SUPREME COURT OF FLORIDA

SAMUEL PETTIT,

Appellant,

vs

Case No. 75565

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

STATE OF FLORIDA

Appellee.

APPEAL FROM THE CIRCUIT COURT

IN AND FOR CHARLOTTE COUNTY

STATE OF FLORIDA

REPLY BRIEF FOR APPELLANT

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SUMMARY OF THE ARGUMENT

The trial court erred in allowing Pettit's trial counsel to withdraw when the record reflects trial counsel was ready to proceed with possible defenses or matters in mitigation. The nature and source of this evidence is not necessarily privileged and its consideration mandated by statute and case authority.

The record does not reflect that the trial court considered the existence of nonstatutory mitigating circumstances which may have been present.

The trial court erred in finding this killing was done at a time when Pettit was under a sentence of imprisonment, and such error cannot be said to be harmless especially in view of the other errors complained of herein.

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

In its reply brief the State reiterates the similarities between Hamblen and the instant case, the bulk of which were conceded in appellant's initial brief.

The state seems to emphasis two points, first no defenses or matters in mitigation appear in the record, and second even if there were such matters in existence disclosure of this evidence would violate attorney client privilege.

The state notes in its brief :

" Counsel for the appellant mentions that trial counsel thought there were possible defenses or grounds in mitigation. The record reflects there were no defenses....Counsel for appellant does not specify the mitigation now refers to but evidence was presented below concerning Huntington's chorea." (page 14)

The state is correct and that is precisely the point. We are apprised in the record that trial counsel had spoken to appellant about matters in mitigation and or in defense (R 383, 384). We know trial counsels were sufficiently distressed by appellant's instructions not to present this evidence that they chose to withdraw. Yet we do not know for certain what these matters were.

Had trial counsel not been allowed to withdraw this evidence could have been adduced at trial, Pettit's instructions not withstanding. Determination of what witnesses to call and what evidence to produce are strategic and tactical decisions and as such rest with counsel. See Sanborn v State 474 So 2d 309 (3rd DCA 1985).

Although Appellee is correct in concluding that any communication between Pettit and his trial counsel is privileged and may not be disclosed, this privilege does not necessarily apply to matters learned by trial counsel from sources other than the accused himself. Florida Statute 90.502 prohibits disclosure of conversations between a lawyer and his client, it does not mention matters gleaned from other sources. Such information might be considered work product but even such work product can be disclosed provided it is factual in nature (not the opinion or conclusions of the attorney) and upon a showing of need. See State v Rabin 495 So 2d 257 (3rd DCA 1986). Ethically, Rule 4-1.6(d) Confidentiality of Information, Rules Regulation the Florida Bar, seems to prohibit the disclosure by counsel of information gathered from sources other than the client himself, but the rule seems to apply to proceedings where evidence is not sought from the attorney through compulsion of law, and in any event, the rule authorizes disclosure upon a court order. See Comment and Disclosures otherwise required or authorized .

Finally the Rules of Criminal Procedure require the prosecutor himself to disclose matters tending to negate the defendant's guilt even if no discovery material is requested. See R Cr P 3.220 (b) (2). For all we know, without further inquiry into the matter, some of the matters referred to by defense counsel might have been revealed to counsel through the discovery procedures themselves and if already know to the prosecutor could not be considered privileged or confidential.

In summary, trial counsels had indicated there existed matters in defense or in mitigation which they proposed to produce at trial or hearing. This evidence could have been produced if trial counsels' Motion to Withdraw had /not been denied. Moreover, since we do not know the source or the nature of these matters it cannot be concluded that the disclosure to the court would violate attorney client privilege.

ISSUE 11

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

As appellant pointed out in his initial brief, the record herein does not reflect the trial court's consideration of non-statutory mitigating circumstances which may have been present in the record.

The trial court must consider any relevant nonstatutory mitigating evidence present in the record Hitchcock v Dugger 481 US 393, 95 L Ed 2d 347, 107 S Ct 1821 (1987). The record in the case sub judice does not reflect whether the trial court found any nonstatutory mitigating circumstance and if so whether or not they were considered.

This court has held that when considering mitigating circumstances the trial court must consider each mitigating circumstance proposed and proven by a greater weight of the evidence. Campbell v State 571 So 2d 419 (Fla. 1990).

Appellee cites Lucas (a case where the accused had the advise of counsel) and argues that it requires Pettit (whose attorneys were discharged) to specify possible nonstatutory mitigating circumstances. This argument ignores this court's findings in Hamblen (whose attorneys where discharged) whose sentence was upheld only after a finding that the trial court had carefully analyzed nonstatutory mitigating evidence and thus fulfilled trial counsel's function. It is the absence in

the record of any showing by the trial court of analysis of possible nonstatutory mitigating circumstances that creates the error complained of here.

ISSUE 3

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

Appellee seems to concede that the trial court erred in finding as an aggravating factor that appellant was under a sentence of imprisonment at the time of the killing. The only issue is the effect of the elimination of this factor in the imposition of the sentence. This leaves two aggravating factors to be balanced against no mitigating factors.

Although there is ample authority affirming the imposition of a sentence of death where more than one aggravating factor exists and no mitigating circumstances are found, the test seems to be whether or not this court can know that the trial court would reimpose a death sentence. In the instant case and especially in view of the withdrawal of trial counsel, and absence of a showing of the trial court's consideration of non-statutory mitigating circumstances, there is no way the court can know the trial court would reimpose the death penalty.

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,

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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, 2002 North Lois Avenue, West Wood Center, Criminial Division Tampa, Florida 33602, this 26th day of March 1991.

GREGORY N. BURNS
Attorney for Appellant