IN THE SUPREME COURT OF FLORIDA

CROSLEY A. GREEN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 77,402

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

# REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
112-A Orange Avenue
Daytona Beach, Florida 32114
(904)252-3367

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

## TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| CROSLEY A. GREEN, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| vs. | ) | CASE NO. 77,402 |
| | ) | |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Appellee. | ) | |
| | ) | |

REPLY BRIEF OF APPELLANT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF THE DOG SCENT TRACKING WHERE INSUFFICIENT PREDICATE HAD BEEN PRESENTED.

Appellee contends that the evidence of the dog scent tracking was admissible because a sufficient predicate had been presented. In support of this contention, Appellee states:

> . . . There was no hesitation on the dog's part in back-tracking the trail that led directly from Peterkin's house, where Green had been staying, to the crime scene. [citations omitted]. The fact that the trial led directly to the crime scene, and could not have been made by the victims, supports an inference that it was left by the guilty party. [citation omitted]. Likewise, the fact that Green had been at Peterkin's house supports an inference that the track was made by him. [citations omitted]. Thus, the trial

court properly admitted the dog track evidence.

(A.B. at pp. 6-7). However, Appellee has omitted some very crucial facts in arriving at this conclusion.

It is true that the back-tracking led from the scene to Peterkin's house. However, the officers returned to the exact scene and continued the same track in an opposite direction around the baseball field. Thus, a reasonable conclusion can be made that the same person made the entire track. Appellant had been seen at the ball field earlier that evening. It is just as reasonable to assume that Appellant made this entire track at that time. The facts do not support an inference that the track could only have been made by the guilty party at or near the time of the alleged crime. Thus, an insufficient predicate was laid for the admission of this dog-track evidence.

In an attempt to down-play the importance of this testimony to the state's case, Appellee suggests that because there was eye-witness identification, any error in admitting the dog scent testimony was harmless at best. This is simply untrue. While there was indeed eye-witness identification, Appellant severely questions the reliability of this testimony. (See Point II). The alleged victim gave conflicting statements concerning the identification including material discrepancies concerning the hair of her alleged assailant which clearly was different from Appellant's hair. The importance of the dog scent evidence cannot be underplayed. Its admission was clearly error which requires reversal for a new trial.

## POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW WHEN THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON FLIGHT.

Appellant relies on the argument presented in the initial brief with regard to the impropriety of instructing the jury on flight. However, Appellant offers as additional authority for this proposition the recent case of Wright v. State, 16 FLW S595, 597 (Fla. August 29, 1991) wherein this Court disapproved the giving of a flight instruction. This Court stated:

> Merely fleeing the scene of a crime does not support a flight instruction, id, nor does the fact that Wright remained at large for six days.

## POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF CHARLES FLYNN WAS HEINOUS, ATROCIOUS AND CRUEL AND FURTHER ERRED IN INSTRUCTING THE JURY THAT THEY MAY CONSIDER THIS AGGRAVATING CIRCUMSTANCE IN ARRIVING AT THEIR RECOMMENDATION.

Appellant reiterates the arguments presented in this issue in his intitial brief with the additional authority for the proposition that the instant offense was not heinous, atrocious and cruel of McKinney v. State, 16 FLW S300 (Fla. May 2, 1991) and Cheshire v. State, 568 So.2d 908 (Fla. 1990).

## CONCLUSION

Based on the reasons and authorities presented in this brief as well as in the initial brief, Appellant respectfully requests this Honorable Court to:

As to Points I, II, III and IV, to reverse Appellant's convictions and remand for a new trial;

As to Points V, VI and IX to vacate the sentence and remand for a new sentencing hearing before a new jury; and,

As to Points VII and VIII to vacate the sentence of death and remand for imposition of a life sentence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Michael S. Becker
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 267082
112-A Orange Avenue
Daytona Beach, Fla. 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Crosley A. Green, #902925, P.O. Box 747, Starke, Fla. 32091 on this 16th day of September, 1991.

Michael S. Becker

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER