FILED
SID J. WHITE
NOV 14 1990
CLERK, SUPREME COURT
By ______
Deputy Clerk

SUPREME COURT OF FLORIDA

SAMUEL PETTIT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

______________________/

Case No. 75-565
Lower Case No. 88-421-CF-A-EOF

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

INITIAL BRIEF FOR APPELLANT

GREGORY N. BURNS
Attorney for Appellant
P.O. Box 2194
Fort Myers, FL 33902
(813) 334-7107
Florida Bar #0179318

TOPICAL INDEX TO BRIEF

	PAGE NO.
STATEMENT OF THE FACTS	2
STATEMENT OF THE CASE	5
SUMMARY OF THE ARGUMENT	10
ISSUE 1	11
ISSUE 2	15
ISSUE 3	16
CONCLUSION	18

STATEMENT OF FACTS

The appellant, SAMUEL PETTIT, abducted the victims, NORMAN LANGSTON and KATHLEEN FINNEGAN, at gunpoint on the night of August 17, 1988, while they were leaving the River Watch Lounge, in Punta Gorda, Florida. The victims were forced into Langston's car and told to drive to a clearing at Alligator Creek and Taylor Road south of Punta Gorda, about 5 miles away . (R 11-31 & 128). On the way, while stopped at Taylor Rd and U.S. 41, Pettit robbed Finnigan of her watch, jewelry and some cash (R 28). After they arrived at the Alligator creek clearing the Appellant forced Langston to turn over his watch and money (R35-37). After robbing Langston, and apparently after getting out of the car, the Appellant shot both Finnegan and Langston twice (R38-40). Finnegan was struck in the arms and forearms with one bullet striking her in the left forearm then exiting and striking her right arm to become lodged in her wrist. The other bullet entered her upper left arm between her elbow and shoulder to become lodged in her shoulder (56). Norm Langston had been shot twice in the right side of the head and again in the face (R 107).

Finnegan survived the shooting and was able to make her way to the Knight's Inn Lodge, a little over half a mile away (R 52,128) where help was summoned. Langston died in the hospital two days latter (R 103 & 104) of these gunshot wounds (R 113).

Subsequent investigation revealed that Pettit had obtained the gun used in the robbery earlier that day (R 87) with the help of his cousin Charlie Lee Mooney (R 76-81, 42 & 88). Pettit had admitted to Mooney that he was going to use the gun to "have a robbery" (R 87) and had borrowed a long sleeve shirt to cover this tattooed arms (R 84) and made a mask out of one sleeve (R 86 & 87). The next morning the Appellant confided to Mooney that he had shot someone (R 92) and gave Mooney Finnigan's watch and earrings (R 94) telling him he had taken them from the victims (R 95) and asking him to sell them (R 93). These items were latter turned over to the police (R 100). Pettit was then given a ride to one Hubert Jackson's house south of Punta Gorda (R 99) and from there got a ride with friends to Naples, Florida (R 146). While at Hubert Jackson's house the Appellant told Robert E. Jackson that he had shot some people and that that was why he needed to get out of town (R 137-139). At about 12:30 the morning of August 19, 1988, the defendant was arrested by Naples Police Officers while sleeping on the beach (R 157-165). The gun used in the robbery was removed from his pocket (163 & 42). Pettit was latter convicted of carrying a concealed firearm as a result of this arrest (R 166).

At subsequent hearing in this matter it was shown that Pettit suffers from a genetic disordered called Huntington's Chorea (R 208). This disorder typically first appears in individuals from 35-40 years of age and is marked by either or both movement disorder or intellectual deterioration (R

209) which become progressively worse as time passes (R 209). It is a degenerative process that affects both mentation and also physical behavior (R 192). The decline is slow but variable taking from 10 to 15 or 20 years (R 209, 192). Apparently, it is caused by an abnormal chromosome (R 192). The disease is not treatable and shortens life expectancy (R 194). Pettit's father suffered from the disease (R 466) and apparently committed suicide because of it (R 192). Although Pettit exhibited jerky movements and other eye movements typical of the disease his mentation, memory, and orientation were found to be normal when he was examined by physicians subsequent to these events. (R 191)

STATEMENT OF THE CASE

On September 6, 1988, in Circuit Court in Charlotte County, Florida the defendant was indicted for First Degree Premeditated Murder, First Degree Felony Murder, Attempted First Degree Premeditated Murder, Attempted First Degree Felony Murder, Robbery (two counts) and Kidnapping (two counts) (R 25Ø). Attorneys Dennis Rehak and Susan Harrell had previously been appointed to represent him (R 248) . Presumably a plea of not guilty was entered on behalf of the appellant at the arraignment and numerous motions were filed on his behalf. In August of 1989, the attorney's for the appellant filed a motion to withdraw alleging in essence that the appellant refused to cooperate with them, or to take their advise, or to allow motions or witnesses to be called on his behalf (R 316). A motion to determine appellant's competency followed shortly thereafter (R 318). Expert witnesses were appointed to examine the accused (R 313) and a hearing was had in the matter on September 6, 1989 (R 319). Dr. Yi Yi Myint, a licensed psychiatrist (R 322), who had been appointed by the Court to evaluate the appellant testified that he was competent to stand trial and assist his counsel (R 227- 331). Dr. Robert Silver, a clinical psychologist (R 399) also examined Pettit and testified that in his opinion the appellant was competent to stand trial, that he understood the charges against him, and the role of the attorneys and the nature of the proceedings (R 344-345). Robert Wald M.D., also examined Pettit and, in his absence,

his report to the court was admitted into evidence upon stipulation of the parties (R 369-372). Dr. Wald's report showed the defendant to be 21 years of age (apparently this is a mistake , Pettit was 27 at the time of the these hearings R.455), with a 9th grade education and that he had spent much of his time since he was 12 years old in boy's schools or prison, having been out of prison only one year in the last nine (R 466 & 467). Dr. Wald was also of the opinion that Pettit was competent to stand trial (R 468). All three mental health experts acknowledged that Pettit suffered from Huntington's Chorea (R334,356, 466). The Court found appellant competent to stand trial (R 374).

On two separate occasions prior to ruling on the motion of the attorneys to withdraw, the court inquired of Pettit regarding any objections he might have to the motion (R 378 and 441). Mr. Pettit simply responded the attorneys could withdraw if they wanted to (R 378 & 441) and that he just wanted to go ahead and plead guilty to the charge (R 380 & 438). He reiterated his desire to change his plea even after being urged not to do so by the judged and warned that he might need the advise of counsel even after a guilty plea was entered (R 380-381). On direct examination under oath by Mr. Rehak, the appellant acknowledged that they had talked about the case and the need to present any defense to the charges or in mitigation and to call any witnesses who might help . Appellant admitted he had instructed his attorney not to do these things. He conceded that his attorneys had advised him

not to plead guilty to the charges and that should he fail to defend himself death was a possible penalty, he also acknowledged that he understood that his attorneys were so sure he was doing the wrong thing that they wanted to withdraw from the case. (R383-387). Appellant reiterated that his desire not to defend himself extended to the penalty proceedings also (393-399). Similar inquires were made by the Court and the Assistant State Attorney immediately prior to ruling on the motion to withdraw by the court with like results (R 435-447). The court then granted appellant's attorneys' Motion to Withdraw.(R 447)

The appellant thereupon changed his plea to guilty to all charges (R 448-462). He was subsequently adjudicated on Counts One (First Degree Premeditated Murder) Three (Attempted First Degree Premeditated Murder) Five and Six (Kidnapping) and Seven and Eight (Robbery) (R 7 & 8).

After Pettit again waived his right to counsel and his right to an advisory jury opinion (R 3,2) the court proceeded with the sentencing phase pursuant to Florida Statute 921.141. The State attempted to show, among other things, that the crime occurred while Pettit was under sentence of imprisonment, that he was previously convicted of a felony involving violence against another person, and was committed while the defendant was engaged in a Robbery (R 4). Appellant presented no evidence during the proceedings, and asked only one question (R 171).

