IN THE SUPREME COURT OF FLORIDA

VICTOR MARCUS FARR,

Appellant,

v.

CASE NO. 77,925

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR COLUMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Farr's statement of the case and facts with the following additions.

Victor Marcus Farr was examined by Dr. Mhatre pretrial to determine whether Farr was competent to stand trial and sane at the time of the crime. Farr specifically informed the court in open court that he did not desire to have Dr. Mhatre's participation in the penalty phase proceedings, following the trial court's acceptance of Farr's guilty plea received on April 2, 1991. (TR 54-55). Farr had no objection to Dr. Mhatre's report being introduced into evidence (TR 56), however, the court noted that the report, albeit introduced, addressed whether Farr was mentally competent to stand trial which was apparently not at issue. (TR 58-59). The court inquired of Farr whether he had any mental problems at which point Farr indicated that he had been institutionalized for depression and hallucinations, although there had been no adjudication of incompetency. (TR 59-60). At the time of Farr's plea and his penalty phase proceedings on May 13, 1991, Farr was under no medication, understood the nature of the crimes for which he was about to be sentenced and had provided specific written instruction to his counsel with regard to how he wanted to proceed without a jury at the penalty phase of his capital sentencing. (TR 61-64). The court specifically stated that in spite of Farr's desires, based on **Hitchcock**, the court must look at all mitigation. (TR 65).

The State first called Mike Dunn, a correctional probation officer, who testified that he prepared a PSI report in Farr's

case. (TR 77-78). Farr told Mr. Dunn that he intended to kill the Bryant girl and the reason he crashed into the tree was because he wanted to kill her but had no more ammunition in his gun. (TR 81).

Mr. Dunn's report also reflected that in 1979, Farr had received alcohol treatment as a result of Farr voluntarily admitting himself to a mental health center in San Antonio, Texas. The report revealed that Farr voluntarily admitted himself in order to avoid court proceedings and remained in the facility for thirty days and was then released. (TR 82). Farr wrote letters which he asked Mr. Dunn to incorporate in the presentence investigation report. (TR 83). Two letters were introduced into evidence, one dated February 20, 1991, and the other April 12, 1991. In essence, each letter reflected that Farr intended to murder the "Bryant girl" because "dead people don't talk" and that was the reason why he ran off the road. (TR 85). He further stated that he was "asking for death because he intended to kill the girl Bryant" and was not going to let her live. "I told her I was going to kill her and she said her prayers and she knew when the cops got behind us, it would take place." (TR 86). "She began to beg. I hit her on the left side of the face, above the eye -- she shut up." (TR 86). In his letter, Farr continued that the girl tried to grab the wheel and turn the car. He hit her again and told her she was going to die. (TR 86). After the crash, he heard her making noises, however, when he saw her and the extent of her injuries, he knew she was not going to live. (TR 87).

Victor Farr was called to the stand and verified that he wrote the letters. (TR 89). Defense counsel read a letter dated April 25, 1991, into the record. (TR 90-93). A second letter, dated April 25, 1991, was also read into the record. (TR 93-96). In material part, the letters reveal:

> I think of what I remember of her as we were in the car. I remember her crying and how she prayed as we drove around. I remember her as I put the gun to her head, as she begged me, please, sir, don't shoot me. I remember as we was speeding away from the police as she began to cry and cried out, Oh God, help us. As I left the road for the tree, I can't remember the name she cried out, but then she said, Lord, help me. Sir, she was a young, sweet girl and, true, I feel for her, but at the time, I could care less. I planned to kill her, true, not by hitting the tree at first. I won't say what I had planned, for it don't matter anyway. I had to hit the tree. I could not let her walk away, nor let the police save her. If I had not been pinned in the car, I would have tried to get to her to make sure she was dying. I could hear her choking and making sounds and watching her legs jump a few times. See, that it why I have requested the death penalty because, true, I don't want to die. I love life. I loving seeing the sun rise, but, also, I am sure she did. She did not wish to die. She was good-looking with a full life ahead of her. I took not only her life, but hurt countless others. Because of me, she will never have a life, no kids, no husband, no nothing. I mean, one must think of this.

(TR 90-91).

