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IN THE SUPREME COURT OF FLORIDA

THEWELL HAMILTON, :

Appellant, :

v. : CASE NO. 78,576

STATE OF FLORIDA, :

Appellee. :

_____/

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant, Thewell Hamilton, relies on the initial brief to respond the the State's answer brief except for the following additions concerning Issues I, III, IV and V.

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING HAMILTON'S MOTION TO SUPPRESS STATEMENTS OBTAINED DURING CUSTODIAL INTERROGATION AFTER HAMILTON ASSERTED HIS RIGHT TO REMAIN SILENT, TO STOP FURTHER QUESTIONING AND TO HAVE ADVICE OF COUNSEL.

The State initially argues that this issue is barred from consideration by the law of the case doctrine. State's brief at 20-21. This contention is incorrect. First, the admissibility of these statements was not raised as an issue in the first appeal of this case. (See, briefs filed in this court in the first appeal, Hamilton v. State, Case no. 72,502) Since the admissibility of the statement issue was not litigated in this

Court on the first appeal, this Court's decision in the previous appeal is not law of the case on this point. Second, this Court reversed the case for a new trial on all issues in the prior appeal. Hamilton v. State, 547 So.2d 630 (Fla. 1989). The admissibility of the statement was an evidentiary matter, and one involving the constitutional rights of the defendant, which was subject to re-litigation at the new trial. The motion to suppress at this second trial was based on different grounds and different evidence. (Compare, Tr 543-577 with the previous record on appeal, case no. 72,502 at 218-285) Specifically, the first motion to suppress was based on the voluntariness of three separate statements. (See, previous record at 218-285) The second motion to suppress, now the subject of this appeal, was based on the failure of the investigating detective to honor Hamilton's request to stop the questioning and his request for counsel. (Tr 543-577) Third, the assertion that Hamilton could have raise the grounds now argued in this appeal in the first appeal ignores the fact that these grounds were not raised in the suppression hearing at the first trial. This Court has held that it will not consider on appeal grounds for suppressing statements which were not first presented in the hearing in the trial court. See, e.g., Whitton v. State, ___ So.2d ___, Case no. 80,536 (Fla. December 1, 1994) (legal grounds not raised in motion to suppress not preserved for appeal).

On pages 21-22 of the State's brief, the argument is made that trial counsel's objections to the admissibility of the

statements did not preserve the issue of Hamilton's assertion of his right to remain silent and reassertion of his right to counsel during questioning. The State quotes trial counsel as saying that when counsel is appointed, he "should at least be consulted as to his desire of whether or not he wants the police to interview his client in their investigation." (Tr 556) This argument of counsel is only one statement out of a significant argument made regarding the admissibility of the statement. The State has presented it as if this were the summation of trial counsel's entire argument for suppressing the statement. State's brief at 21-22. However, the State has omitted reference to the record where counsel argues the other grounds and specifically cites Kyser v. State, 533 So.2d 285 (Fla. 1988), a decision from this Court based on Edwards v. Arizona, 451 U. S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), which is a foundation for grounds now raised in this appeal. (Tr 556-560) Trial counsel adequately presented the grounds now urged on this appeal to the trial court at the suppression hearing.

Regarding the merits, there was no dispute about the relevant facts. The exchange between Hamilton and Investigator Adams was tape recorded, transcribed and the parties stipulated to the transcript as accurate. (Tr 543, 555) Consequently, the only question was a legal one which the trial judge decided incorrectly. Hamilton does not contest that Adams began the October 16th interview at Hamilton's written request. However, during the interview, Hamilton reasserted his rights not to be

questioned which Investigator Adams failed to honor. (See, discussion in initial brief at 26-31)

The State has suggested that the admission of the statement was harmless error. In support of this position, the State briefly recites some the circumstantial evidence which suggests Hamilton may have committed the murders. State's brief at 28. However, in evaluating whether a constitutional error, such as the one here, is harmless, this Court must evaluate more that the evidence suggesting guilt. Harmless error review is not a sufficiency-of-the-evidence or an overwhelming evidence test. State v. DiGuillio, 491 So.2d 1129 (Fla. 1986); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

