IN THE SUPREME COURT OF FLORIDA

TOMMY RICHARDSON,

Appellant,

v. CASE NO. 76,829

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR JACKSON COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

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_____ :

REPLY BRIEF OF APPELLANT

ISSUE I

THE COURT ERRED IN DENYING RICHARDSON'S MOTION TO SUPPRESS STATEMENTS HE HAD MADE TO THE POLICE ON TWO OCCASIONS, IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State's argument on this issue relies upon this court's opinion in Hoffman v. State, 474 So.2d 1178, 1181 (Fla. 1985). It cites on that case for the proposition that "the question is whether or not the record clearly demonstrates the voluntariness of the confession." (Appellee's brief at p. 24) Contrary to that assertion, this court did not hold so in that case.

> We have held that a trial judge need not recite a finding of voluntariness if his having made such a finding is apparent from the record.

Id.

Thus, what must be apparent is not, as the state claims, that the confession was voluntary, but that the court's finding of voluntariness is unmistakably clear. This conclusion

accords with the United States Supreme Court's holding in Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967) in which the court held "Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity." This court in McDole v. State, 283 So.2d 553 (Fla. 1973), amplifying Sims, said:

> We do not believe that such 'unmistakable clarity' appears simply from the trial judge's statement that the motion to suppress the confessions is denied."

Id. at 554.

In short, this court should review the record for the trial court's unmistakable finding of the confession's voluntariness and not for evidence to support the court's terse "motion denied."

ISSUE II

THE COURT ERRED IN DENYING RICHARDSON'S MOTION FOR A CONTINUANCE BECAUSE THE STATE'S FIREARM EXPERT'S REPORT WAS NOT RELEASED UNTIL THE WEEK BEFORE TRIAL WAS SCHEDULED TO START, A VIOLATION OF THE DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL AND SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The State initially relies on Richardson's failure to file a written motion for continuance as a reason for affirming on this point. Yet, Rule 3.190 Fla. R. Crim. P. allows the trial court to waive that requirement, and that can be implied here since neither the state or the court objected to the oral motion. Similarly, it can be presumed to have been taken in good faith because there was no evidence or allegation to the contrary.

On page 28 of its brief the state claims Richardson had conceded the "absence of prejudice to the case, saying that all four witnesses to the murder said that the only gun present was the one brought by the defendant." (T 331) That is not quite what he said. Defense counsel agreed that the four children would say "that gun [i.e. Richardson's] wasn't down there at the house that night." (T 331) He thought, however, that the shell in question could have been fired by a neighbor who lived down the road (T 331-32). Despite the state's witnesses' testimony to the contrary, counsel wanted to pursue the theory that someone else shot Newton. To have denied him the opportunity to pursue that defense was error, especially when there was no pressing need to rush to trial.

Trial counsel, contrary to the state's claim, never said that he believed that "he should not have to work over the weekend." (Appellee's brief p. 29) What he said was "I think it is unfair to the Defendant and his counsel to try to prepare a capital case over the weekend after receiving this tidbit of crucial evidence." (T 328) What was unfair was not having to work on Saturday and Sunday, but that no one else would be working on those days whom he might contact, preventing him from developing his theory of defense that at least one of the shells came from a different gun (T 327-28).

ISSUE III

THE COURT ERRED IN ALLOWING THE STATE TO SAY, AT THE CONCLUSION OF ITS CLOSING ARGUMENT THAT THE JURY SHOULD SHOW RICHARDSON THE SAME MERCY HE SHOWED NEWTON, WHICH WAS INTENDED TO ELICIT SYMPATHY FOR HER, IN VIOLATION OF THE DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The state said the prosecutor's comment at issue here was prompted by the defense theory that Richardson committed only a second degree murder. (Appellee's brief at p. 32) That is, Richardson asked the jury for mercy (in effect) because he argued that he had committed only a second degree murder rather than a premeditated homicide. While the state obviously believes its version of the facts show a premeditated murder, juries and appellate courts are not always so similarly persuaded. Discounting an alternative interpretation of the facts which supports a reduced degree of homicide as nothing more than asking for a jury pardon exhibits a limited vision of the adversarial nature of our judicial system.

ISSUE IV

THE COURT ERRED IN FINDING THAT RICHARDSON KILLED IRENE NEWTON IN AN ESPECIALLY HEINOUS ATROCIOUS, AND CRUEL MANNER.

Counsel for the State does an admirable job trying to do what the trial court failed to do: provide adequate justification for finding that the murder was especially heinous, atrocious, and cruel. Ultimately it fails, not because it did not try hard enough, but because this aggravating factor does not apply in this case.

Initially, Richardson points out that the state relied upon different evidence than used by the trial court in justifying the its finding of this factor. The court's sentencing order focussed on the type of gun the defendant used ("a 12 gauge automatic shotgun, the most powerful shotgun in common use.") and the circumstances surrounding the shooting. It made no mention of any supposed terror Newton or her family endured because there was no such evidence. Indeed, the state tacitly acknowledged its speculative game when it argued that the fear and knowledge of Richardson's threats "must have consumed" the victim before the murder. (Appellee's brief at p. 33) If so, there was no evidence of fear, and to the contrary, the only thing Newton apparently consumed on New Year's Eve was enough liquor to give her a .21 blood alcohol content (T 664). She was dressed for a party and about to leave when the boy friend she had tossed out of her trailer a few days earlier came to the front door (T 517).

