IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,138

CHESTER LEVON MAXWELL,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA CRIMINAL DIVISION

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ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This claim is before this Court for a second time. During Appellant's initial post-conviction proceedings this Court determined that neither the judge or jury was precluded from considering any nonstatutory evidence that was brought forth at trial. Maxwell v. Wainwright, 490 So.2d 927, 933 (Fla. 1986). Subsequent to that determination the United States Supreme Court rendered its decision in Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 337 (1987). Since that decision, this Court has determined that the standard jury instruction regarding mitigating evidence was in violation of Hitchcock. Appellee concedes that this issue is again properly before this Court for the limited purpose of determining whether the Hitchcock violation was harmless error. Demps v. Dugger, 514 So.2d 1092 (Fla. 1987).

Resolution of this appeal does not require further oral argument before this Court. The nonstatutory mitigating evidence at issue in the instant case has already been before this Court on two separate occasions, the direct appeal and the appeal of the initial post-conviction motion. Maxwell, supra; Maxwell v. State, 443 So.2d 967 (Fla. 1983). The task before this Court, harmless error analysis, can be accomplished by reviewing the record and pleadings of the instant appeal as well as the records of the two prior cases. This Court has already reviewed the evidence in the context of an ineffective assistance of

counsel claim and characterized it's impact as follows: "Moreover, it is highly doubtful that a more complete knowledge of appellant's childhood circumstances, mental and emotional problems, school and prison records, etc., would have influenced the jury to recommend or the judge to impose a sentence of life imprisonment rather than death." Maxwell, 490 So.2d at 932

Contrary to Appellant's assertion otherwise, this issue does not require a second evidentiary hearing. One such hearing was conducted during Appellant's first collateral proceeding. The sole issue centers around the jury instruction given and whether that instruction limited the judge or jury's consideration of nonstatutory mitigating evidence. Appellant has never claimed that trial counsel was precluded from bringing forth any evidence in mitigation, consequently, he is not entitled to further embellish the substance of his mitigating evidence. Appellee asserts that the evidence offered in mitigation at trial is all that should be considered by this Court.

Appellee adopts appellant's record reference symbols as outlined in the Initial brief but will add the following; PSI will denote reference to the presentence report prepared prior to sentence.

STATEMENT OF THE CASE

Appellee accepts as accurate appellant's Statement of the Case as well as appellant's Procedural History.

STATEMENT OF THE FACTS

Appellee does not accept appellant's statement of the facts. The facts relevant to resolution of this issue are as follows; At the penalty phase appellant presented four witnesses, his father and three neighbors. The testimony consisted of statements claiming that appellant was a good friend, never caused any problems and has much to offer society. (R 1397-1408). He was never rough with the neighborhood children, acted like a big brother to the children and he would help clean up the neighbor's lawn. (R 1400, 1407). At the age of ten he lived with his grandmother until she became sick. He then went to live with his father. (R 1404, 1406). He was raised by his mother prior to living with his grandmother. [None of the witnesses ever elaborated upon or even mentioned appellant's mother subsequent to that]. Appellant would help his father maintain an apartment building that was owned by his father. In return, the father would give appellant money when he asked for it. (R 1407).

SUMMARY OF THE ARGUMENT

The evidence offered in mitigation at appellant's trial would not have prompted a jury to recommend a life sentence. Furthermore, even if a jury would have been prompted to make a life recommendation, a jury override would have been proper. Irrespective of the faulty instruction, Judge Coker did consider the nonstatutory mitigating evidence in making his initial determination that death was the appropriate sentence. The general statements regarding appellant's upbringing and status in the neighborhood is very weak evidence compared to the aggravating factors held to be valid, consequently any error in the jury instructions must be considered harmless beyond a reasonable doubt.

