IN THE SUPREME COURT OF FLORIDA

KENNETH KOENIG, :

Appellant, :

vs. : Case No. 75,019

STATE OF FLORIDA, :

Appellee. :

:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MANATEE COUNTY
STATE OF FLORIDA

REPLY BRIEF OF THE APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant, Kenneth Koenig, will rely upon his initial brief in reply to the arguments presented in the State's answer brief as to Issues III., IV.A., and V.

ARGUMENT

ISSUE I

APPELLANT'S ADJUDICATION OF GUILT OF FIRST DEGREE MURDER AND HIS SENTENCE OF DEATH ARE UNRELIABLE AND IN VIOLATION OF CONSTITUTIONAL PRINCIPLES OF DUE PROCESS OF LAW AND THE RIGHT NOT TO BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT WHERE THEY ARE PREDICATED UPON A NO CONTEST PLEA, AND THE RECORD DOES NOT CLEARLY ESTABLISH THAT APPELLANT KNOWINGLY AND VOLUNTARILY RELINQUISHED HIS CONSTITUTIONAL RIGHTS.

It is rather ironic that Appellee asserts that "[t]here 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" (Brief of the Appellee, p. 11), while at the same time acknowledging, at least implicitly, that the record reflects considerable uncertainty as to the nature of the plea Appellant wished to enter. For example, although Appellant actually entered a plea of "no contest" to the charges against him, as Appellee mentions at page 10 in its brief, the written "Acknowledgment and Waiver of Rights Form" Appellant signed the day before he entered his plea reflected that he was "pleading Guilty as charged to" the three counts of the indictment. (R372--emphasis supplied) Also, as Appellee notes at page 10 of its brief, "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 (R263-264)." And, finally, as Appellee points out at page 10 of its brief, at the sentencing hearing of August 28, 1989, Appellant said he had "pleaded guilty." (R270) Far from bolstering Appellee's position that Appellant's plea was sufficiently reliable to support imposition of the death penalty, these portions of the record instead demonstrate Appellant's apparent confusion over what plea he was entering/had entered, thus further undermining confidence in the validity of the plea.

Appellee complains that Appellant did not move "to withdraw his guilty plea before the trial court," and argues that he should not be permitted to do so on appeal, citing Tillman v. State, 522 So.2d 14 (Fla. 1988). (Brief of the Appellee, p.15) Of course Appellant, unlike Tillman, did not enter a "guilty plea," but a plea of no contest.

In Robinson v. State, 373 So.2d 898 (Fla. 1979) this Court held that the voluntary and intelligent character of a plea is a proper subject for appeal. The Robinson Court went on to reject the appellant's contention that a defendant "has a right to a general review of the plea by an appellate court to be certain that he was made aware of all the consequences of his plea and apprised of all the attendant constitutional rights waived" except in a death penalty case, which "requires this type of review." 373 So. 2d at 902.

With regard to Appellant's waiver of a sentencing jury, [1] the remarks of Justice Marshall, dissenting from the denial of certiorari in the capital case of Jells v. Ohio, __U.S.__, 111 S.Ct. 1020, 112 L.Ed.2d 1101 (1991) are particularly instructive. The Ohio capital sentencing scheme is somewhat different from Florida's in that a death sentence cannot be imposed unless the jury unanimously finds beyond a reasonable doubt that it is the proper sentence, and even then the trial court must also find independently beyond a reasonable doubt that death is the correct sentence before it may be imposed. However, in Florida, as in Ohio, the jury plays a "vital role," 112 L.Ed.2d at 1101, in the scheme of assessing capital punishment. A Florida jury's sentencing recommendation must be given "great weight," Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), and can be a "critical factor" in whether a death sentence is imposed. LaMadline v. State, 303 So.2d 17, 20 (Fla. 1974). Justice Marshall's opinion in Jells is equally applicable here. Jells executed a written waiver of jury trial in open court after he had an opportunity to consult with counsel. The Ohio Supreme Court held there was no error in "the trial court's failure specifically to advise petitioner of the effect of his waiver on sentencing." 112 L.Ed.2d at 1103. Justice Marshall wrote:

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[1] Appellee claims that Appellant's written waiver of a jury for sentencing was signed on the day Appellant changed his plea (Brief of the Appellee, pp. 14-15, footnote 1), but the record does not necessarily support this assertion. Although it appears that Appellant's attorney did write 7/7/89 under his own signature, the waiver form does not show when Appellant himself signed it. (R363)

I cannot accept the Ohio court's conclusion. The Sixth Amendment guarantees a criminal defendant the right to a trial by jury. While this right is subject to waiver, "we `do not presume acquiescence in the loss of fundamental rights,'" Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (citation omitted), and courts are therefore obliged to establish that any such waivers are made knowingly and voluntarily, id., at 464-465. It is generally accepted that waivers of certain constitutional rights--such as a waiver through a guilty plea of the right to trial or a waiver of the right to counsel--should be made in open court. See e.g., Brady v. United States, 397 U.S. 772, 748 (1970) (right to trial); Johnson v. Zerbst, supra, at 465 (right to counsel). Because these rights are critical in protecting a defendant's life and liberty, trial courts must apprise the defendant of the "relevant circumstances and likely consequences," Brady v. United States, supra, at 748 (emphasis added), to determine whether the defendant's waiver is made freely and intelligently.

