctly found four aggravating circumstances to be established beyond a reasonable doubt, considered all relevant statutory and nonstatutory mitigating circumstances, and engaged in a deliberative weighing process to validly impose the death sentence upon appellant. In the instant case, the trial court found four aggravating circumstances to be established beyond a reasonable doubt. Two of those factors are not contested upon appeal, to-wit: the capital felony was committed while the defendant was engaged in the commission of a robbery and a burglary [§*921.141(5)(d), Florida Statutes*] and the capital felony was especially heinous, atrocious or cruel [§*921.141(5)(h), Florida Statutes*]. In his brief, appellant does contest the finding by the trial court of two other aggravating circumstances, prior violent felonies and avoiding or preventing a lawful arrest. The trial court's finding of these aggravating circumstances was proper. In addition, the trial court considered all mitigating evidence proposed by the defendant and, after weighing the

aggravating and mitigating circumstances, the trial court properly imposed the sentence of death in the instant case.

A. Prior Violent Felonies

In this claim, as he did in Claim II above, appellant contends that the prior convictions for robbery in Canada and Pennsylvania should not have been considered by the trial court because they are unreliable. As discussed above, the convictions were properly considered where they are final and validly entered. Additionally, it is significant for the trial court, when evaluating a defendant's prior history and character, to consider the fact that even prior to the robbery committed in the instant case appellant had a history of committing robberies. This type of consideration is essential when examining the character of a defendant.

Appellant alternatively argues that if the convictions were properly used in aggravation, the prior robberies committed by appellant are entitled to little weight. He contends that the prior robberies were too remote in time from the instant offense. However, in Thompson v. State, 553 So.2d 153, 156 (Fla. 1989), this Court considered whether or not a defendant's 1950 conviction in Illinois for rape was too remote in time and place to be considered a valid aggravating factor. This Court determined that the aggravating circumstance is valid where our capital sentencing statute is silent as to when or where a previous conviction for a violent felony must have taken place.

Appellant also argues that neither of the robberies were particularly aggravated in light of the punishment received. However, many factors go into punishing a defendant including prior history, age, availability of incarceration facilities, etc. Merely because appellant received only two years imprisonment in Canada does not mean that the offense wasn't serious. To the contrary, as appellant acknowledges, the offense committed carries a maximum sentence of life imprisonment. The length of sentence received does not lessen the severity of the robbery committed by appellant with a sawed-off shotgun.

B. Committed for the Purpose of Avoiding or Preventing a Lawful Arrest

Appellant contends that the trial court improperly found as an aggravating circumstance that the murders were committed for the purpose of avoiding or preventing a lawful arrest. He argues, based upon this Court's decision in Menendez v. State, 368 So.2d 1278 (Fla. 1979), that the state did not clearly prove that the dominant or only motive for the murder was the elimination of a witness. Your appellee submits otherwise and, in accordance with the precedent established by this Court, the trial court correctly found the existence of the aggravating factor.

The facts supporting this aggravating circumstance were proven beyond a reasonable doubt and comply with this Court's caveat issued in Riley v. State, 366 So.2d 19, 22 (Fla. 1978),

to-wit: "proof of the requisite intent to avoid arrest and detection must be very strong [where the victim was not a law enforcement officer]". In the instant case, the unrebutted testimony of state witness Charles Friedman revealed that prior to the commission of the homicide appellant indicated that he might have to kill. Mr. Friedman was told by appellant that he needed to pull a "scam" (something that's not legal; R 70), and that in order to pull the scam off, appellant may have to "off" someone (to kill someone; R 70). Significantly, appellant also told Mr. Friedman that the murder would have to be committed in order that appellant could "get away with it" (R 76). One of the possible victims mentioned by appellant to Mr. Friedman was Ida Souta, also known to many as "Mom" (R 70 - 71). The conversation between Mr. Friedman and appellant occurred approximately 1 - 2 weeks prior to the homicide (R 73).

Your appellee submits that the facts as discussed above justify the finding of the aggravating circumstance that the crime was committed for the purpose of avoiding arrest. In Riley v. State, supra, this Court found this factor to be established by evidence that the victim, who knew the defendant, was shot and killed during a robbery. The victim was bound and gagged after one of the perpetrators expressed a concern over possible subsequent identification. Similarly, in Lopez v. State, 536 So.2d 226, 230 (Fla. 1988), the defendant therein stated within earshot of a state's witness that the victims had to be shot because the perpetrators could not afford to leave any witnesses

behind. In the instant case, appellant advised Mr. Friedman that it would be necessary to "off" his victim in order to get away with the robbery. Although existing in the instant case, it is not necessary that intent be proved by evidence of an express statement by the defendant or an accomplice indicating their motives and avoiding arrest. Routly v. State, 440 So.2d 1257 (Fla. 1983). Nor is it required that this be the only motive for the murder. In Bolender v. State, 422 So.2d 833 (Fla. 1982), this Court upheld the finding that murders were committed for the purpose of avoiding or preventing a lawful arrest where the victims were murdered partially to prevent retaliation but also to prevent arrest. In Routly v. State, supra, this Honorable Court distinguished Menendez, supra by focusing on the fact that in Menendez, it was not apparent as to what events preceded the actual killing. In the instant case, however, we do know what transpired prior to the murder. We know that appellant needed money and formulated a plan to acquire same by robbing and killing the victim. The killing was done so that appellant could get away with the murder. Your appellee therefore submits that proof of the requisite intent to avoid arrest and detection is very strong in this case.