The fact that an assistant state attorney may have drafted an order which was adopted by the trial court does not establish that there were any prejudicial ex parte communications between the two. Appellant cannot claim any prejudice as he never once requested to file updated briefs, he did not request a hearing for any additional argument nor did he request a second evidentiary hearing. Once the order was entered appellant never filed for rehearing in the trial court. Appellant simply did nothing to ever apprise the trial court of any further action that he wished to take. Now that a final order was entered appellant claims that he was prejudice. Although he failed to pursue any remedy available to him the trial court, his

dissatisfaction with trial court's order is now properly considered on appeal.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DETERMINED THAT ANY HITCHCOCK ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

Appellee concedes that this issue is properly before this Court for a second time in light of the United States Supreme Court decision in Hicthcock v. Dugger, 481 U.S. 393 (1987). Appellant's death sentence is constitutional given the fact that the nonstatutory mitigating evidence if properly considered by the jury would not have resulted in a life recommendation.

In his initial brief at page 24, Appellant cites to several cases were this Court held that certain types of mitigating evidence can properly form the basis for a life recommendation. Appellee does not take issue with that. It is simply that the evidence presented in this case is not of the quality and magnitude of the evidence as presented in other cases.

A review of the evidence presented, if properly considered by the jury would not have resulted in a life recommendation. Contrary to appellant's assertions otherwise, the state did not concede that there was substantial mitigating evidence presented. (Appellant's brief pg. 20). Appellant takes a statement made by the state totally out of context. The nonstatutory evidence presented at trial was characterized as

substantial in response to the allegation that trial counsel was ineffective for failing to produce more evidence in mitigation at the penalty phase. (P.C.R. 98). The state has never conceded that the evidence presented at trial was substantial in that it warranted a life recommendation from the jury.

When reviewing this claim appellee contends that the only evidence properly before this Court is that which was admitted at trial. In any event this Court has already reviewed additional evidence during appellant's prior collateral appeal under the claim of ineffective assistance of trial. The Court characterized that evidence as merely cumulative. Maxwell v. State, 490 So.2d 927, 932 (1986). The substance of the mitigating evidence presented at trial consisted of very general statements about the defendant. The overall theme of the testimony was that appellant was a good person, liked by his neighbors, admired by neighborhood youth, and he performed various outdoor chores for others. They all made the general statement that appellant had much to offer society, however that affirmation was never elaborated upon.(R 1396-1408).

Appellant claims that the record contains various categories of mitigating evidence. He first contends that the jury should have been able to consider appellant's age. The jury was so instructed as age is included in the statutory list of mitigating evidence, consequently age is not applicable to claim of Hitchcock error. (R 1425). Next appellant claims there exists evidence presented at the guilt phase which demonstrates a

devotion to his family. (R 1184-1185, 1189). The evidence relied upon to illustrate family devotion is the fact that appellant said he was going to visit his uncle who was not home and that he helped his father around the house. A review of the record negates this claim for two reasons. First of all the testimony was admitted to bolster appellant's alibi defense. It is obvious that the jury did not believe that appellant actually did those activities on the day of the killing since he was convicted of first degree murder. Secondly, whatever work appellant does for his father is not done out of the goodness of his heart. Appellant lived with his father rent free and was given money by his father when asked. (R 1184-1185, 1407). Appellant also claims that he has an impoverished childhood, however, there was always a family member around to care for him. He never knew his natural mother so his paternal grandmother cared for him. When she became too ill he and his brother lived with his father. (R 1403, 1406). Appellant's father owned several apartments and lived in a four bedroom house. (R 1407, PSI). Appellant can not claim that he was ever deprived of anything or did not have a proper home. Appellee asserts that this evidence does not indicate that appellant had an impoverished childhood.

Appellant also claims that he was cooperative with the police since he did not resist arrest and he voluntarily went to the police station. This evidence is rebutted with the fact that appellant lied to police about his identity, he lied to police

about whether or not he was traveling alone, he lied to police regarding his employment at Palm Aire and he lied to police about the ownership of his luggage. (R 850, 864, 867, 1236, 1237, 883-897). These facts coupled with the fact that he was smart enough not to resist arrest and that he voluntarily went to the police station does not exhibit a sincere effort to cooperate with police.