Some courts, believing that the Constitution does not compel an inquiry by the trial judge when a defendant purports to waive his right to a jury trial, have nevertheless recognized that "trial courts should conduct colloquies with the defendant . . . [and] make sure that [the] defendant knows what the right guarantees before waiving it." See United States v. Cochran, 770 F.2d 850, 852 (CA9 1985) (citing cases). In my view, when a capital defendant's waiver of his jury trial right includes a waiver of his right to jury sentencing, this type of a searching inquiry by the trial judge into the knowing and voluntary nature of the waiver is not only sound practice but is constitutionally compelled.

The decision to waive the right to jury sentencing may deprive a capital defendant of potentially life-saving advantages. As we have recognized, the jury operates as an essential bulwark to "prevent oppression by the Government." Duncan v. Louisana, 391 U.S. 145, 155 (1968). "`[O]ne of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contempo-

> rary community values and the penal system.'" Gregg v. Georgia, 428 U.S. 153, 181 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968). Indeed, it has been argued that juries are less inclined to sentence a defendant to death than are judges. See Spaziano v. Florida, 468 U.S. 447, 488 n.34 (1984) (Steven, J., concurring in part and dissenting in part), citing H. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment 37-50 (1968).
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> * * *
>
> Given the consequences of petitioner's decision, the trial court's inquiry, which focused only upon whether petitioner signed the boilerplate waiver form voluntarily, was constitutionally inadequate. The court did not determine whether petitioner fully understood his entitlement to a jury trial--that is, whether he had signed the waiver "with sufficient awareness of the relevant circumstances and likely consequences" of his act. See Brady v. United States, supra, at 748. Nor did the waiver itself cure this defect, since it did no more than inform petitioner of his "constitutional right to a trial by jury." 53 Ohio St. 3d, at 25, 559 N.E.2d, at 468. It did not explain to him that he also was waiving his right to be sentenced by a jury or that, in the absence of a waiver, he could be sentenced to death only upon the jury's unanimous vote and the independent approval of the trial judge.

112 L.Ed.2d at 1103-1104.

Justice Marshall also opined that appellant's opportunity to consult with counsel was not "an adequate substitute for a full inquiry in open court." 112 L.Ed.2d at 1104.

The short waiver form Appellant executed did nothing to apprise him of the importance of the right he was giving up by foregoing any expression by the "conscience of the community" as to what his ultimate fate should be. It was necessary to advise him

of the significance of the right he was giving up on the record in open court.

ISSUE II

THE COURT BELOW ERRED IN CONSIDERING IN AGGRAVATION FOREIGN CONVICTIONS WHICH WERE NOT SHOWN TO HAVE BEEN OBTAINED IN COMPLIANCE WITH APPELLANT'S CONSTITUTIONAL RIGHTS, AND ONE OF WHICH WAS NOT ON ITS FACE A CONVICTION FOR A CRIME OF VIOLENCE.

At page 17 of its brief, Appellee argues that Canada would be the "proper forum" for Appellant to challenge his Canadian conviction as being uncounseled. However, it seems certain that Canadian courts would not and could not entertain an argument that Appellant's conviction was not obtained in compliance with the laws of the United States and Florida; only the courts of this country and this State would be in a position to make such a determination.

With regard to Appellee's argument that Appellant did not argue below that his Canadian conviction was not a crime of violence (Brief of Appellee, pp. 17-18), Appellant alleged as follows in his "Motion to Preclude Prior Conviction as Aggravating Circumstance" (R332-333):

> 1. 921.141(5)(b) states that aggravating circumstances shall be limited to the fact that the Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> 2. That the State Attorney's Office has supplied the defense counsel with a certified copy of a conviction in the Province of Ontario, Judicial District of Halton in the country of Canada. Further, that said certificate of conviction states that he "did steal from the A&W Drive-in Restaurant a sum of money, while

> armed with a sawed off shotgun. Contrary to Section 303 of the Criminal Code.".
>
> 3. That said conviction does not therefore meet the necessary criteria in order to constitute an aggravating circumstance to be presented by the State under Florida Statute 921.141.

While not a model of specificity, the motion did indicate that Appellant's conviction in Canada did not involve the use or threat of violence necessary for it to qualify as an aggravating circumstance under section 921.141(5)(b). Furthermore, this Court should consider whether the State has proven aggravating circumstances beyond a reasonable doubt regardless of the precise arguments which may or may not have been presented below.

Appellee's statements that "Appellant does not dispute the fact a conviction for armed robbery was entered in Canada in 1976" and that "there is no contention by appellant that the crime committed in Canada was anything but an armed robbery" (Brief of the Appellee, pp. 16,18) are inaccurate. Appellant certainly does dispute the fact that the State proved below that he was convicted in Canada of a crime that would constitute an armed robbery, or any other crime of violence, under Florida law.