In his brief, appellant relies on this Court's decision in Perry v. State, 522 So.2d 817 (Fla. 1988). Perry is distinguishable, however, where there was no direct evidence of motive. In the instant case as aforementioned above, appellant told the witness that he had to "off" the victim. Also,

appellant's speculation at page 41 of his brief that the instant crime may have been a robbery that simply got out of hand is not supported by the evidence. Contrary to appellant's assertion, the victim did not offer resistance as evidenced by the fact that there were no wounds compatible with defensive wounds (R 107). The combination of the fact that there were no defensive wounds coupled with appellant's pre-homicide statements that he was going to kill the victim indicate forethought in killing the victim and in no way indicates that this was a "robbery which got out of hand".

Your appellee submits that the avoiding arrest aggravating circumstance was proven beyond and to the exclusion of every reasonable doubt. Your appellee further submits that even if this Honorable Court should find that the trial court's finding of this aggravating circumstance was error, such error is harmless. It should be noted that although the prosecutor argued the applicability of the cold, calculated and premeditated aggravating factors, the court relied on basically the same facts to find the avoid arrest factor. Your appellee submits that the cold, calculated and premeditated factor is proven by clear evidence which shows the planning over a period of time sufficient to invoke application of that aggravating factor. However, your appellee submits that the trial judge did not err in finding the avoiding arrest aggravating factor based on the statements of appellant prior to the murder that he had to "off" someone in order to get away with the murder.

C. Mitigating Circumstances

Appellant contends that the trial court's reference to "non-mitigating" circumstances requires resolution due to purported ambiguity. This assertion is totally baseless when the term is placed in context. At the sentencing hearing (and in his written order), the court said the following:

> The defendant has agreed that none of the statutory mitigating circumstances apply. However, he contends that there is several, there are many nonmitigating circumstances that should be considered; these are:
>
> One, prior psychiatric history; two, prior deprived environmental background; three, emotional instability; and, four, remorse and admission of guilt.
>
> The court finds that the defendant has proven these mitigating circumstances. (R 273 - 274; 419)

Obviously, reference to "these mitigating circumstances" refers to the factors mentioned immediately above, those factors which the trial judge mistakenly referred to as "non-mitigating" circumstances. A review of the entire statement of the trial court as outlined above indicates that the judge made a distinction between statutory and non-statutory mitigating circumstances and it is apparent when reviewing the entire statement in context that "non-mitigating" was actual referring to "non-statutory mitigating circumstances". No clarification is needed here where the term "non-mitigating" is obviously a simple oral mistake when viewed in context of those items described (which are all non-statutory mitigators).

Appellant also contends that the trial court failed to comply with the dictates of Campbell v. State, 571 So.2d 415 (Fla. 1990), by failing to consider all mitigating circumstances urged by appellant. The record of the proceedings below totally belies this contention. The trial court, contrary to appellant's contention, addressed all of the factors which are non-statutory mitigators in his order. The other alleged mitigators mentioned in appellant's brief, to-wit: alcohol and drug abuse, good behavior in jail, artistic ability, and helping of others while in jail, are either encompassed by the non-statutory mitigators that were discussed by the judge in his order or they are simply not mitigating. This record does not reveal that appellant's alleged artistic ability was a mitigating factor. Appellant's alcohol and drug abuse was certainly encompassed within the court's consideration of prior psychiatric history. Appellant's good behavior in jail and helping others while in jail was considered when the trial court listed "remorse and admission of guilt." Good jail behavior is encompassed within remorse as a general category of related conduct. See Campbell v. State, Id. at 419, n. 3, n. 4.

Your appellee submits therefore, that all non-statutory mitigating circumstances proposed by the defendant were encompassed within the trial court's consideration and, therefore, the trial court's imposition of a death sentence should be affirmed.

ISSUE V

WHETHER THE TRIAL COURT PROPERLY IMPOSED SENTENCES FOR THE NON-CAPITAL OFFENSES IN THE INSTANT CASE.

As his final point on appeal, appellant contends that the trial court erred by using two scoresheets in imposing sentencing for robbery and for burglary, and that the court erred by improperly scoring the "prior record" section of the scoresheets. For the reasons expressed below, the trial court's sentences for burglary and robbery should be affirmed by this Honorable Court.

In his brief, appellant acknowledges that it is proper to prepare two scoresheets. This is done in order to compare which scoresheet has the highest score and, thus, is the one to be used. However, in the instant case, it made no difference which scoresheet was used. Appellant was given life sentences on both the burglary count and the robbery count due to departure for an unscored capital felony, a valid reason to depart upwards. Livingston v. State, 565 So.2d 1288 (Fla. 1990); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987). Thus, any contention that it was error for the court to use both scoresheets is clearly harmless error in the instant case. The same sentences were obtained no matter which scoresheet was used.

Your appellee further submits that the trial court did not err when scoring the "prior record" of appellant. For the reasons asserted above in Issue II in this brief, the prior convictions of appellant were properly considered and also were given the correct number of points. Appellant's assertion that

his Canadian offense of robbery with a sawed-off shotgun should be scored as a misdemeanor under Florida law is preposterous. It is absurd to consider a Canadian offense which is punishable by life imprisonment as a misdemeanor under Florida law. The correlative Florida statute requires scoring armed robbery with a sawed-off shotgun as a felony. This Honorable Court should affirm the life sentences for burglary and for robbery.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the judgment and the sentence of the trial court should be affirmed.

Respectfully submitted,

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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 Robert F. Moeller, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 24th day of May, 1991.

OF COUNSEL FOR APPELLEE.