At the sentencing proceedings the appellant's probation officer was called and testified that appellant was on probation at the time these crimes were committed (R 172). Also called was John Petramala who described the appellant's arrest, in September 1985, and subsequent convictions for resisting arrest with violence and battery on a police officer (R 166-170).

In an effort to show the nonexistance of certain mitigating circumstances the State called Dr. Lane Carlin, a neurologist, (R 187) who had examined the appellant pursuant to court order (although not required to examine the defendant as to mitigating matters) (R 410, 188). Dr. Carlin testified that he saw no evidence that the appellant was under the influence of extreme mental or emotional disturbance (R 195) or that his ability to appreciate the criminality of his conduct or conform his conduct to the law was impaired as a result of Huntington's Chorea (R 196) he saw no reason why Huntington's Chorea should be considered a mitigating circumstance (R 197). These opinions were concurred in by a second neurologist, Dr. Harris L. Bonnette, (R 200,201 and 210, 211).

Appellant's grandfather, Charlie Oliver Pettit, testified that Huntington's Chorea is a brain disease and does affect the actions or part of what a person will do. He asked the court to commit the appellant to a hospital to be treated with a new drug. (R. 214)

Pettit indicated that he had nothing to say about the sentence and again refused a lawyer prior to imposition of sentence. (R. 215,234,235)

Shortly thereafter the court sentenced appellant to death (R 239), finding the existence of three aggravating circumstances, specifically, the defendant was under sentence of imprisonment when he committed the capital felony, the defendant was previously convicted of a felony involving the use of violence to the person (other than Norman Langston), and that the capital felony was committed while defendant was engaged in the commission of Robbery and of Kidnapping. (R 430). The court considered all the statutory mitigating circumstances and found none to exist. (R 430).

Review to this court was automatic (R 433).

SUMMARY OF ARGUMENT

The trial court erred in allowing Pettit's trial counsel to withdraw on their own motion in view of possible mitigating circumstances in existence. As a result relevant mitigating evidence was not presented to the court. Such a result frustrates the intent of the statute providing for mandatory review of all death sentences by this court and could have been avoided by requiring trial counsel to disclose the names of potential witnesses and to briefly summarize the testimony anticipated. The trial court could then call theses witnesses as court witnesses and place their testimony on record and consider such testimony in its sentencing decision if otherwise proper.

The trial court erred in imposing the death penalty after allowing the defendant's trial counsel to withdraw on their own motion when no mitigating circumstances were presented where the record does not show the trial court considered the possible existence of nonstatutory mitigating circumstances contained in the record including the presentence investigation provided therein.

The trial court erred in finding as an aggravating circumstance that the accused was under a sentence of imprisonment at the time of the killing because he was on probation at that time and probation does not constitute a sentence of imprisonment under the applicable statute.

ISSUE 1

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO WITHDRAW FILED BY PETTIT'S ATTORNEYS

Prior to the entry of Pettit's guilty pleas, the trial court granted the motion to withdraw made on behalf of Pettit's court appointed attorneys . This was not a motion filed by Pettit to discharge his attorneys but rather a motion filed by the attorney's themselves based on the refusal of the appellant to cooperate with them. At the hearing Pettit conceded that that he was pleading guilty contrary to the advise of his attorneys, and that he had instructed his attorneys not to raise any defenses to the charges or matters in mitigation or to call witnesses on his behalf in both the guilt and penalty phases of the proceedings.

As a result of this no objections were made to evidence which might have otherwise been inadmissible. Because the Appellant did not present any evidence himself, no mitigating circumstances were placed before the court, and the aggravating circumstances shown by the prosecutor were unrebuted. Moreover, because this was an intentional killing during the course of a robbery, the absence of any showing of mitigating circumstances virtually insures the imposition of a sentence of death (see Maxwell v State 443 So 2d 967 (1983), White v State 446 So 2d 1031 (1984), and Sims v State 444 So 2d 922 (1983).

The issue thus becomes the defendant's right to represent himself verses the courts' duties to insure that the death penalty is not applied in inappropriate cases. Appellant contends that the trial court erred in granting the motion to withdraw under these circumstances.

