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FILED
SID J. WHITE
AUG 14 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

GERALD WAYNE BUNNEY,

Petitioner,

vs. Case No. 78,141

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Appellee relies on the additional facts as follows.

At trial, Appellant affirmatively agreed with the trial court that the case of Chestnut v. State, 538 So.2d 820 (Fla. 1989) was of controlling authority. (R. 40, 41). Additionally, Appellant, through defense counsel laid claim to such intent busting theories as epilepsy, brain damage and borderline retardation. (R. 40). He claimed that his proffered witnesses would testify that he suffered a "Petit Mal seizure not long before the offense", where he would momentarily "blackout" and pause in his speech. (R. 43, 44, 240, 241, 242). He laid claim to brain damage and retardation. (R. 43). Subnormal mental age. (R. 43). Inherited mental disorders or diseases. (R. 43, 44, 242). Alcohol fetal syndrome. (R. 45, 244). Asthma. (R. 241). Hyperactivity as a child. (R. 241). Slow learner. (R. 241) Treatment with Ritalin. (R. 241). That his expert would testify that due to brain damage and retardation, he could not form specific intent. (R. 243, 245). Finally, Appellant wound up his argument by stating;

> MR. ALLDREDGE: Your Honor, I have argued earlier for the record that we are not seeking to establish any diminished capacity defense. What we are attempting to do by this testimony is give credence to the defendant's statements to the deputies and to the detectives that his mind was filled with static, that it was numb, that the numbness that he referred to has a medical and psychiatric basis, that this is something he's not fabricating merely to try to beat the charge that he's here today on.

> And, also, Your Honor, we believe that all this testimony is extremely relevant to go to the issue of mens rea, could he have, the Gerald Bunney that's in this courtroom with his present mental makeup, could he have formed the intent at the time of the offense.

At first, the prosecutor merely reminded the jury of the detail with which Appellant related his shocking story to Detective McDermott. Appellant remembered "that the girl's nightgown was about a quarter of the way down past her knees--" (R. 279). As subsequently explained, to the court and defense counsel, the prosecutor brought up that fact only to remind the jury of the detail with which Appellant was able to recollect the murder. (R. 291). At the point of the next objection, the prosecutor was commenting on how the evidence demonstrated Appellant predetermined plan to choke and kill the little girl. (R. 288). However, it was defense counsel who, upon vociferous objection, literally made a spectacle of where the prosecutor had placed his hands during the argument. It was defense counsel who introduced the word "pubic" into the objection and complained just how "vital" it was for the record to show where the prosecutor's hands were. (R. 288). Before the jury was brought back to hear the remainder of closing arguments, the judge, at the request of defense counsel, read the jury a cautionary instruction which sought to assure the jury that anything the judge said did not indicate his preference for one verdict over another. (R. 296).

SUMMARY OF THE ARGUMENT

Appellant failed to preserve his first issue for appeal because he never raised the argument that an epileptic seizure incapacitated him during the murder. Additionally, given the tenor of Appellant's defenses at trial, epileptic incapacitation should have been raised, in the trial court, through the insanity defense. In any event, this issue is not encompassed within the certified question from the Second District Court of Appeal and should not be considered herein.

The issue concerning prosecutorial misconduct is not encompassed within the certified question and should not be considered by this Court.

The issue concerning the alternate juror's is not encompassed within the certified question and should not be considered by this Court.

A contemporaneous conviction for an unscorable capital felony is still a valid reason for departure. The 24 points added to the kidnapping scoresheet were hardly a substitute for a capital conviction departure, and were not intended to be. The departure is based upon the horrendous nature of a capital felony and, as such, forms the policy behind the departure.

ARGUMENT

ISSUE I

WHETHER APPELLANT FAILED TO PRESERVE HIS FIRST ISSUE FOR APPELLATE REVIEW?. WHETHER "EPILEPTIC INCAPACITATION" IS A DEFENSE THAT SHOULD HAVE BEEN RAISED BY A PLEA OF INSANITY?.

For its answer to Petitioner's Issue I, Respondent relies on the arguments advanced in its brief in the court below and particularly readvances the argument that Petitioner has committed procedural default by not raising the instant issue with particularity in the trial court.

Additionally, and not by any waiver of the foregoing, Respondent offers the following additional comments.

In the trial court, Petitioner raised all kinds of "intent busting" theories of defense. However, unlike the situation in Wise v. State, 580 So.2d 329 (Fla. 1st DCA 1991), absolutely no proffer was made which portrayed the "static" in Petitioner's head as a "running fit," which "is the psychomotor, partial complex epilepsy in which people will continue to engage in what appears to be purposeful behavior but they don't know what it is that they are doing". Wise, at 330. The question of whether epilepsy is actually a physical defect was never broached in the trial court. In Wise, the First District assumed that epilepsy is as physical an impairment as a broken leg and, accordingly,

was not governed by Chestnut v. State, 538 So.2d 820 (Fla. 1989). In the instant case, Petitioner argued in the trial court that his "present mental makeup" rendered his conduct intentless and that there was a "medical and psychiatric basis" for the static in his head.[1] Consequently, inasmuch as Petitioner viewed his own theory(s) of defense as a mental one, he should now be held to it and be required to have asserted the insanity defense at trial.

