IN THE SUPREME COURT OF FLORIDA

PATRICK C. HANNON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 78,678

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, Patrick C. Hannon, will rely upon his initial brief in reply to the arguments presented in the State's answer brief as to Issues III, V, and VII.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY STRIKING PROSPECTIVE JURORS LING AND TROXLER FOR CAUSE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

Appellee's suggestion in its brief at pages 6-7 that Appellant somehow waived the issue of the trial court's improper granting of the State's challenges for cause because defense counsel "did not object to the procedure used by the prosecutor and did not attempt to further inquire of the prospective jurors" misses the point of Appellant's issue, which is that the State, as the party seeking to exclude prospective jurors Ling and Troxler, failed to carry its burden of showing that they were disqualified to sit on Appellant's jury.

In Johnson v. State, 608 So. 2d 4 (Fla. 1992), which is cited by Appellee at page 4 of its brief, the prospective jurors who were removed for cause indicated that they could not under any circumstances vote to impose a sentence of death upon a defendant, and were not examined further on the subject. Ling and Troxler were questioned more extensively regarding their views on capital punishment than were the jurors in Johnson, and expressed opinions which were not so rigidly opposed to the death penalty.

Appellee engages in pure speculation by arguing that the error in excusing Ling and Troxler for cause was harmless because the State had peremptory challenges left which it could have used to remove them. Appellee also incorrectly cites Trotter v. State, 576 So. 2d 691 (Fla. 1990) as dealing with "[r]efusal to dismiss juror for cause when defendant has peremptory challenges left." Brief of the Appellee, page 7. In

Trotter, the defendant had exhausted his peremptories, but failed to object to any venireperson who ultimately was seated on his jury, and thus did not preserve for appellate review the question of whether the trial court improperly denied his challenges for cause.

ISSUE II

THE STATE WAS IMPROPERLY PERMITTED TO INVADE THE PROVINCE OF THE JURY ON THE ULTIMATE ISSUE IN THIS CASE BY SUGGESTING THAT STATE WITNESS TONI ACKER BELIEVED THAT APPELLANT MIGHT HAVE BEEN INVOLVED IN THE INSTANT HOMICIDES.

Appellee's contention that Appellant did not object to the questioning of Detective Mozell Linton regarding Linton's conversation with Toni Acker is simply incorrect. The record reflects that defense counsel began objecting the moment the prosecutor broached the subject of Detective Linton showing to Acker the composite drawing of the subject who was seen at the Cambridge Woods Apartments on the night in question. (R 964) There was then a discussion outside the presence of the jury as to the admissibility of Linton's testimony about Acker's reaction to the composite, as well as the State's desire to impeach Acker's previous testimony by establishing that she had made a statement to Linton about having asked her brother, Jim Acker, about the possibility that Appellant was involved in the instant homicides. (R 965-969) The trial court clearly understood that Appellant was objecting to this entire line of testimony; he said, at the conclusion of the discussion, "You need not object again, Mr. Episcopo [defense counsel]; I've overruled your objection." (R 969) Furthermore, it is doubtful whether any objection was needed. The court had not merely indicated in advance that he would permit Linton's testimony, he had, in effect, <u>required</u> the State to present the testimony, because in overruling Appellant's objection to Toni Acker's testimony, the court said that he might revisit the issue of prejudice to Appellant if the prosecutor failed to call Linton to impeach Acker. (R 766) Therefore, any objection lodged by defense counsel would have been futile and hence

was unnecessary. See Brown v. State, 206 So. 2d 377, 384 (Fla. 1968) ("A lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless. [Citation omitted.]")

ISSUE IV

APPELLANT'S DEATH SENTENCES VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE IS VAGUE, IS APPLIED ARBITRARILY AND CAPRICIOUSLY, AND DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

Appellee cites Smalley v. State, 546 So. 2d 720 (Fla. 1989), in which this Court upheld the constitutionality of the especially heinous, atrocious, or cruel aggravating circumstance. (Brief of the Appellee, p. 17) However, subsequent decisions of the Supreme Court of the United States have eviscerated the holding in Smalley such that it can no longer be considered good law. In Espinosa v. Florida, 505 U.S. ____, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), the High Court rejected one of the central tenets of Smalley, that the judge is the only true sentencer in Florida, by recognizing that "Florida has essentially split the [sentencing] weighing process in two," between the judge and the jury, and noting that "if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." 120 L. Ed. 2d at 859. And in Sochor v. Florida, 504 U.S. ____, 112 S. Ct. _____, 119 L. Ed. 2d 326, 339 (1992) the Court called into question this Court's conclusion in Smalley that the HAC aggravating factor is not vague because it was sufficiently narrowed by the definitions this Court employed in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973) so that the sentencer (that is, in this Court's view, the judge) can apply the aggravator in a rational and consistent manner.

