SUPREME COURT OF FLORIDA

MICHAEL G. LOVETTE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 78,202

REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR INDIAN RIVER COUNTY, FLORIDA (Criminal Division)

Clifford H. Barnes, Esquire
Florida Bar No. 0329681
1803 South 25th Street
Suite 3
Fort Pierce, Florida 34950
(407) 466-8400
Counsel for the Appellant

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PRELIMINARY STATEMENT

Appellant was the defendant in the trial court. He will be referred to as Appellant or by name in this Answer Brief.

The Record on Appeal is consecutively numbered beginning on Page 1 with the opening of the Trial. The sentencing proceedings by the trial judge are prepared separately, however, and are included in the second of two volumes entitled "Pretrial Conference, Motions to Suppress and Sentencing" and "Motion to Suppress, Motion in Limine and Sentencing" respectively. All references to the trial Judge's sentencing hearing will be by the symbol (S) followed by the appropriate page number inparentheses. The rest of the record will be referred to by the symbol (R). Appellee's Answer Brief will be referred to by the symbol (AB). Although the record supllemented with an additional Motion to Suppress hearing, it will not be referred to.

ISSUE II

THE COURT ERRED IN ADMITTING APPELLANT'S STATEMENTS TO A MENTAL HEALTH EXPERT IN STATE'S CASE IN CHIEF

Contrary to Appellee's assertion, this Court's ruling in Hargrave v. State, 427 So.2d 713 (Fla. 1983), is not on point with this case. In Hargrave, the psychologist was not appointed as a confidential defense expert, he did not testify in the State's guilt phase, he was presented to rebut a psychological defense offered by the defendant (substantial domination by another), he was cross-examined at length by the defense when he did testify, the defense presented their own expert's testimony thereafter, and finally, the defense in that case did not timely object to the testimony. Hargrave 427 So.2d at 713-715.

Appellee's citation of Preston v. State, 528 So.2d 896 (Fla. 1988) does not help the State's case either. In Preston, this Court, in addition to ruling that no timely objection had been made at trial, found that:

> "...Appellant underwent a court-ordered psychiatric examination only after placing his sanity in issue and after notice to his counsel. Moreover, the psychiatrist's testimony of which he complains was presented after he had opened the door through the introduction of psychiatric testimony of his own on the subject."
> 528 So.2d at 899

This Court most recently revisited this issue in Long v. State, 610 So.2d 1283 (Fla. 1992). In Long, the defendant complained that the trial court had improperly allowed the State to

call a mental health expert to testify as to his sanity. Noting that the defendant had filed a notice of insanity and presented testimony to support that defense, this Court rejected that complaint. The Court agreed that the trial court should not have allowed the expert to recite statements made to him by the defendant but held that that issue had been waived, and was harmless error.

The law on this issue, including the cases cited by the State, is very consistent: it is a violation of the Fifth Amendment for the State to present statements made by a defendant through the testimony of a mental health expert, where the defendant has not first put his mental health in issue or called the expert to testify for some other reason. Likewise, on the issue of attorney-client privilege, the State is unable to cite a case where the waiver found by the court did not involve a situation where the defendant actually presented an insanity defense.

ISSUE V

THE COURT ERRED BY NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO PREMEDITATED MURDER

Appellee states that Appellant was "fifteen feet from where the sexual battery and murder took place" in order to support his conviction for premeditated murder (AB 18). The pages cited by Appellee certainly support that assertion. However, they do not link his presence in that area in time with the sexual battery and murders, therefore this assertion is of little relevance to whether Appellant was properly convicted as a principal.

ISSUE VI

THE COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE SEXUAL BATTERY CHARGE

The State asserts that on page 1106 of the record it is reflected that Appellant "heard Mrs. Edwards moaning," irrespective of Dr. Berland's testimony (AB 20). This is an incorrect citing of the record, since the person who was moaning was not identified at that point in the record. Other than Dr. Berland's testimony that Appellant admitted hearing Mrs. Edwards pleading and seeing Mrs. Edwards without pants at some point in time (R 1231), the record is devoid of proof that Appellant knew of the rape. Even his statement to Dr. Berland, however, is hardly proof that he knew of and intended that the rape occur.

ISSUE VII

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT X, ROBBERY OF THE SHIRT

Appellant agrees that "common sense and logic dictates that Bornoosh was forced to take off his shirt" (AB 21). Although this may be true for those who read the record, there is no proof that, at the time, Appellant saw this or knew this fact. Common sense and logic would also dictate that a robber would assume that a Domino's store would have extra uniforms on hand for its employees.

ISSUE IX

THE TRIAL COURT'S ERRORS IN ADMITTING DR. BERLAND'S TESTIMONY AND IN NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE COUNTS DISCUSSED IN ISSUES V, VI, VII, AND VIII, DEPRIVED APPELLANT OF A FAIR SENTENCING HEARING

The statement by Appellee that even without Dr. Berland, "the jury was well aware of the fact that Appellant heard moaning by Mrs. Edwards" (AB 23) is incorrect. The only prior reference to "moaning" did not identify who made the sounds (R 1106). Contrary to Appellee's assertion, the State did emphasize Dr. Berland's testimony. The State argued in their penalty phase closing that Bornoosh "...heard Frances Edwards pleading as she was being raped on the other side of the door...", "...as she pleaded her husband was helpless to come to her aid" (R 1565-1566) and that Appellant was "...the one person who's still alive who heard Frances Edwards pleading and was in a position to stop what happened" (R 1573).