An analysis for harmless error requires an examination of the permissible evidence on which the jury could have relied and the impermissible evidence which might have influenced the jury's verdict. Ibid. A reviewing court cannot consider only evidence supporting a guilty verdict, no matter how strong that evidence may be, just as a jury is not to consider only the evidence of one party. In Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), the Supreme Court made clear that the focus of any harmless error inquiry is not simply whether the accused would have been convicted had there been no error, but rather on the influence the error may have had on the outcome of the trial. The Sullivan Court said,

> Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." Yates v. Evatt, 500

> U.S. ___, ___ (1991)(emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never rendered -- no matter how inescapable the findings to support that verdict might be -- would violate the jury-trial guarantee. See, Rose v. Clark, 478 U.S. 570, 578 (1986); id., at 593 (Blackmun, J., dissenting); Pope v. Illinois, 481 U.S. 497, 509-510 (1987) (Stevens, J., dissenting).

113 S.Ct. at 2081; see, also, Yates v. Evatt, 500 U.S. ___, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991). The State's suggestion that harmless error review in this case need only look to permissible evidence suggesting guilt does not comport with the mandated harmlessness test established for constitutional error.

ISSUE III

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN FINDING AND CONSIDERING IN THE SENTENCING PROCESS THE HEINOUS, ATROCIOUS OR CRUEL AND THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCES WHICH WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

The State disputes Hamilton's statement in the initial brief that the evidence presented in this second trial provided no greater explanation of the events surrounding the shootings which would prove the HAC and CCP circumstances beyond a reasonable doubt. State's brief at 34. However, reading the State's summary of testimony from the first trial and the State's summary of testimony from the second trial, supports Hamilton's assertion that no significant additional proof emerged from the second trial which would prove the aggravating circumstances.

A reading of the judge's factual finding in the sentencing order also contradicts the State's position. (R 580-581) On pages 43 and 44 of the State's brief, the argument is made that the "additional testimony" proves that Madeline was shot first and then Michael. This sequence, the State argues, would show that HAC and CCP were proven beyond a reasonable doubt. Just as in the first appeal of this case, the State "has [not] offered any explanation of the events of that night beyond speculation." Hamilton v. State, 547 So.2d 630, 633 (Fla. 1989). The sentencing judge in his order acknowledged that "the record is devoid of any evidence which in any way attempts to explain or

justify the killings." (R 580) Later in the order, the court continues to make findings based on assumptions about the way the homicides may have occurred. (R 580-581) The judge specifically noted, however, that, "It is unclear whether the two shots fired into the body of Michael Luposello were prior to or after the shots fired into the body of Madeline Hamilton." (R 581)

ISSUE IV

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN SENTENCING HAMILTON TO DEATH BECAUSE A DEATH SENTENCE IS DISPROPORTIONAL TO THE CRIMES COMMITTED.

Hamilton's position is that no validly found aggravating circumstances exist to support a death sentence since the only two the court found (HAC and CCP) were not proven beyond a reasonable doubt. The State now asserts that another aggravating circumstance was established by the evidence and should be sufficient to uphold the death sentence. State's brief at 48-49. Specifically, the State now claims that the aggravating circumstance of a previous conviction for a violent felony, Section 921.141(5)(b) Fla. Stat., can be used in this case based on the contemporaneous murder convictions.

This assertion is flawed. First, the jury was not instructed on this aggravating circumstance -- HAC and CCP were the only circumstances included in the instructions. (Tr 848) Second, the prosecutor agreed to the instructions as given without objection. (Tr 851) Third, the prosecutor never urged the trial judge to find the previous conviction for violent felony aggravating factor at the time of sentencing. (Tr 887-895) Fourth, even if the prosecutor had objected to the failure to give an instruction and the court's failure to find the circumstance, no cross-appeal was filed.