Following closing arguments, the State and defense counsel prepared proposed orders for the trial court. Prior to sentencing, the court asked Farr to read the proposed sentencing orders and asked for any additions or comments. (TR 116). Having shown a lack of any reason why sentence should not be

imposed, the trial court concluded that four statutory aggravating factors existed, specifically that Farr had been previously convicted of another capital felony; that the murder was committed during the commission of felonies; that the murder was intended to thwart law enforcement because "dead people don't talk"; and that the murder was especially heinous, atrocious and cruel. (TR 116-119). With regard to mitigation, the court found:

> MITIGATING CIRCUMSTANCES: The Defendant offered no evidence of mitigation, and, specifically, instructed his attorney not to argue for any mitigation. **Nevertheless, the court has considered the possibility that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The court notes that the Defendant registered a blood alcohol content of .20 percent on the evening of the crime; but in view of the Defendant's clear memory of the details of the crime and the decisions made by the Defendant that evening, the court finds that this is not a mitigating circumstance or if it is a mitigating circumstance, it is outweighed by the aggravating circumstances previously enumerated.** The court has considered no evidence, nor factors imposing the penalty herein and has no information not disclosed to the Defendant or his counsel, which the Defendant has not had the opportunity to deny or explain. (cite omitted).
>
> Upon the preceding findings, the court bases its sentence. It is the opinion of this court that there are sufficient aggravating circumstances existing to justify the sentence of death. The aggravating circumstances existing are so clear and convincing that virtually no reasonably person could differ. The court is mindful that the sentence must be a matter of reasoned judgment; that no mitigating circumstances, either statutory or nonstatutory, exist to outweigh or offset the aggravating circumstances, which have been

> proved to the court beyond and to the exclusion of every reasonable doubt. Therefore, the court adjudicates you, Victor Marcus Farr, guilty as to Count XII of the indictment and you are hereby sentenced to death for the murder of Shirley Bryant. . . .

(TR 119-121). See Judgment and Sentence (TR 309-312).

SUMMARY OF ARGUMENT

The trial court, pursuant to **Hamblen v. State**, 527 So.2d 87 (Fla. 1991), properly determined that Farr knowingly and voluntarily waived an advisory sentencing jury and limited the presentation of mitigating evidence. The trial court did consider "evidence in mitigation" but rejected same. The court noted however that **even** if present, the aggravating circumstances far outweighed any mitigation. Moreover, the court's determination that the murder was committed to hinder the enforcement of laws and was especially heinous, atrocious or cruel was unrefuted by the record and proven beyond a reasonable doubt.

ARGUMENT

ISSUE

THE TRIAL COURT DID NOT ERR IN ALLOWING FARR TO WAIVE THE PRESENTATION OF MITIGATING EVIDENCE OR FAILED TO INSURE THAT THE DEATH PENALTY WAS PROPERLY IMPOSED PURSUANT TO THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 9, 16 AND 17 OF THE CONSTITUTION OF FLORIDA

Farr first asserts that although a defendant can refuse to contest the imposition of a death sentence and waive the presentation of evidence in mitigation, **Pettit v. State**, ____ So.2d ____ (Fla. January 9, 1992), 17 F.L.W. S41, and **Hamblen v. State**, 527 So.2d 87 (Fla. 1991), in the instant case, Victor Farr, "a man with a history of depression and suicide attempts", "wanted the State to do what he had been unsuccessful in doing in the past -- kill himself." (Appellant's Brief, page 12). Such an assertion is unfounded and contrary to Farr's own medical evidence. (**See** Dr. Mhatre's report, TR 261-266).

In **Lamadline v. State**, 303 So.2d 17 (Fla. 1974), the court concluded that the defendant has the right to waive a penalty phase jury in a capital sentencing proceedings. In **State v. Carr**, 336 So.2d 358 (Fla. 1976), the court further found that it was within the trial court's discretion to determine whether to accept an otherwise voluntary and intelligent waiver of a sentencing jury. In **Carr**, the defendant entered a plea of guilty to murder in the first degree and entered a written waiver of the advisory jury. The trial court, after reviewing the record, found that the defendant had voluntarily and freely waived an advisory jury. In **Holmes v. State**, 374 So.2d 944 (Fla. 1979),

the court reaffirmed the right of a defendant to waive an advisory sentencing jury, and in **Palmes v. State**, 397 So.2d 648 (Fla. 1981), in affirming the death penalty and Palmes' waiver of a jury during the penalty phase, held:

> . . . There was no jury recommendation because appellant waived his right to have the jury hear evidence on the question of sentence. One who has been convicted of a capital crime and faces sentencing may waive his right to a jury recommendation, **provided the waiver is voluntary and intelligent.** Upon finding such a waiver, the sentencing court may in its discretion hold a sentencing hearing before a jury and receive a recommendation, or may dispense with that procedures. (cites omitted). The record shows that the court inquired into appellant's waiver and found it to be intelligent and involuntary.