The evidence also does not show that she was particularly afraid of Richardson. When he brandished the knife, she did not retreat, quiver in fear, or try to protect herself. Instead, she advanced on the defendant who backed down the trailer until he got to his gun (T 496-97). There is, in short, no evidence that Newton in some way suffered from a battered woman syndrome. The defendant had never beaten her, and every time he came around to talk with her after she had thrown him out, she called the police whereupon he dashed into the woods. This is hardly the picture of a woman cowering in fear of a man.

But as mentioned, the court in this case made no mention of the facts the state discussed, and it is not this court's function to cull through the record to provide what the sentencer obviously did not choose to include in justifying this aggravating factor. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981).

The court's order made no mention of any mental anguish Newton suffered before her murder for the good reason that such a finding would have had no record support. Contrary to the state's assertion, there is no evidence the defendant followed or "stalked" Newton for days. (Appellee's Brief at p. 34) Instead he came to the trailer he used to share with her several times between Christmas and New Year's Eve to talk with her (T 505-506).

The mental anguish this court has accepted as justifying finding the murder especially heinous, atrocious, and cruel,

has tended to be that fear generated by the events immediately surrounding the victim's death. For example, the state cited Swafford v. State, 533 So.2d 270 (Fla. 1988) in support of its mental anguish argument. In that case, the defendant kidnapped the victim from her job as a clerk at a convenience store, drove her to a wooded area several miles away, raped her, then shot her nine times in her torso, having to reload his gun at least once in the process. The victim died from a loss of blood rather than from any of the bullet wounds. That killing showed a wanton atrocity by the extreme mental suffering the victim must have endured immediately before her death.

In Mills v. State, 462 So.2d 1075 (Fla. 1985), the defendant and his partner were looking for a place to burglarize when they kidnapped the victim from his trailer. They had initially used a knife to effectuate the abduction, but changed to a shotgun they had found in his trailer. Mills took the man to a remote location, tied his hands, then hit him in the back of the head with a tire iron. He was killed by a single blast from the shotgun when he tried to flee as the two kidnappers were leaving. Even though the murder was quick and death instantaneous, it was nevertheless especially heinous, atrocious, and cruel because of the anguish the victim had suffered immediately before his death.

In Philips v. State, 476 So.2d 194 (Fla. 1985), the defendant stalked a parole supervisor and shot him twice. The victim fled about 100 feet while Philips reloaded his gun and came after him. He was killed when Philips shot him several

more times. The murder was especially heinous, atrocious, and cruel because of the mental anguish the victim must have suffered in the time between the two volleys.

The court in this case made no findings of fact that even remotely show Newton suffering any mental agony for an appreciable time immediately before her death. There is also no evidence she had a deadly fear of her former boy friend, and to the contrary, the evidence shows she had dismissed him from her life and was getting on with having a good time.

This murder was not especially heinous, atrocious, and cruel.

ISSUE V

THE COURT ERRED IN FINDING THAT RICHARDSON COMMITTED THIS MURDER IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In Douglas v. State, 575 So.2d 165 (Fla. 1991) this court rejected this aggravating factor even though Douglas had obtained a rifle, tracked down his former girlfriend, forced her to have sexual intercourse with her husband, who was accompanying her, and then brutally bludgeoned and shot him as she watched. The murder was not cold, calculated, and premeditated because it derived from the defendant's "violent emotions" arising out of a domestic situation.

In the more recent case of Santos v. State, Case No. 74,467 (Fla. September 26, 1991) this court similarly rejected the trial court's finding that the murder was cold, calculated, and premeditated. Santos and the victim, Irma Torres, had lived together for several years, and eventually the relationship ended, according to the defendant, because the victim's family meddled in the couple's affairs. Two days before the murders, Santos went to his former girlfriend's house and threatened to kill her. The police were summoned, and they searched him but found no weapon.

Santos saw Irma walking down the street with their two year old daughter, and he chased her as she fled from him. He quickly caught her and killed both her and his child. This court rejected the trial court's conclusion that the murder was cold, calculated, and premeditated because "Santos was involved

in an ongoing, highly emotional domestic dispute with Irma and her family. The unrebutted expert testimony indicated that this dispute severely deranged him." Id.

Similarly in this case, Richardson was very emotional over Newton's leaving him, or rather forcing him to leave her. On the night of the murder, he looked "crazy" and acted "upset." (T 169) and the court found that he committed the murder while he was under the influence of an extreme mental or emotional disturbance (T 173-76). Although the facts in this case obviously differ from those in Santos, the underlying principles applied in that case have equal justification here. The only conclusion that this court can reach regarding the propriety of finding this aggravating factor is that the court erred in doing so.

