

FILED

SID J. WHITE

JUL 2 1992

CLERK, SUPREME COURT

By  Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DONN A. DUNCAN,

Appellant,

v.

CASE NO. 78,630

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
FL. BAR. #618550
210 N. Palmetto Avenue
Suite 447
Daytona Beach, Florida 32114
(904) 238-4990

COUNSEL FOR APPELLEE/
CROSS-APPELLANT

TABLE OF AUTHORITIES

CASES:

PAGES:

<i>Nibert u. State,</i> 574 So.2d 1059, 1062 (1990)	2
<i>Scull u. State,</i> 533 So.2d 1137 (Fla. 1988)	2

POINT 1 ON CROSS APPEAL

THE TRIAL COURT'S FINDINGS IN MITIGATION ARE NOT SUPPORTED BY THE EVIDENCE AND SHOULD BE STRICKEN AND NOT CONSIDERED IN REVIEWING DUNCAN'S SENTENCE.

Duncan contends that the trial court resolved factual conflicts in favor of finding that the mitigating factors existed. However, the trial court cited no facts in support of these mitigating circumstances. The only place the trial court resolved "factual conflicts" was in its "Basic Statement of Fact", and the facts that the trial court found certainly do not support these mitigating factors. The trial court found:

...The Defendant also stated he was moving out in the morning and the victim could sleep on the couch when she returned. The Defendant then went into the bedroom he and the victim shared and was not seen until morning.

The victim returned home later that night in an intoxicated state and slept on the couch.

(R 1341). Thus, any conflict between Duncan's statement that he and the victim fought all night and the testimony of Carrieanne Bauer and Antoinette Blakely that they did not hear any argument was resolved against Duncan.

As to evidence that Duncan was under the influence of alcohol at the time of the murder, there is not even a conflict. There simply is no evidence. The trial court specifically found:

All the witnesses testified that the Defendant appeared sober and that no one observed him drink any alcoholic beverages since the night before.

(R 1341). The record contain no evidence, much less "a reasonable quantum of competent proof" to establish that Duncan's ability to conform his conduct to the requirements of the law was substantially impaired, that he was under the influence of extreme mental or emotional disturbance, or that he was under the influence of alcohol at the time of the killing. *See, Nibert v. State*, 574 So.2d 1059, 1062 (1990). Consequently, the state contends that the trial court abused its discretion in considering these mitigating factors. *See, Scull v. State*, 533 So.2d 1137 (Fla. 1988).

CONCLUSION

Based on the foregoing arguments and authorities, appellee/cross-appellant requests this court find that the trial court's findings that Duncan was under the influence of alcohol, under the influence of extreme mental or emotional disturbance, and his ability to conform his conduct to the requirements of the law was substantially impaired are not supported by the evidence, and affirm Duncan's conviction and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618550
210 N. Palmetto
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR APPELLEE/
CROSS-APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief has been furnished by hand delivery to Michael S. Becker, Assistant Public Defender, in the Public Defender's in-box at the Fifth District Court of Appeal, this 30th day of June, 1992.



KELLIE A. NIELAN
Of Counsel