Also without merit is the claim that the killing was a an impulsive/reflexive act. This court has already determined that the killing was intentional and premeditated. Maxwell v. State, 443 So.2d 967, 971 (Fla. 1983). The case relied upon by appellant, Minekas v. State, 519 So.2d 601 (Fla. 1988) is clearly distinguishable. There the defendant never held a gun before, and he just witnessed the death of his brother. In the instant case appellant knew how to handle a gun as he had already been convicted of robbery by aiming a gun at two other victims. (PSI, R 1381-1388). Appellant, well versed in firearms, was not a novice at this behavior. His actions were anything but reflexive.

Appellant also claims that the fact that appellant only killed one of the four victims should be considered mitigating evidence or that fact somehow negates the strength of the aggravating factors. There is absolutely no evidence to illustrate any weakness in the aggravating factors. Furthermore, not killing the remaining three defenseless victims can hardly be considered strong mitigating evidence. Sochor v. State, 16 FLW 297, 299 (Fla. May 2, 1991).

Also without merit is appellant's claim that the there was any weakness in the identity of the perpetrators. Mr. Gelber one of the robbery victims, never waivered in his identity of appellant as the killer. (R 660). Furthermore, lingering doubt, if it did exist, is not permissible mitigating evidence. Aldrige v. State, 503 So.2d 1257, 1259 (Fla. 1987). Appellant's reliance on Copper v. State, 16 FLW 375 (Fla. May 9, 1991) is unavailing. In that case this Court determined that conflicting evidence (emphasis added) of the actual killer can form the basis for a life recommendation. In the instant case there is no conflicting evidence, appellant was the actual killer. Maxwell v. State, 490 So.2d 927, 933 (Fla. 1986). This fact also belies appellant's contention that there existed equal culpability between appellant and his codefendant, Griffin. Although both men were responsible for the robberies, it was only appellant who shot and killed Mr. Klien. Maxwell, supra. Appellant also claims that Judge Coker did not take into consideration the nonstatutory mitigating evidence that existed on the PSI, however, Judge Coker did say prior to sentencing that he did so consider the report. (R 1433).

The presentation of appellant's mitigating evidence is either weak in substance or clearly refuted by other evidence. The jury would not have been swayed to recommend a life sentence. The erroneous instruction was harmless beyond a reasonable doubt. Rogers v. State, 511 So.2d 526, 535 (Fla. 1987).

Even if the jury would have recommended life if given a proper instruction on nonstatutory mitigating evidence, Judge

Coker stated that he had considered the evidence presented at sentencing and such evidence still warranted a sentence of death. Gorham v. State, 454 So.2d 556, 560 (Fla. 1984). Irrespective of the faulty jury instruction, the law was clear that a defendant was not precluded in presenting any relevant mitigating evidence at sentencing. Shriner v. State, 386 So.2d 525 (1980); Songer v. State, 365 So.2d 696 (Fla. 1978). Trial counsel knew that Florida law did not preclude consideration of nonstatutory evidence. (P.C.R. 61). Judge Coker was aware of the law as well as he told the prospective jury panel that evidence will be presented to the same jury as to any matter relevant to the sentencing including aggravating and mitigating circumstances. (R 125). Judge Coker made reference to additional evidence and argument that they would hear at the penalty phase upon which they then advise the court of their recommendation. (R 128). Prior to the sentencing phase he told the jury that they were about to hear additional evidence that they should consider in conjunction with the evidence already heard at trial. (R 1379). As conceded by appellant that judges are presumed to follow the law, it is clear that Judge Coker did consider the evidence presented. Judge Coker never precluded appellant from presenting any evidence even though all the evidence in mitigation was nonstatutory. (R 1395-1409). Appellant's closing argument referred only to nonstatutory evidence.(R 1416-1422). Judge Coker ordered a presentence report which contained much of the nonstatutory mitigation evidence.(R

1430-1431). Judge Coker prefaced his sentencing decision with a statement regarding what was considered in his decision. He specifically refers to the penalty phase proceeding, the arguments advanced by defense counsel, the jury's recommendation, the presentence report and a letter written by defense counsel to the Court. (R 1432-1433). Lastly, Judge Coker stated in the order denying the motion for post-conviction relief, that he did in fact consider all that was presented. The record supports this finding. Delap v. Dugger, 513 So.2d 659, 662-663 (Fla. 1987).