It must be admitted that many of the issues raised herein have already been decided adversely to Appellant. See Hamblen v State 527 So. 2d 800 (Fla 1988) it is also conceded that counsel cannot be forced upon an unwilling defendant (see Faretta v California, 422 U.S. 806, 95 S.Ct. 2525, 45 L. Ed. 2d 562 (1975). However, in Hamblen the defendant himself discharged his attorney's while in this instance the attorneys were allowed to withdraw on their own request in absence of an objection from Pettit. Also, in this instance it appears from the record, including the motion to withdraw, and the direct examination of the accused by his attorney, that there were in existence possible defenses or grounds in mitigation which the attorneys believed should have been raised. This is in contrast to Hamblen where there is no mention of whether Hamblen's attorneys thought there mitigating circumstances, furthermore Hamblen's attorneys were required to remain as stand by counsel.

Hamblen's appellate counsel argued that because Hamblen's trial counsel was allowed to withdraw, the record presented to this court on appeal would by definition be incomplete thus frustrating the Courts statutory and constitutional duties of review. This court rejected this

view in part because of that trial court's role in the analysis of the evidence, both aggravating and mitigating including non-statutory mitigating circumstances as shown in the psychological reports, and concluded that society's interest in seeing the death penalty was not inappropriately applied was protected by the trial judge.

Hamblen's counsel suggested the appointment of a guardian ad litem to pursue and present any mitigating circumstances. This suggestion was rejected. Appellant would suggest, at least in cases like this, where the defendant's counsel has moved to withdraw and the court is apprised of the existence of mitigating circumstances, that prior to allowing trial counsel to withdraw, the court require counsel to list the names of those who would otherwise be called as witnesses and to summarize briefly the testimony anticipated. In this manner the trial court would at least have some inkling of the existence or non-existence of mitigating circumstances. It may be that the trial court in this or other similar cases would feel that this testimony even if presented formally would make no difference in his sentencing decision. In that instance the matter should go no further. If on the other hand the trial court wished to inquire further, these witnesses could be produced as the court's witnesses (Florida Statute 90.615) and the court itself could inquire of them , assuming of course that their testimony is otherwise admissible under the rules of evidence. The sentencing statute provides that evidence may be presented as

to any matter "the court deems relevant to the nature of the crime and character of the defendant". Florida Statute 921.141 (1) Emphasis mine . This information could be elicited as part of the motion to withdraw or through discovery documents already contained in the court file. The trial court could only find this information helpful in its sentencing decision and in the discharge if its responsibilities in insuring the death penalty is not imposed upon one who might otherwise be undeserving. The State, would have its opportunity for discovery and to interpose objections at the sentencing hearing when these witnesses if any testified. A more complete record would be available for this court's review.

Finally, the record reflects no proper grounds to allow defendant's counsel to withdraw, at least prior to his change of plea. A desire on the part of the defendant in a criminal case to plead guilty contrary to advise of counsel is not, in itself, a waiver of counsel. See R. Crim P 3.111 (d). Nor is it a proper ground to allow trial counsel to withdraw. Rule 4-1.2 (a) Scope of Representation, Rules Regulating the Florida Bar. Moreover, in this instance, no offer of new counsel was made to the accused after the court allowed trial counsel to withdraw and prior to the appellant's change of plea contrary to R. Crim P. 3.111(d)(1) see also Hayes v State 566 So 2d 340 (2nd DCA 1990).

ISSUE 2

THE TRIAL COURT ERRED IN SENTENCING
PETTIT TO DEATH WHERE THE RECORD
DOES NOT REFLECT CONSIDERATION OF
NONSTATUTORY MITIGATING CIRCUMSTANCES

Nonstatutory mitigating circumstances of the crime and record or character of the defendant may not be narrowly limited by statute. See Lockett v Ohio 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954 (1978). More importantly, the sentencing court must consider any relevant mitigating evidence. Hitchcock v Dugger 481 US 393, 95 L Ed 2d 347, 107 S Ct 1821 (1987).