At page 18 of its brief Appellee makes this rather startling remark: "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." Appellee cites no authority whatsoever for this proposition, and, indeed, the Canadian statutes introduced into evidence by the prosecutor below suggest that it is erroneous. Section 302 of the

Revised Statutes of Canada 1970 provided for alternative ways in which robbery could be committed (R516 -- State's Exhibit Number 15):

Robbery and Extortion

> 302. Every one commits robbery who
> (a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;
> (b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;
> (c) assaults any person with intent to steal from him; or
> (d) steals from any person while armed with an offensive weapon or imitation thereof. 1953-54, C.51, s. 288.

The first three subsections above involved the use of violence in attempts to obtain the property of another; subsection (d), the subsection pursuant to which Appellant was charged, did not require the use of violence. Furthermore, to apply the presumption suggested by Appellee would violate the due process requirement of the Fourteenth Amendment in contravention of the principles expressed in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Appellee's reliance upon this Court's statement in Clark v. State, 443 So.2d 973 (Fla. 1983) that any robbery qualifies as a crime of violence for capital sentencing purposes (Brief of the Appellee, p.18) is misplaced. The Court obviously was referring to offenses which would constitute robbery under the statutes of Florida; the State never proved that the offense for which Appellant was convicted in Canada would so qualify.

As for Appellant's Pennsylvania conviction, Appellee makes much of the fact that Appellant's collateral attack on this conviction was dismissed (Brief of the Appellee, pp. 18-19) However, it should be remembered that the United States District Court for the Middle District of Pennsylvania did not dismiss Appellant's petition for writ of habeas corpus on the merits, but for other reasons, as explained in footnote 3 of Appellant's initial brief on page 34.

ISSUE IV

THE TRIAL COURT ERRED IN SENTENCING APPELLANT, KENNETH KOENIG, TO DIE IN THE ELECTRIC CHAIR, BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

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

At page 26 of its brief, Appellee cites Bolender v. State, 422 So.2d 833 (Fla. 1982) in support of its argument that the aggravator in question may be applied to Appellant. However, in Bolender one of the victims "was described as a police informant." 422 So.2d at 838. Ida Souta had no connection with law enforcement.

At page 27 of its brief Appellee argues that the absence of defensive wounds on Ida Souta shows that she offered no resistance, and that the homicide therefore did not result from a robbery that got out of hand. Of course, the fact that the associate medical

examiner did not note any wounds compatible with defensive wounds does not conclusively show that Souta did not put up a struggle. Furthermore, her resistance could have been verbal, rather than physical.

Appellant would also point out that his actions after the homicide did not indicate an intent to avoid or prevent arrest. He made no attempt to conceal the body or wipe up the blood. (R32-33, 37-38,41-42) He left the knife that was apparently used in the killing in plain view, near Souta's head. (R33) He apparently made no effort to wipe away his fingerprints; his thumb print was lifted from Souta's bedroom dresser. (R39,56-58) Appellant remained in the area, cashing the check Souta had written using his own name, at the window of a bank teller who knew him and who could (and did) identify him. (R49-55)

Appellee argues that the cold, calculated, and premeditated aggravating circumstance has been proven, even though it was rejected by the sentencing court. (Brief of the Appellee, p.27) Appellee states 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." (Brief of the Appellee, p.27) To use "basically the same facts" to find both CCP and avoid arrest would run afoul of the prohibition against doubling of aggravating circumstances discussed in Provence v. State, 337 So.2d 783 (Fla. 1976) and other cases. Moreover, the cold, calculated, and premeditated aggravating circumstance requires a careful plan or

prearranged design to kill. Capehart v. State, 16 F.L.W. S447 (Fla. June 13, 1991). Charles Friedman's testimony showed an Appellant who was in a quandary as to what he should do. Appellant had several different ideas in mind, only one of which involved Ida Souta, and none of which was specific. (R70-72,81) He had no definite plan or design when he talked to Friedman, and his state of mind was not such that CCP can be applied here.

C. Mitigating Circumstances

Appellee questions whether Appellant's "alleged artistic ability was a mitigating factor." (Brief of the Appellee, p. 29) Of course, pursuant to Campbell v. State, 571 So.2d 415 (Fla. 1990), it was incumbent upon the trial court to make this determination, which he failed to do. However, in McCrae v. State, 16 F.L.W. S421 (Fla. May 30, 1991) this Court recently identified above-average intelligence and writing ability as a valid nonstatutory mitigating factor, and artistic ability should be treated no differently. Similarly in footnote 4 in Campbell, found at 571 So.2d 419, which is cited by Appellee at page 29 of its brief, this Court listed "[c]ontribution to community or society as evidenced by an exemplary work, military, family, or other record" as a category of valid nonstatutory mitigation. Certainly, the creation of art must be considered a contribution to society that would fit within this category.

CONCLUSION

Appellant, Kenneth Koenig, respectfully renews his prayer for the relief requested in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Assistant Attorney General Robert J. Krauss, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 27th day of June, 1991.

Respectfully submitted,

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