IN THE SUPREME COURT OF FLORIDA

DONN A. DUNCAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 78,630

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT/ANSWER BRIEF OF CROSS-APPELLEE

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, AND INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE 1, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellee's argument with regard to this issue is simply unpersuasive. Appellee first notes that this Court has affirmed a death sentence under express proportionality review where the defendant has been convicted of a prior "similar violent offense." (Brief of Appellee, pg. 3) However, the cases cited for this proposition are easily distinguishable from the instant case. In Lemon v. State, 456 So.2d 885 (Fla. 1984) this Court upheld the finding of heinous, atrocious and cruel in addition to the finding of a prior violent felony. Additionally, there was a

single mitigating factor found in Lemon. In King v. State, 436 So.2d 50 (Fla. 1983) once again this Court affirmed the death sentence on the finding of two valid aggravating circumstances: heinous, atrocious and cruel and prior violent felony and also approved the finding of no mitigating circumstances. In Harvard v. State, 414 So.2d 1032 (Fla. 1982) this Court once again affirmed a death sentence upon a finding of heinous, atrocious and cruel in addition to the finding of a prior violent felony. However, subsequently, this Court ordered a new penalty phase for Harvard in Harvard v. State, 486 So.2d 537 (Fla. 1986). The result of this new penalty phase was a sentence of life imprisonment for Mr. Harvard. The remaining cases cited by Appellee for this proposition as Appellee admits involved two aggravating circumstances.

Appellee's next argument is that the cases where this Court has affirmed the death sentence where only one aggravating factor was present, also demonstrate that Appellant's sentence is proportionate. This is simply not true. In Aranso v. State, 411 So.2d 172 (Fla. 1982), this Court affirmed the death sentence upon a finding that the crime was especially heinous, atrocious and cruel. This Court specifically noted the sheer heinousness of that crime in affirming the death sentence. However, in Aranso v. Wainwright, 497 So.2d 1161 (Fla. 1986), this Court remanded for a new trial on the basis of an alleged Bradv' violation. On remand, Mr. Arango was permitted to plead guilty

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Bradv v. Maryland, 373 U.S. 83 (1963).

to second degree murder and received a ten year sentence. In Gardner v. State, 313 So.2d 676 (Fla. 1975) this Court again affirmed the death sentence upon a single aggravating factor of heinous, atrocious and cruel and a finding of **no** mitigation. Subsequently, this sentence was vacated by the United States Supreme Court in Gardner v. Florida, 430 U.S. 349 (1977). Mr. Gardner was not resentenced to death. In Douslas v. State, 328 So.2d 18 (Fla. 1976), this Court affirmed a death sentence upon a finding of heinous, atrocious and cruel and **no** mitigation. Once again, this Court subsequently reduced Mr. Douglas' sentence to life on proportionality review in Douglas v. State, 575 So.2d 165 (Fla. 1991). Finally, in LeDuc v. State, 365 So.2d 149 (Fla. 1978), this Court affirmed the death sentence upon a finding of heinous, atrocious and cruel and **no** mitigation. Once again, Mr. LeDuc received relief from this Court in LeDuc v. State, 415 So.2d 721 (Fla. 1982) wherein this Court ordered an evidentiary hearing on his claim of ineffective assistance of counsel. On December 3, 1982, Mr. LeDuc's sentence was reduced to life.

Despite Appellee's arguments to the contrary, the trial court was correct in finding the existence of numerous mitigating circumstances. Thus, this case is much like the situation which existed in Sonser v. State, 544 So.2d 1010 (Fla. 1989) where this Court reversed the death sentence based upon a finding of a single aggravating circumstance and numerous mitigating circumstances. Proportionality review requires the same result in Mr. Duncan's case.

Appellee's contention that the death sentence is proportionate given Appellant's prior similar violent felony is equally untenable. First, the prior offense is not similar to the instant offense. The evidence concerning the prior offense was that Appellant killed a fellow inmate who was known to be a bully in the prison and with whom Appellant had had previous problems. The prosecutor testified that these factors influenced him to offer a deal to Appellant to plead to second degree murder. (R 919) Second, the instant offense involved a domestic situation, between Appellant and his fiancee. This Court has long held that the domestic killings are generally not the type for which the death penalty was intended. See generally, Blakely v. State, 561 So.2d 560 (Fla. 1990), Farinas v. State, 569 So.2d 425 (Fla. 1990), and Wilson v. State, 493 So.2d 1019 (Fla. 1986).

Finally, Appellee concludes its argument on this point with a quote from the trial judge in Fead v. State, 512 So.2d 176 (Fla. 1977), wherein he stated, "If the death penalty is not for one who repeatedly commits murder ... then for whom can it be said that it is reserved?" (Brief of Appellee, pg. 11) Apparently, not for Mr. Fead, whom this Court ordered to be sentenced to life.

POINT ON CROSS APPEAL

THE FINDINGS BY THE TRIAL COURT THAT APPELLANT'S ABILITY TO CONFORM HIS CONDUCT TO THE LAW WAS SUBSTANTIALLY IMPAIRED AT THE TIME OF THE CRIME AND THAT HE WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE AT THE TIME OF THE KILLING AND THAT HE WAS UNDER THE INFLUENCE OF ALCOHOL AT THE TIME OF THE KILLING ARE PROPER.

Cross Appellant/Appellee argues that these findings by the trial court although apparently given little weight should be stricken as they cannot be sustained by any presented below. This is untrue.

During the guilt phase below, Carrieanne Bauer testified that although she did not see Appellant drinking at the house, Appellant had been drinking that evening. (R 550-551) In fact, although Appellant took a thirty minute nap, he still appeared drunk when he awoke that night. (R 551) Antoinette Blakely testified that although Appellant did not seem drunk and she did not see him drinking at home, the fact remains that Appellant was not in their presence for that entire evening. While Deputy Keith Hubbard testified that Appellant did not seem intoxicated when he arrested him, Appellant did appear dazed and disoriented. (R **642**) The evidence also showed that Appellant told the officers that he and the victim had argued throughout the night. (R **646**) While it is true that Carrieanne Bauer and Antoinette Blakely testified that they did not hear any argument, the fact remains that this issue is a factual one to be determined by the trial judge who did so. The fact that alcohol

must have been a contributing factor is borne out by the fact that at 8:00 a.m. the victim had a blood alcohol level of .143. (R 685) To have a blood alcohol level this high, the victim must have been very intoxicated the night before as high as .26. (R 689) Despite this testimony, the victim s mother testified that the victim did not appear drunk at all when she returned. Obviously, there was a conflict in the evidence which conflict had to be resolved by the trial court. Having resolved this conflict in favor of a finding that the mitigating factors existed, this Court cannot disturb such a finding. The trial court's finding with regard to the mitigating circumstances must be approved.

CONCLUSION

Based on the foregoing reasons and authority, Appellant/Cross Appellee respectfully requests this Honorable Court to: vacate his death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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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 Donn A. Duncan, No. 013871, P. O. Box 747, Starke, FL 32091 on June 26, 1992.

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