Appellee's reliance upon Hodges v. State, 18 Fla. L. Weekly S255 (Fla. April 15,

1993) to support its argument that the section 921.141(5)(h) aggravating circumstance is constitutional is misplaced; Hodges dealt with the cold, calculated, and premeditated aggravating factor found in section 921.141(5)(i), not with HAC.

As the Supreme Court of the United States noted in Richmond v. Lewis, 506 U.S. ____, 113 S. Ct. ____, 121 L. Ed. 2d 411, 420 (1992), "a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. [Citations omitted.]" Florida's HAC circumstance suffers from this infirmity, and Appellant's sentences of death cannot stand.

ISSUE VI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING IN AGGRAVATION THAT THE INSTANT HOMICIDES WERE ESPECIALLY WICKED, EVIL, ATROCIOUS OR CRUEL.

In its discussion of this issue, Appellee engages in speculation and manufactures evidence out of whole cloth. Appellee's statement that Appellant slit Brandon Snider's throat as Snider "knelt before" Appellant (Brief of the Appellee, p. 20) is apparently based upon the testimony of the State's blood spatter expert, Judith Bunker. However, Bunker's actual testimony regarding Snider was as follows (R 1122): "I can't say that he was kneeling, but he certainly was lower to the floor, at least, with one foot, one knee on the floor. [Emphasis supplied.]" Appellee's statement that Snider was kneeling before Appellant when his throat was cut is not supported by the record. And on page 21 of its brief, Appellee claims as follows: "After kicking the bed over, Hannon put six bullets into the huddled body of Snider [sic]." There was absolutely no evidence that Appellant kicked over the bed before Robbie Carter was shot. The evidence showed instead that Carter was still under the bed when he was found, and that the bed was lifted up and placed against the wall by Deputies Shoemaker and Swoope of the Hillsborough County Sheriff's Department when they responded to the scene. (R 428-429)

The cases relied upon by the State in support of its argument that the trial court properly found HAC as to the Carter shooting (Brief of the Appellee, p. 21) are all distinguishable from the instant case. In Preston v. State, 607 So. 2d 409 (Fla. 1992), the victim was forced to drive to a remote location, walk at knifepoint through a dark field, and disrobe before being stabbed to death. Here, Carter was not

subjected to any such prolonged ordeal before being shot. Similarly, in Douglas v. State, 575 So. 2d 165 (Fla. 1991), the victim was subjected to a lengthy and humiliating ordeal during which he was forced to perform various sexual acts with his wife at gunpoint before he was finally struck in the head with the stock of a rifle and then shot. And in Gaskin v. State, 591 So. 2d 921 (Fla. 1991), the victim was wounded and likely suffered physical pain and mental anguish for some period of time before the fatal shot was administered. Here there were no similar acts to set the shooting of Robbie Carter apart from the norm of homicides.

More to the point than the cases cited by Appellee are the cases cited by Appellant in his initial brief, as well as the recent case of Robertson v. State, 611 So. 2d 1228 (Fla. 1993). Robertson attempted to rob a man and a woman who were in a car. He shot the man four times, and the woman got out of the car, whereupon Robertson demanded her rings. The woman was crying and screaming that she did not have any money. Robertson shot her nine times. The trial court found HAC applicable to the female victim's homicide, but this Court disagreed, as the evidence failed to show that Robertson shot her "with the intention of torturing her or with the desire to inflict a high degree of pain or with the enjoyment of her suffering..." 611 So. 2d at 1233. Similarly, Robbie Carter was shot without undue preliminaries, and with no indication of a desire or intent to torture him or to inflict excess pain upon him.

ISSUE VIII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING IN AGGRAVATION THAT APPELLANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY BASED UPON HIS CONTEMPORANEOUS CONVICTIONS FOR THE OTHER HOMICIDES.

