IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,844

NORBERTO PIETRI,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

****

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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SUPPLEMENTAL ISSUE

WHETHER THE TRIAL COURT'S INSTRUCTION TO THE JURY REGARDING FLIGHT WAS HARMLESS ERROR

Appellant claims that he is entitled to a new trial because the trial court instructed the jury on flight. Conceding that this issue was not properly raised in appellant's initial brief, appellant seeks to circumvent that procedural error by relying on Fenelon v. State, 594 So.2d 292 (Fla. 1992).[1]

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[1] Although this Court has granted appellant's motion to file this supplemental brief, appellee still contends that Fenelon v. State, 594 So.2d 2929 (Fla. 1992) should not be applied retroactively in the case sub judice. In an attempt to establish a consistent and equitable formula regarding retroactive application of new law, this Court decided Smith v. State, 598 So.2d 1063 (Fla. 1992). In essence any new decisional law will be applied to cases pending on direct review, as long as the issue was preserved at trial. Smith, 598 So.2d at 1066. Mindful of the rule announced in Smith, appellee asserts that there is no equity to the state for penalizing it for following the law as it existed at the time the now challenged evidentiary ruling was made. To force the state to incur the expense of a

If the holding of Fenelon is applied to the instant case, then the state concedes that the trial court erred in giving the flight instruction. Appellee maintains however that appellant is still not entitled to relief as any error must be deemed harmless beyond a reasonable doubt. Fenelon; State v. DiGuillio, 492 So.2d 1192 (Fla. 1989).

Appellant's entire defense centered around his alleged inability to form the intent to kill Officer Chappel. He claims that when he shot the officer in the heart, his intentions were two fold; 1.) he intended to shoot the officer and 2.) he intended to escape. (R 1823, 2391-92, 2510-11). His alleged inability to form the intent to kill was the result of his overall addiction to and earlier ingestion of cocaine three hours prior to the killing. (R 2537-62, 2646-47).

The instruction on flight did not contribute to appellant's conviction for first degree murder. He admitted that he always intended to get away, (R 2510-11), consequently, the instruction on flight was irrelevant. The sole issue based on his defense, centered on appellant's intent when he shot the

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new trial based on error that was non existent at the critical stage of the proceedings does absolutely nothing to promote finality, enhance the likelihood that subsequent rulings on any issue will be accurate, nor does it foster any confidence in the criminal justice as a whole.

The rule in Fenelon should not be applied to appellant's case since it was decided almost two years after appellant's trial. The rule in Smith will encourage defendants to delay even further the litigation of appeals, hoping that a new decision will be announced during the appellate process that will result in a reversal of a conviction or sentence.

officer. The fact that he fled the scene is not determinative of whether he intended to kill the officer or merely hurt him to effectuate his escape. Consequently reversal is not warranted.

Furthermore, there was overwhelming evidence of appellant's guilt absent any evidence of flight that would establish his murderous intent and negate his defense. Less that an hour before the murder, appellant burglarized the Kutlick/Tronnes home.(R1846-58, 1864-67). He admitted that he was able to form the intent to burglarize their home regardless of the fact that he ingested cocaine two hours prior to the burglary. (R 2483). Appellant's actions also demonstrate same. He stalked the neighborhood until he found a home that was unoccupied.(R 2375). He used a towel to wipe the windows on the house and the windows on "his" truck so it would appear that he owned the house. (R 2379, 2383). He gained entry by removing a window over the kitchen sink, he then wiped his fingerprints from the area once inside the house.(R 2379-80). Once in the home, he opened two doors, one in the rear of the house and one in the front, in order to facilitate an escape if he was caught in the act. (R 2380). When he found the two guns, a .38 revolver and a nine millimeter he made sure the nine millimeter was loaded. (R 2382-84). He intentionally kept that gun by his side rather than place it in a tote bag with the other stolen property. (R 2384, 2504). He did so because he was an escapee, driving a stolen vehicle, and carrying stolen property. (R 2507). Once he loaded the property in the car he again wiped the windows on his truck so as not to appear suspicious. (R 2383-84).

While transporting the stolen property to his cohorts to sell in exchange for cocaine, appellant was stopped for speeding by Officer Chapel. During the time that the officer attempted to stop appellant, he thought of escaping and turning himself in.(R 2390). He watched the officer dismount from his motorcycle, remove his helmet, and walk up to his truck.(R2508). From approximately a distance between three to seven feet, appellant removed the gun from it's pouch, cocked it turned around and shot the officer once on the heart. (R 1894, 2159-60, 2391). He then sped away.(R 1922, 1939-41). Appellant then went to his nephew's house and disposed of the gun and the stolen truck by sinking it in a canal. His nephew testified that appellant seemed normal to him. (R 2153). Appellant's actions clearly demonstrate a deliberate and methodical plan to burglarize the Kutlick home in order to obtain cocaine. He admitted that he took the loaded gun in case he needed it. Appellant's self serving statement that he only intended to shoot the officer to get away rather than kill him was clearly rebutted by the overwhelming evidence of his intentions to burglarize and kill anyone who got in his way. The instruction to the jury regarding flight was harmless error beyond a reasonable doubt.

Respectfully submitted,

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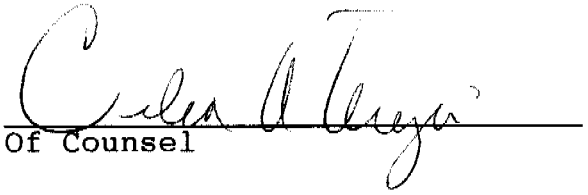
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Supplemental Answer Brief of Appellee" has been tele-faxed to: **PETER BIRCH, ESQUIRE**, Fax No. (407) 833-0368, this **6th** day of October, 1992.



Of Counsel

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