Appellant attempts to refute Judge Coker's statement that he did consider all the evidence by relying on the jury instructions that were in use at that time. Specifically appellant relies on the instructions used in two other capital cases were Judge Coker presided. Such an argument is specious and incomplete. When determining whether Hitchcock error has occurred the appropriate starting place would be a review of the instructions. However, the next step would be to review the entire record for any indication as to what was or was not considered. Thomas v. State, 546 So.2d 716, 717 (Fla. 1989). What was revealed in the record of either Thomas, supra or O'Callaghan v. State, 542 So.2d 1324 (Fla. 1989) is simply irrelevant to the resolution of this appeal. The fact that Judge Coker instructed juries in other capital cases with the same instruction used in the instant case, offers absolutely no insight into what he did and did not consider when sentencing

Chester Maxwell. The same instructions were used because they were the standard jury instructions in place at the time. Unfortunately they did not articulate clearly enough what the actual law was in Florida regarding mitigating evidence.

Appellant also claims that since the sentencing order does not specifically address the nonstatutory evidence, that suggests that the judge did not consider it. This Court has rejected that argument on previous occasions. Card v. Dugger, 512 So.2d 829 (Fla. 1988). The record leads to the conclusion that Judge Coker did consider what he said he considered. (R 1432 - 1433). Demps v. Dugger, 514 So.2d 1092, 1094 (Fla. 1987). After weighing the aggravating factors against the weak mitigating evidence offered it is clear beyond a reasonable doubt that the judge would have imposed death, regardless of a life recommendation. As this Court stated in Songer v. State, 544 So.2d 1010 (Fla. 1989), the death penalty is reserved for the most aggravated and least mitigated murders. Songer, 544 So.2d at 1011. In the instant case there is a complete lack of any statutory mitigating evidence. Secondly the evidence being presented as nonstatutory is weak in relevancy and substance. See generally Francis v. State, 529 So.2d 670, 673 (Fla. 1988); Brown v. State, 526 So.2d 903, 908 (Fla. 1988). The remainder of it is totally refuted by the record. The absence of any real mitigating evidence weighed against the fact that appellant had been previously convicted of a violent felony, and that the murder was committed during a robbery would not have resulted in

a life sentence. [The prior violent felony also involved an armed robbery]. Demps v. Dugger, 514 So. 2d 1092, 1093 (Fla. 1987).

Finally appellant claims that his trial was contaminated with several constitutional errors. Appellant's brief at pg. 35-36. All these allegations have been ruled to be without merit by this court in either the direct appeal or the prior collateral proceeding.

In summation appellant has failed to establish that any error in the jury instructions would have resulted in a life sentence.

ISSUE II

THE SENTENCING ORDER WAS NOT IMPROPERLY PREPARED NOR WAS THERE ANY IMPROPER EX PARTE CONTACT BETWEEN THE TRIAL JUDGE AND THE PROSECUTOR

Appellant complains that the trial court impermissibly decided the instant case without the benefit of an evidentiary hearing or further updated briefs. It is alleged that this error was compounded by the fact that the state attorney's office drafted an order which was ultimately signed by the judge. Appellant had known since June of 1989 that this case was transferred back to circuit court pursuant to this Court's June 21, 1989 order. (P.C. R 40). He has never once requested another evidentiary hearing, updated briefs, status conference or oral argument in front of the circuit court. He has done absolutely nothing to expedite or further clarify his position in this matter. [This despite the fact that he sent periodic status reports to the federal district court. Appellant has a federal habeas petition in federal court which has been stayed pending the outcome of this issue.] Yet because the judge finally rules on this matter he claims prejudice.