In Cannady v. State, 620 So.2d 165 (Fla. 1993), this Court resolved a similar dispute in favor of reversing a capital defendant's death sentence. The trial court in Cannady, like

the trial court here, found two aggravating circumstances -- HAC and CCP. Just as in Hamilton's case, two homicides were involved in Cannady, and the jury was not instructed upon the aggravating circumstance of a previous violent felony conviction based on the contemporaneous convictions for two murders. Apparently, the trial judge in Cannady, likewise, was not presented with this as a potential aggravating circumstance. This Court held the HAC and CCP aggravators were not proven beyond a reasonable doubt. Rejecting the State's argument that the sentence could be upheld because the previous violent felony conviction aggravator was supported by the evidence, even though not found by the sentencing judge, this Court wrote,

> We have found that neither of the two aggravating circumstances found by the trial court was properly applied to the murders of Georgia Cannady and Gerald Boisvert. Even without those aggravating circumstances, however, the State asserts that the death penalty is still appropriate because the record supports the additional statutory aggravating factor of prior violent felony convictions based on Cannady's contemporaneous convictions in this case. See, Pardo v. State, 563 So.2d 77 (Fla. 1990), cert., denied, ___ U.S. ___, 111 S.Ct. 2043, 114 L.Ed.2d 127 (1991); Echols v. State, 484 So.2d 568 (Fla. 1985), cert., denied, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986). We disagree.
>
> Under the circumstances of this case, it would be improper for this Court to impose the death penalty based on a single aggravating factor not found by the trial judge. Further, the aggravating factor of prior violent felony convictions was not submitted to the advisory jury and, apparently, was not submitted as an aggravating factor to the trial court in the penalty phase of this proceeding. Additionally, the State did not file a cross-appeal on this issue.

> Consequently, this issue has not been preserved for appeal.

620 So.2d at 170. Cannady controls this case and Hamilton's death sentence must also be reversed.

ISSUE V

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE SENTENCING JUDGE, WHO DID NOT PRESIDE OVER THE GUILT AND PENALTY PHASES OF THE TRIAL, ERRED IN SENTENCING HAMILTON, SINCE HE DID NOT PERSONALLY HEAR THE TESTIMONY OF THE WITNESSES AND WAS NOT PRESENT AT THE TIME THE JURY HEARD THE EVIDENCE PERTINENT TO THE SENTENCING DECISION.

The State has argued that Hamilton is not entitled to resentencing pursuant to this Court's decision in Corbett v. State, 602 So.2d 1240 (Fla. 1992), solely because the decision in Corbett issued after Hamilton was sentenced. In support of this argument, the State incorrectly relies on a post-conviction case, Ferguson v. Singletary, 632 So.2d 53 (Fla. 1993), in which this Court held that the Corbett decision was not a fundamental change in the law under the standard announced in Witt v. State, 387 So.2d 922 (Fla. 1980), and could not be retroactively applied in a post-conviction proceeding. This is not a post-conviction proceeding, and the correct standard to be applied in this case concerning retroactive application of this Court's decisions is the one discussed in Smith v. State, 598 So.2d 1063 (Fla.1992).

In Smith, this Court clarified how decisions of this Court should be applied to later cases which are not yet final. Acknowledging that Article I, Sections 9 & 16 of the Florida Constitution requires an "evenhanded approach to the retrospective application of the decisions of this Court with respect to all non-final cases," 598 So.2d at 1066, this Court held,

> Thus, we hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final.

Ibid.

Hamilton's case falls within the Smith rule. He objected to being sentenced by a substitute judge who had not presided over the trial. (R 569-573; Tr 880-886) He filed his notice of appeal in this case on September 3, 1991. (R 586) Consequently, his case was pending direct review in this Court at the time the decision in Corbett issued on June 11, 1992. Hamilton also notes that this Court applied Corbett in Craig v. State, 620 So.2d 174 (Fla. 1993), which came to this Court in the same procedural posture.

CONCLUSION

For the reasons presented in the initial brief and this reply brief, Thewell Hamilton asks this Court to reverse his convictions for a new trial, or alternatively, reverse his death sentence with directions to impose a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by delivery to Gypsy Bailey, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. Thewell Hamilton, on this 25th day of January, 1995.

W. C. McLAIN