Finally, this issue is not encompassed within the certified question from the Second District. Accordingly, it should not be considered by this Court. Gould v. State, 577 So.2d 1302 (Fla. 1991) at footnote 2.

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[1] In Wise, the defendant couldn't remember anything about the killing yet Petitioner herein simply says that he felt "static" in his head while he recounted for detectives the details of his horrendous deed. Accordingly, it is manifestly impossible for Petitioner to fit his particular "static" story into the "running fit" theory as recognized in Wise.)

ISSUE II

WHETHER THE PROSECUTOR'S HAND GESTURES DEPRIVED APPELLANT OF A FAIR TRIAL? WHETHER THIS ISSUE IS ENCOMPASSED WITHIN THE CERTIFIED QUESTION?

Respondent relies on its arguments as laid out in its Answer Brief before the Second District and as reproduced herein in the Appendix. Additionally, this issue should not be considered by this Court inasmuch as it was not contained within the certified question. Gould, supra, at footnote 2.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY ALLOWING THE ALTERNATE JUROR'S TO REVIEW A VIDEO TAPE WHILE SEATED IN OPEN COURT WITH THE REST OF THE JUROR'S AND WHILE COUNSEL WAS PRESENT IN THE COURTOOM? WHETHER THIS ISSUE IS ENCOMPASSED WITHIN THE CERTIFIED QUESTION?

Respondent relies on its arguments as laid out in its Answer Brief before the Second District and as reproduced herein in the Appendix. Additionally, this issue should not be considered by this Court inasmuch as it was not contained within the certified question. Gould, supra, at footnote 2.

ISSUE IV

IN A SENTENCING FOR A FELONY WHERE THERE IS A CONTEMPORANEOUS CONVICTION OF AN UNSCORED CAPITAL FELONY, IS IT PROPER TO DEPART BASED ON THE DEFENDANT'S CAPITAL CONVICTION WHEN THE APPLICABLE GUIDELINES PROVIDE THAT VICTIM INJURY IS SCORABLE? (CERTIFIED QUESTION)

This is the only issue contained within the ambit of the certified question. Accordingly, this is the only issue that should be considered by this Court.

Petitioner challenges the long standing rule that a sentencing court can depart from the guidelines on the basis of a contemporaneous conviction for an unscorable capital felony. He says that because 24 points were already factored into the guidelines for the kidnapping conviction, (for victim injury) that the departure amounts to one based upon factors already taken into account on the scoresheet. He feels that the 24 points "shared" by both the kidnapping and capital murder convictions amount to both a "scoring" of the capital felony and an unlawful departure for the same. His reasoning is faulty.

If one were to follow Petitioner's reasoning, a contemporaneous capital felony would only be "worth" a mere 24 points on the guidelines and thus could never constitute grounds for departure unless the State was willing to forego assessing points for victim injury. Such is obviously not in keeping with the intent of the guidelines or the policy behind departing for a contemporaneous capital conviction.

The trial court did not depart because the victim was killed. Rather, Petitioner earned the departure because the heinous nature of an unscorable capital felony conviction is something this Court has deemed a sufficient reason for departure. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Livingston v. State, 565 So.2d 1288 (Fla. 1988). The 24 points added for victim injury are attributable to the kidnapping conviction regardless of the capital felony by virtue of Florida Rule of Criminal Procedure Re Sentencing Guidelines Rules (3.701 and 3.988), 509 So.2d 1088 (Fla. 1987) as relied on by Petitioner. The reason for the departure was, thus, not the injury to the victim, but the dreadful and unscorable nature of the contemporaneous capital conviction.

One could consider a scenario where this Court approves a rule of criminal procedure whereby capital crimes not awarded the death penalty are thus "scored" on the guidelines. Is it at all reasonable to think that a mere 24 points would be assessed for such a crime? Of course not. It is equally unreasonable to think that the 24 points for victim injury scored by the kidnapping conviction constitutes sufficient punishment so as not to warrant a departure sentence based upon the contemporaneous capital felony. Victim injury may well be already factored into the guidelines, but the contemporaneous conviction for a cruel capital felony is not. Accordingly, the policy behind departing based upon the contemporaneous conviction for a capital felony is still served regardless of the rule allowing for the scoring of victim injury in this case.

Furthermore, if the 24 points for victim injury were subtracted from the guidelines for, arguendo, the sake of not punishing Petitioner twice for factors already considered in the guidelines, it is undisputable that the trial court could still depart based upon the capital felony. Inasmuch as the extent of the departure is no longer reviewable, any range achieved absent the 24 points could be departed from, with impunity, all the way up to life in prison. Accordingly, regardless of the addition of victim injury points for the conviction of any felony committed along with the capital crime, departure to the statutory maximum can always be achieved. Such was true before the change in the Rules, such is true after.

CONCLUSION

WHEREFORE, the decision of the district court should be affirmed.

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 Steven T. Northcutt, Esquire, Levin, Hirsch, Segall & Northcutt, P.A., Ashley Tower, Suite 1500, P.O. Box 3429, Tampa, Florida 33601-3429 this 12th day of August, 1991.

OF COUNSEL FOR RESPONDENT