397 So.2d at 656.

Likewise, in **Anderson v. State**, 574 So.2d 87 (Fla. 1991), the court observed that Anderson's waiver of his right to present mitigating testimony through any witnesses testimony was properly waived because ". . . Anderson made a knowing, intelligent, and voluntary waiver of his constitutional right to present mitigating evidence. We find that **Faretta** and **Johnson** do not apply to the situation before us and that the trial judge had no obligation to conduct a **Faretta** inquiry since Anderson was represented by counsel." 574 So.2d at 95.

In **Pettit v. State**, ____ So.2d ____ (Fla. 1992), 17 F.L.W. S41, this Court upheld Pettit's waiver of the presentation of mitigating evidence while being "unrepresented at the penalty phase." The court found that Pettit had a desire and full mental capacity to make such a waiver. The court further opined that

although the responsibility of the trial court to analyze the possible statutory and nonstatutory mitigating factors, the trial judge satisfied this requirement when he reviewed testimony of two neurologists who examined Pettit to testify at the sentencing hearing. **See also Klokoc v. State**, 589 So.2d 219 (Fla. 1991).

Beyond peradventure, the trial judge in the instant case repeatedly inquired of Farr as to whether he was making a knowing and intelligent waiver of his rights at the sentencing phase of his capital trial. Farr was represented by counsel. Pretrial, he was examined by Dr. Mhatre as to his competence to stand trial and his sanity at the time of the crime. Dr. Mhatre's report was introduced as was a number of letters written by Farr; one of which provided specific instructions as to how his counsel was to proceed with regard to the penalty phase of his trial. Farr acknowledged in his written letters that Dr. Mhatre "could have presented some evidence in mitigation," however, he declined to have said evidence used. Ultimately, the trial court, in discerning the appropriateness of the penalty to be imposed, found four statutory aggravating factors proven beyond a reasonable doubt and observed that in considering mitigation, specifically, whether Farr's capacity to appreciate the criminality of his conduct was impaired, it was rejected, because of Farr's memory and planning at the time of the crime. The court specifically observed, however, that **even if Farr's drinking the day of the crime could be considered as "mitigation", the aggravation outweighed the mitigation and therefore the death penalty was appropriate.**

Hamblen, Pettit, Anderson and **Klokoc, supra,** demonstrate no error occurred **sub judice.** Based on the foregoing, Farr made a knowing and voluntary waiver of the jury as well as dictated the extent to which mitigation would be introduced at the penalty phase of his capital trial. No relief should be forthcoming.

Farr also argues that the trial court erred in failing to consider mitigating evidence. The record reflects the trial court did consider as a statutory mitigating circumstance, whether Farr's mental capacity was impaired based on his blood alcohol level of .20 at the time of the crime. The trial court rejected this mitigating factor, finding that Farr had a clear memory and made conscientious decisions during the course of this criminal episode. (TR 120). The court observed that although Farr offered no evidence in mitigation, "nevertheless" the trial court considered the possibility that Farr's capacity was impaired. The court further observed that even "if it is a mitigating circumstance (Farr's impaired capacity), it is outweighed by the aggravating circumstances previously enumerated." (TR 120). Clearly, under **Santos v. State,** ____ So.2d ____ (Fla. 1991), 16 F.L.W. S633, **Rogers v. State,** 511 So.2d 526 (Fla. 1987); **Campbell v. State,** 571 So.2d 415 (Fla. 1991), and other cases, the trial court properly combed the

record and determined that "any mitigating evidence" was outweighed by the aggravating circumstances.[1]

Farr lastly argues that two of the four statutory aggravating factors were improperly found. Specifically, he points to the fact that the court should not have found that the homicide was committed to disrupt a governmental function or hinder the enforcement of laws, and he argues that the homicide was not especially heinous, atrocious and cruel.