The closeness of a jury's vote is an entirely legitimate consideration as to whether the error was harmful. See Omelus v. State, 584 So.2d 563 (Fla. 1991), where this Court overturned a death sentence which was based on a 8-4 vote, and specifically weighed that factor in its analysis, 584 So.2d at 576. It should be remembered that in their guilt phase deliberations, the jury had the Court twice reread Dr. Berland's brief testimony (R 1431-1434).

ISSUE XII

THE COURT ERRED BY ALLOWING THE STATE TO ARGUE AND BY INSTRUCTING ON TWO AGGRAVATING FACTORS FOR WHICH APPELLANT CANNOT BE HELD VICARIOUSLY LIABLE

Appellee misinterprets this Court's decision in Omelus v. State, 584 So.2d 563 (Fla. 1991). Its logical conclusion is not that aggravating factors are never applicable to a nonshooter. Indeed, the defendant in Omelus was properly convicted of the "cold, calculated, and premeditated" factor even though he wasn't present for the killings, because he had planned them. Likewise, in this case, Appellant has conceded that the aggravating factors of prior violent felony, felony murder, and under sentence of imprisonment all are applicable, if constitutional.

Recently, this Court reaffirmed its Omelus ruling in another case involving a defendant who arranged a killing but was not present at the scene, Archer v. State, 613 So.2d 446 (Fla. 1993). The Court rejected the finding of HAC because, although that defendant knew the victim would be shot, he did not know..."that the victim would be shot four times or that he would die begging for his life," 613 So.2d at 448. What is important in each of these cases is the lack on the part of the defendant of the mental requirement of the aggravators, not simply that they were not at the scene of the killing.

This Court has correctly restricted the application of aggravators to those to whom they personally apply. Nowhere in Florida's sentencing scheme is there a "felony-aggravator" principal that one defendant is responsible for acts or mental

states which satisfy the factor but are committed by another. In fact, the case law is clear that aggravating factors focus on the defendant's actions and intent, and without such a showing the factors are not proven.

ISSUE XIII

THE COURT ERRED IN FINDING APPELLANT VICARIOUSLY LIABLE FOR FOUR AGGRAVATING FACTORS

Appellee misinterprets this Court's decision in Omelus v. State, 584 So.2d 563 (Fla. 1991). Its logical conclusion is not that aggravating factors are never applicable to a nonshooter. Indeed, the defendant in Omelus was properly convicted of the "cold, calculated, and premeditated" factor even though he wasn't present for the killings, because he had planned them. Likewise, in this case, Appellant has conceded that the aggravating factors of prior violent felony, felony murder, and under sentence of imprisonment all are applicable, if constitutional.

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ISSUE XV

THE COURT ERRED IN INSTRUCTING ON, AND FINDING THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATOR, WHICH WAS NOT PROVEN BEYOND A REASONABLE DOUBT

The degree to which this Court now requires proof of this aggravating factor is illustrated in Power v. State, 605 So.2d 856 (Fla. 1992) and Geralds v. State, 601 So.2d 1157 (Fla. 1992).

In Power a finding of CCP was overturned even though that defendant entered the 12 year old victim's house with a gun early in the morning, threatened to kill her, raped her, hog-tied her, stabbed her, disposed of her body in a field, and ate a sandwich from her lunch box. This Court ruled that the evidence might have proved a prearranged plan to rape the victim, but not to kill her. Also, this Court held that actions by the defendant after the killing could not be used to show heightened premeditation beforehand.

Similarly, in Geralds, another home invasion case, this Court ruled that CCP was unproven despite the fact that the defendant researched the family's schedules, brought gloves and change of clothes and plastic ties to the house, parked away from the house, bound the victim twenty minutes before her death, beat her and stabbed her three times, and left her to bleed to death. Again, this Court held that the evidence was just as susceptible that the plan was only to commit a burglary.

Finally, see Clark v. State, 609 So.2d 513 (Fla. 1992) where the Court rejected CCP despite the defendant having driven the

victim into the woods and shooting him in the chest and mouth with a shotgun, all in order to take his job.

ISSUE XVI

THE COURT ERRED IN INSTRUCTING ON, AND FINDING THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR, WHICH WAS NOT PROVEN BEYOND A REASONABLE DOUBT

Appellee's contention that "HAC" is applicable to this case because of the victims' fear and emotional strain and the fact that they were killed in one another's presence is weakened by this Court's ruling in Maharaj v. State, 597 So.2d 786 (Fla. 1992). In Maharaj, the defendant shot a father four or five times in his son's presence, then took the son in another room and shot him after a period of time. The son was shot while kneeling or sitting with his head close to and facing the wall. Both victims died. This Court held that "HAC" was not applicable to the son's death. Also, see Burns v. State, 609 So.2d 600 (Fla. 1992). In Burns, the Court ruled HAC was not proven where the defendant struggled with an officer and shot him with his own gun while the officer had his hands raised, pleading with him not to shoot.