Although in this case, as in Hamblen, the defendant plead guilty and proceeded without an attorney and without the presentation of mitigating factors, the record in Hamblen reflects the trial court's consideration of statutory and nonstatutory mitigating evidence. This court noted that nonstatutory mitigating factors usually considered in capital cases i.e. work history, family history, etc., were contained in the psychological reports provided to the court. Similar reports as well as a Presentence Investigation were furnished to the trial court in the case sub judice, these reports contained possible nonstatutory mitigating evidence: to wit the Huntington's Chorea itself as conceded by the prosecutor (R 395) and the opinion of Pettit's mother that the disease was the cause of his criminal behavior (R 479). Although at the sentencing the trial court did comment that it had

considered the testimony of Charlie Oliver Pettit (R 239) the court's comments earlier reflect a careful consideration of the evidence directed only at the statutory mitigating and aggravating circumstances (R 237, 238, 239). At no point did the trial court indicate that it had considered the possible existence or effect of nonstatutory mitigating circumstances.

Hamblen's death penalty was upheld in part because this court found that the trial judge had considered mitigating evidence on his own. Thus excusing in part the need for counsel to do the same. This court remarked

> " In this case, the trial judge made a thoughtful analysis of the facts. ...The judge did not merely rubber stamp the state's position. He also carefully analyzed the possible statutory and nonstatutory mitigating evidence. Emphasis mine Hamblen ibid 8Ø4.

Here there is no showing that the trial court did the same.

Moreover, Hamblen wished to be sentenced to death, Appellant, while acknowledging his guilt, expressed no opinion as to the sentence he preferred (R 398). This error in failing to consider the possibility of nonstatutory mitigating factors is especially important because the death penalty is presumed correct where, as is the case here, aggravating factors exist without contravening mitigating factors. See Maxwell.

ISSUE 3

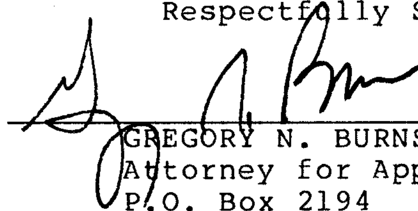
THE TRIAL COURT ERRED IN FINDING APPELLANT WAS UNDER A SENTENCE OF IMPRISONMENT PURSUANT TO FLORIDA STATUTE 921.141 (5)(a)

In sentencing Pettit, the trial court found and considered the statutory aggravating circumstance the he was under a sentence of imprisonment at the time of the killings. This finding could only have been based on the testimony of his probation officer that he was on probation at that time. This was plainly error See Ferguson v State 417 So 2d 639 (1982) and Ferguson v. State 417 So 2d 631 (1982) Bolender v. State 422 So 2d 833 (1982). In absence of this aggravating factor there is no way this court can know that the trial court would have still imposed a sentence of death and the cause should be remanded for sentencing to the trial court. See Elledge v State 346 So 2d 998 (1977). This is especially true in view of the trial court's failure to consider nonstatutory mitigating circumstances herein.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Appellant respectfully asks this Honorable Court to reverse the sentence imposed herein and remand the matter for sentencing to the trial court or impose a sentence of life imprisonment without parole for 25 years.

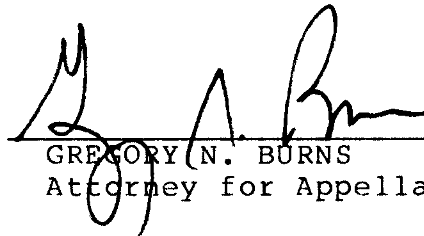
Respectfully Submitted,



GREGORY N. BURNS
Attorney for Appellant
P.O. Box 2194
Fort Myers, Florida 33902
(813) 334-7107
Florida Bar # 01793184

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Reply Brief has been furnished by mail or hand delivery to OFFICE OF THE ATTORNEY GENERAL, Park Trammell Building, 8th Floor 1313 Tampa Street, Tampa, Florida 33602, this 13th day of November 1990.



GREGORY N. BURNS
Attorney for Appellant