ISSUE VI

THE COURT ERRED IN IGNORING, IN ITS SENTENCING ORDER, THE WEALTH OF MITIGATING EVIDENCE RICHARDSON PRESENTED, IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

The state on pages 39-40 of its brief discounts Dr. Walker's opinion that Richardson was under the influence of alcohol, cocaine or both when he killed Newton (T 169, 509). It does so because he "failed to set forth what facts substantiate[d] this statement." The problem with this conclusion stems from Section 90.705 Fla. Stat. (1989) which allows an expert to give an opinion without disclosing the underlying facts or data justifying his conclusion. If the state wanted to discredit Dr. Walker, it could have done so by challenging the basis for his testimony on cross-examination.[1]

Regarding the court's failure to find the mitigating evidence Richardson argued was present, this court recently re-emphasized its ruling in Campbell v. State, 571 So.2d 415 (Fla. 1990). Santos v. State, Case No. 74,467 (Fla. September 26, 1991) 16 FLW S633:

> Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence. . . . In Rogers [v. State, 511 So.2d 526 (Fla. 1987)] we set forth extensive discussion of the federal cases from which this limitation

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[1]In his Initial Brief, Richardson inadvertently claimed he suffered an abused childhood. As the state correctly pointed out, there is no evidence of that.

> derives . . . The requirements announced in Rogers and continued in Campbell were underscored by the recent opinion of the United States Supreme Court in Parker v. Dugger, 111 S.Ct. 731 (1991).

As presented in the Initial Brief, Richardson's mental retardation was both believable and uncontroverted (See Initial Brief at pp. 31-32). Likewise, the state never refuted Dr. Walker's conclusion regarding Richardson's drug and alcohol abuse. The court, therefore, should have found the defendant's mental retardation and drug and alcohol use as mitigating. That it did not do so was error, and this court should remand for a new sentencing hearing.

ISSUE VII

THE COURT ERRED IN SENTENCING RICHARDSON TO DEATH BECAUSE SUCH A SENTENCE IS NOT PROPORTIONALLY WARRANTED UNDER THE FACTS OF THIS CASE.

The State on page 41 of its brief, says "the record is devoid of any reference to ongoing domestic problems between the defendant and Irene." That is an amazing claim since it was her tossing Richardson out of her trailer, as a self-help form of divorce, that created the situation which resulted in her death. Richardson wanted to talk with her about that unilateral action, but she wanted nothing to do with him. That the murder arose out of this domestic fight screams from the record.

Similarly, the state claims there is no evidence of Richardson's drug and alcohol abuse, and it dismisses Dr. Walker's conclusions as conjecture. If so, the state never objected to them or otherwise produced evidence to refute his testimony at trial. The state cannot dismiss his testimony by characterizing it as "purely speculative in nature."[2]

The state, on page 42 of its brief, says it "would also rebut the defendant's contention that he did not brood for a long time about killing Irene." Rather than refute that claim,

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[2]The state claimed Richardson's testimony rebutted Dr. Walker's testimony on this point, but it provides no record citation for this assertion, and appellate counsel can find no such testimony in Richardson's testimony at the sentencing phase of the trial or in what he said at the hearing on his motions to suppress his statements.

Richardson accepts that he brooded over her murder, that as he walked to her trailer he thought about her and what she had done to him. In Kampff v. State, 371 So.2d 1007 (Fla. 1979) this court placed great weight on the defendant's brooding over his failed marriage with his wife/victim. This coupled with his alcoholism justified reducing his death sentence to life in prison.

So here. Richardson must have mulled over his five year relationship with Newton, and under the sway of drugs or alcohol have convinced himself that she needed to be killed. After killing her, he realized what he had done and tried to end his own life.[3]

Finally, Richardson's argument does not ignore the "fact that the jury, by an overwhelming recommendation, voted in favor of the death penalty." (Appellee's brief at p. 43) First, the margin by which the jury recommends a life or death sentence is irrelevant. Craig v. State, 510 So.2d 857 (Fla. 1987). Second, this court has engaged in a proportionality review of death sentences regardless of the jury's recommendation, and it has reduced such sentences to life in prison in several cases even when the jury has recommended death. Blair v. State, 406 So.2d 1103 (Fla. 1981). Thus, when

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[3]The trial court in mitigation found that Richardson had tried to commit suicide after killing Newton (R 173-76). To make this finding the court of necessity must have rejected the state's claim that Richardson did not intend to kill himself. (Appellee's brief at p. 42)

this court examines whether a defendant merits death under its obligation to conduct a proportionality review, the jury's recommendation has no bearing on that analysis.

CONCLUSION

Based upon the arguments presented here, Tommy Richardson respectfully asks this honorable court to either reverse the trial court's judgment and sentence and remand for a new trial, or reverse the trial court's sentence and remand for imposition of a sentence of life in prison without the possibility of parole for twenty-five years or for a new sentencing hearing before a jury.

Respectfully submitted,

NANCY A. DANIELS
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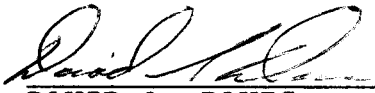
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Giselle D. Lylen, Assistant Attorney General, Post Office Box 013241, Miami, Florida; and to appellant, TOMMY RICHARDSON, #121201, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 24th day of October, 1991.

DAVID A. DAVIS