The trial court found that the "unrefuted testimony established beyond a reasonable doubt that the Defendant **intended** to thwart the police's ability to prove that he kidnapped the victim Bryant, as evidenced by Defendant's statement that Dead

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[1] Moreover, as noted in **Lucas v. State**, 568 So.2d 18 (Fla. 1990), although there is a requirement that the trial court address nonstatutory mitigating factors "presented", the court recognized that:

> Lucas did not point out to the trial court all of the nonstatutory mitigating circumstances he now faults the court for not considering. Because nonstatutory mitigating evidence is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish. This is not to much to ask if the court is to perform the meaningful analysis required considering all of the applicable aggravating and mitigating circumstances.

568 So.2d at 23-24. Where, as here, Farr waived an advisory jury and dictated the limitations with regard to mitigation presented, Farr cannot be heard to complain that the trial court in any fashion failed to consider nonstatutory mitigating evidence such as Farr's "chronic alcoholism; history of depression and suicide attempts; his emotionally deprived family background; and the fact that he had been sexually abused as a child," which were **not** expressly relied upon by Farr, but rather must be gleened from statements in the PSI report and Dr. Mhatre's report. Necessarily, these factors would pale in light of the aggravating factors. Therefore, any error must be deemed harmless at worst.

people don't talk." (TR 310). Throughout all of Farr's letters and the factual finding for the plea, the evidence went unrefuted that Farr intended to kill Shirley Bryant. His actions that entire day evidenced a total disregard for any human life except his own. Farr intended to extricate himself from his criminal conduct and intended no witnesses would remain. Through sheer fortuity Farr did not succeed in murdering in cold blood the two earlier victims. Ms. Bryant's boyfriend lived because he succeeded in jumping out of the car. Farr's efforts constitute the very nature of the conduct contemplated by this aggravating factor - to hinder law enforcement - and eliminate a witness - the sole or dominate reason for the murder. **Henry v. State**, 586 So.2d 1033 (Fla. 1991); **Zeigler v. State**, 580 So.2d 127 (Fla. 1991); **Hitchcock v. State**, 578 So.2d 685 (Fla. 1990), and **Randolph v. State**, 562 So.2d 331 (Fla. 1990).

As to the trial court's determination that the murder was especially heinous, atrocious or cruel; the "unrefuted testimony established beyond a reasonable doubt that the Defendant told the victim Bryant that he was going to kill her; that the victim Bryant begged for her life several times and was praying; that the Defendant put a gun to the victim Bryant's head several times and pulled the trigger; that the Defendant removed the victim Bryant's shoes so she could not escape from him; all of said circumstances establishing that the crime carried out was conscienceless and pitiless and caused the victim Bryant to agonize over her impending death for a period of time. **See Douglas v. State**, 575 So.2d 165 (Fla. 1991)." (TR 311).

Farr argues that only his "unreliable statements provided the court's foundation for this circumstance." (Appellant's Brief, page 22). Be that as it may, the testimony in writing went unrefuted. Moreover, even **without** Farr's "testimony" as to Shirley Bryant's begging and praying, the agony she suffered goes without saying. At gunpoint she and her boyfriend were kidnapped. Her boyfriend got away and she was left with Farr. A high speed chase ensued and as a result, the car crashed. The pitiless and conscienceless nature of this crime and the terror Ms. Bryant suffered, needs "no words." **Bryan v. State**, 533 So.2d 744 (Fla. 1988); **Parker v. State**, 476 So.2d 134 (Fla. 1985); **Preston v. State**, 444 So.2d 939 (Fla. 1984). The trial court did not err in concluding these two factors were appropriate in Farr's case. Even assuming one is struck, the State would submit any error is harmless in light of the lack of any mitigation and the presence of three aggravating factors, that standing alone would warrant the death penalty. **Capehart v. State**, 583 So.2d 1009 (Fla. 1991); **Holton v. State**, 573 So.2d 284 (Fla. 1990); **Hill v. State**, 515 So.2d 176 (Fla. 1987); **Shere v. State**, 579 So.2d 86 (Fla. 1991).

CONCLUSION

Based on the foregoing, Appellee would urge this Honorable Court to affirm the conviction of first degree murder and sentence of death in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. W.C. McLain, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 16th day March, 1992.

Carolyn M. Snurkowski
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