Appellant takes exception with certain portions of the judge's order. Specifically, the judge's order refers to trial record excerpts that are relevant to the issue at hand, i.e. was judge or jury precluded from considering nonstatutory evidence. Appellant claims that such "factual findings" are impermissible without an evidentiary hearing. Appellant's argument ignores

the obvious relevancy in what actually happened at trial regarding the jury's and judge's perception as to what they thought they could properly consider for sentencing purposes. However for purposes of this appeal the only relevant portion of the judge's order is the which deals with whether the court did consider the evidence presented and what effect that evidence had on the court's decision. (P.C.R. 42).

Appellant also claims that the order contains inaccurate legal and factual conclusions. The proper forum in which to challenge the legal or factual sufficiency of the order denying post-conviction relief is this appeal. Appellant cannot establish that any prejudice inhered from the fact that he was not given an opportunity to submit further pleadings or conduct yet another evidentiary hearing. Dissatisfaction with the order is what the appeal process is all about. His appellate avenue has not been foreclosed.

Appellee asserts that appellant would not be entitled to another evidentiary hearing on this matter. He was afforded such a hearing in his last motion for post-conviction relief. Although that hearing centered around a claim of ineffective assistance of counsel, the factual predicate for that claim consisted of the presentation of "additional" nonstatutory mitigating evidence. Appellant is not entitled to a third attempt at embellishing the record concerning the existence of nonstatutory mitigating evidence. An evidentiary hearing is not relevant to resolution of the Hitchcock claim, since appellant

has never claimed that he was precluded from presenting nonstatutory mitigating evidence at his sentencing hearing.

Appellant complains that the trial court impermissibly allowed the state attorney's office to draft an order. Appellant alleges that this was an improper delegation of the trial court's duty. Appellant's reliance on Patterson v. State, 513 So.2d 1257 (Fla. 1987) is unavailing as the State did not prepare an order which included findings of fact for sentencing purposes. In Patterson the Court was concerned with the delegation of the trial court's independent duty to weigh the aggravating and mitigating circumstances. Judge Coker did in fact do that at the original trial. Furthermore, the issue being considered in this appeal, harmless error for Hitchcock violation, has ruled upon by Judge Coker during the last collateral appeal. Maxwell v. State, 490 So.2d 927 (Fla. 1986).

Appellant also claims that preparation of the order by the state attorney implies impermissible ex parte communications took place between the state and the judge. Appellant's allegation is insufficient on it's face. Nassetta v. Kaplan, 557 So.2d 919 (Fla. 4th DCA 1990).

CONCLUSION

WHEREFORE, based on the above facts and relevant case law, Appellee respectfully requests that this Court **AFFIRM** the trial court's order.

Respectfully submitted,

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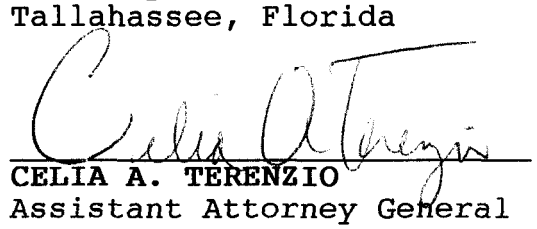

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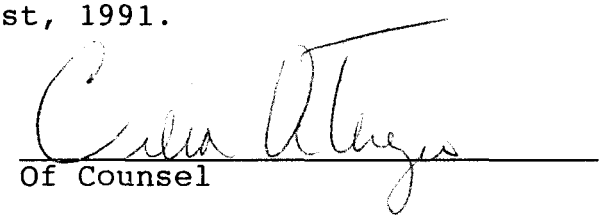
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been furnished by United States Mail to: ANDREW A. OSTROW, ESQUIRE, FOLEY & LARDNER, 777 South Flagler Drive, Suite 200, East Tower, West Palm Beach, Florida 33401-6163, this 2nd day of August, 1991.



Of Counsel

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