ISSUE XVIII

THE TRIAL COURT ERRED IN FAILING TO PROPERLY CONSIDER AND FIND PROPOSED NONSTATUTORY MITIGATING CIRCUMSTANCES SUPPORTED BY UNCONTRADICTED EVIDENCE

In Santos v. State, 591 So.2d 160 (Fla. 1991) the Court ruled that "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," 591 So.2d at 164.

As demonstrated in Appellant's initial brief, there were several important nonstatutory factors that were presented, went unrebutted, but were evidently ignored by the trial judge.

ISSUE XIX

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE

Appellee's reliance on State v. White, 470 So.2d 1377 (Fla. 1985) is misplaced. In White, the defendant heard his cohorts discussing the need to kill the eight victims, and although he verbally opposed the killing, the Court held that "...it can hardly be said that he did not realize that lethal force was going to be used in carrying about the robbery," 470 So.2d at 1380. The Court pointed out that even with the knowledge that the victims were being systematically separated and shot, the defendant "stood by" while it happened and didn't leave the house. As pointed out earlier, in the case at bar there is no evidence whatsoever that Appellant was given any warning prior to the shooting. Appellant's statements to authorities was that Wyatt was going to "lock all of them in the closet" and that Appellant "never had no idea he was going to shoot nobody" (R 1105-1107). Even in Appellant's statement to Dr. Berland there is no suggestion of a warning prior to Appellant seeing Wyatt aiming and firing (R 1231-1232).

Assuming arguendo that Appellant is a proper candidate for the death penalty even as a nontriggerman, a weighing of aggravating and mitigating circumstances is still necessary as in any other death penalty case. As argued, there are but three proper aggravating factors (which are diminished by the facts in this case) versus four mitigators already found and several more that should have been found.

Counsel has been unable to locate a nontriggerman case with so little proper aggravation and so much proper mitigation wherein this Court has upheld a death sentence. The State has cited State v. White, 470 So.2d 1377 (Fla. 1985) as favorable precedent for Appellant's death sentence. However, see the Court's earlier decision in White v. State, 403 So.2d 331, 339 (Fla. 1981), where the Court emphasized that "there were no mitigating circumstances."

This Court recently considered the proportionality issue in a case involving a defendant who shot his victim in the chest and mouth with a shotgun in order to steal his possessions and his job, Clark, V. State, 609 So.2d 513 (Fla. 1992). After rejecting the trial court's finding of several aggravators, including "CCP" and "HAC", the Court reduced the death sentence (imposed after a 10-2 vote), to life. In Clark, as in this case, there were no statutory mitigating factors established, but several nonstatutory.

In this case, the jury was presented with unspeakably gory photos of multiple victims, they heard improper evidence such as Dr. Berland's testimony, they were improperly allowed to consider unproven charges and aggravating factors, and they heard improper argument by the prosecutor. Despite all of this, Appellant missed a life recommendation by only one vote. Appellant's case can hardly be included in "the most aggravated and unmitigated of most serious crimes." Holsworth v. State, 522 So.2d 348 354-355 (Fla. 1988).

Appellant urges this Court, pursuant to Parker v. Dugger, ___ U.S.____ 111 S.Ct. 731, 112 L.Ed. 812 (1991), to independently

reweigh the evidence, excluding the inappropriate aggravating factors and including all mitigation, and impose a life sentence for each of the three murders.

ISSUE XX

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

Appellee's claim that Appellant's attack on the constitutionality of "HAC", "CCP", and "in the course of a felony" aggravating factors was not preserved for appeal is incorrect. Appellant challenged these three factors in detail prior to trial (R 1710 - 1721, 1688 - 1706, 1681 - 1687). After a hearing, the trial court denied Appellant's challenge to these factors (R 1887, 1888, and 1896). During the penalty phase, Appellant renewed his pretrial motions, the trial court acknowledged same, and implicitly denied them again by instructing the jury on these factors (R 1454, 1594 - 1600). After the instructions were give, Appellant renewed his objections. The trial court noted them and reaffirmed his rulings (R 1600).

Appellee's claim that the United States Court has found the "HAC" instruction constitutional is incorrect. In fact, the Court has found it to be unconstitutionally vague. Espinosa v. Florida, ____ U.S. ____ 120 L.Ed. 854 (1992). Appellant submits that the "CCP" factor is just as vague and therefore is also unconstitutional.

CONCLUSION

Based on the foregoing authority and argument, Mr. Lovette's convictions must be reversed, and his sentence of death vacated or reduced to life.

Respectfully submitted,

CLIFFORD H. BARNES, ESQUIRE
Attorney for the Appellant
1803 South 25th Street
Suite C
Fort Pierce, Florida 34950
(407) 466-8400
Florida Bar No.: 329681

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Celia Terenzio, Esquire, Assistant Attorney General at the Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, on this 24 day of May, 1993.

CLIFFORD H. BARNES, ESQUIRE