The case of Cannady v. State, 18 Fla. L. Weekly S67 (Fla. January 14, 1993), incorrectly cited on page 23 of Appellee's brief as "Kennedy," is interesting, but provides no support for Appellee's position. Cannady killed his wife and shortly thereafter killed Gerald Boisvert, and attempted to kill Steve Russ. As to both killings, the trial court found HAC and CCP, and sentenced Cannady to death. On appeal, this Court rejected the applicability of HAC and CCP as to both homicides, and concluded that the death penalty therefore could not be imposed for Cannady's killing of his wife. However, this Court noted that the record supported the aggravating factor of prior violent felony conviction as to Boisvert, because of Cannady's conviction for the killing of his wife, and remanded for a new penalty phase as to this homicide. The Court did not explain why Cannady's conviction for killing Boisvert could not also be used to support the prior violent felony aggravator as to the killing of Cannady's wife, resulting in a new penalty trial for that homicide as well. Subsequently, on rehearing, the Court determined that both of Cannady's death sentences should be vacated in favor of life sentences, rejecting the State's argument that the death penalty was appropriate because the record supported the statutory aggravating circumstance of prior violent felony based on Cannady's contemporaneous convictions. Cannady v. State, 18 Fla. L. Weekly S277 (Fla. May 6, 1993).

Duest v. Dugger, 555 So. 2d 849 (Fla. 1990), cited by Appellee on page 23 of its brief, unlike the instant case, did not involve a double homicide where each was used to aggravate the other, nor is it clear that the prior violent felony of armed robbery occurred contemporaneously with the homicide; Duest v. State, 462 So. 2d 446 (Fla. 1985) makes reference only to his conviction for first degree murder, and does not mention any contemporaneous robbery conviction.

Dolinsky v. State, 576 So. 2d 271 (Fla. 1991), cited by Appellee at page 23 of its brief, is likewise distinguishable. It involved only one conviction for first degree murder and one death sentence; Dolinsky's convictions for two counts of second degree murder were used as the prior violent felonies.

In Ziegler v. State, 580 So. 2d 127 (Fla. 1991), cited by Appellee on page 23 of its brief, the defendant was convicted of two first degree murders, for which sentences of death were imposed, and two second degree murders. Thus, there were prior violent felonies apart from the other first degree murder which could have supported the prior violent felony aggravator.

ISSUE IX

THE TRIAL COURT'S SENTENCING ORDER CONTAINS INSUFFICIENT FACTUAL BASIS AND ANALYSIS TO SUPPORT APPELLANT'S SENTENCES OF DEATH.

At page 24 of its brief, Appellee asserts that in his sentencing order the trial judge "even set forth his analysis for rejecting the residual lingering doubt argument of defense counsel." This so-called "analysis" consisted of a single sentence (R 1807, 1809): "The residual or lingering doubt argument of defense counsel to the jury that a life rather than a death sentence would give the defendant more time within which to attempt to prove his innocence does not constitute a Mitigating Circumstance." This is not analysis, it is a mere unsupported and undeveloped conclusion, and is representative of the lack of reasoning and thought that went into the sentencing order.

ISSUE X

APPELLANT'S SENTENCES OF DEATH DENY HIM EQUAL JUSTICE UNDER THE LAW, AS NEITHER OF THE OTHER PARTICIPANTS IN THE EVENTS AT THE CAMBRIDGE WOODS APARTMENTS WAS SENTENCED TO DEATH.

Appellee's statements at page 28 of its brief that it was Appellant who "killed both victims" and that "Jim Acker did not commit either of the murders" are incorrect. It was Acker who initially attacked and stabbed Brandon Snider, and Dr. Diggs, the medical examiner, stated that all of the stab and cutting wounds were potentially lethal. (R 495-497, 501) Thus, even according to the State's own witnesses at Appellant's trial, Acker was every bit as involved in killing Snider as was Appellant. Furthermore, Appellee conveniently ignores the fact that Acker was subsequently tried and found guilty of both murders, thus establishing beyond a reasonable doubt that he did indeed commit both murders.

The case of Coleman v. State, 610 So. 2d 1283 (Fla. 1992), which is incorrectly cited as "Culman" at page 26 of Appellee's brief, provides scant support for Appellee's position. Bruce Frazier, who received a lesser sentence than Coleman's death sentences, was less involved in the homicides than was Jim Acker here. Furthermore, Frazier was convicted of only one count of first degree murder, even though there were four homicide victims, while Acker was convicted of killing both Brandon Snider and Robbie Carter.

It is rather ironic that the State finds itself in the position of attempting to defend Acker's life sentences. But the best the State can come up with in mitigation is that Acker had "a pretense of moral justification in that he was in defense of his sister..." (Brief of the Appellee, p. 28) This is very weak mitigation indeed.

CONCLUSION

Appellant, Patrick C. Hannon, respectfully renews his prayer for the relief requested in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, and to the Appellant, Patrick C. Hannon, Inmate Number 500914, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, on this 29th day of June, 1993.

Respectfully submitted,

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