IN THE SUPREME COURT OF FLORIDA

JAMES PATRICK BONIFAY,

Appellant,

vs. CASE NO. 78,724

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

As stated in Initial Brief of Appellant; pages 1 through 15.

SUMMARY OF ARGUMENT

As stated in Initial Brief of Appellant; pages 16 through 17.

ARGUMENT

ISSUE I

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL PRIVILEGE AGAINST SELF INCRIMINATION BY ADMITTING OVER DEFENSE OBJECTION THE APPELLANT'S TAPE RECORDED CONFESSION INTO EVIDENCE.

In summarizing the Appellant's position in regard to this issue, the Appellee omitted two factors which the Appellant requested that this Court consider in making it's determination on the propriety of the trial court's admission of the Appellant's recorded confession. First, the Appellant pointed out that not only was an attorney or parent not present when the Appellant gave his statement, but also that the Appellant had not been able to talk to or receive advice from either. This distinction is important because at the trial of this matter, defense counsel proffered the testimony of the Appellant's mother, Theresa Crenshaw, and the testimony of the Appellant, as follows:

> We believe the testimony will be that had she (Theresa Crenshaw, Appellant's mother) been contacted, or had there been an effort to contact her, that she would have advised Mr. Bonifay not to make the statement and Mr. Bonifay would testify that he would not have made the statement had he been able to talk with his mother first (R. 95).

This proffer was stipulated to by the State (R. 95, 96).

The Appellee attempted to isolate this issue and suggested that the Appellant in his Initial Brief was "implying" that a juvenile defendant cannot make a voluntary waiver without a parent present (Answer Brief of Appellee, 7). This issue had the additional aspect of the proffered testimony as discussed above and

the Appellant at all times asked this Court to consider this aspect of this issue under the standard of the "totality of the circumstances" standard as set out in Schnekloth v. Bustamonte, 412 US 218, 36 L.Ed. 854, 93 S.Ct. 2041 (1973) (Initial Brief of Appellant, 18).

The second omission by the Appellee in answering the Appellant's position on this issue was the fact that the Appellant was in fear for his family at the initial stages of the investigation by law enforcement. Both interrogation officers stated that the Appellant expressed a fear for his family prior to giving his confession (R. 174-176, 249, 256). This certainly is another factor for this Court to consider, along with the fact that the Appellant was crying and emotional during the giving of the confession, in determining the "totality of the circumstances".

This fear for his family is also directly related to the other factor that the Appellant asked this Court to consider in regard to this issue; the promise by law enforcement to do their best to do everything they could to protect the Appellant's family. It is the Appellant's contention that this promise made prior to the Appellant's confession was an improper inducement for the Appellant to give that statement. The Appellee in discussing this aspect of this issue took a position that the Appellant must necessarily show "coercive police activity" for the Appellant's statement to be deemed involuntarily (Answer Brief of Appellee, 5). However, the Appellant's position was based upon the proposition that a confession cannot be obtained by any direct or implied promise, however slight, Mallory v. Hogan, 378 US 1, 12 L.Ed. 2d 653, 845

S.Ct. 1489 (1964) (Initial Brief of Appellant, 18). This was a direct promise by law enforcement on a matter that was of great concern to the Appellant. This promise by law enforcement would also qualify as "state action", referred to in Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed. 2d 473, 483 cited by Appellee.

Based on the totality of the above circumstances, this Court should reverse the trial court's judgment and sentence and remand for further proceedings.

ISSUE II

THE COURT ERRED IN FINDING THAT APPELLANT COMMITTED THIS MURDER IN AN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL MANNER.

The Appellant's reply to the Appellee's answer on this issue is best stated by listed the Appellee's citation of cases and briefly pointing out to this Court the factual elements found to be present which lead to the affirmation of the trial court's finding that the murder was committed in an especially heinous, atrocious, and cruel manner, that are not present in this matter before the Court.

(1) Gaskin v. State, 591 So.2d 917 (Fla.1991); Victim saw her husband murdered, was stalked throughout her house.

(2) Routly v. State, 440 So.2d 1257 (Fla.1983); Victim was abducted, bound, gagged, and driven to an isolated area.

The following six cases are the cases referred to in Appellee's Answer Brief (p.12) as being cited by Routly.

(3) Knight v. State, 338 So.2d 201 (Fla.1976); Victim kidnapped, made to drive home and get his wife, hours preceded the actual killing, forced to drive to a deserted area, could have escaped but returned because Defendant had his wife, and wife murdered along with victim.

(4) White v. State, 403 So.2d 331 (Fla.1981); Eight people were shot and six people were killed; victims tied, blindfolded, and gagged for many hours; victim feared for the return of her child and boyfriend, victims heard discussions of the proposed dispositions of bodies; victims were in two groups when killed and heard the other being murdered.

(5) Adams v. State, 412 So.2d 850 (Fla.1982); Eight year old abducted and strangled to death, nude body, burned on arm before death, swelling in hands by tight binding, seven coils of rope around neck.

(6) Steinhorst v. State, 412 So.2d 332 (Fla.1982); Three victims kidnapped, bound and gagged, confined in a small van with the murdered body of their companion, held captive for several hours.

(7) Griffin v. State, 414 So.2d 1025 (Fla.1982); Sixteen year old victim kidnapped from murder scene of first victim whom he was visiting, driven to deserted area, struck in the face, and dragged into the woods.

(8) Smith v. State, 424 So.2d 726 (Fla.1982); Victim abducted from work, confined in motel room, and raped.

Other cases cited by Appellee:

(9) Douglas v. State, 575 So.2d 165 (Fla.1991); Victim forced to participate in sexual acts at gunpoint, and hit in the head with rifle so forcefully that the stock shattered.

(10) Harvey v. State, 529 So.2d 1083 (Fla.1988); Victims elderly couple, attacked in their home, discussions of the proposed dispositions of the victims bodies, victims tried to run away, husband and wife killed in each other's presence.

(11) Sochor v. State, 580 So.2d 595 (Fla.1991); Victim abducted, dragged from truck after struggle, and choked to death.

(12) Swafford v. State, 533 So.2d 270 (Fla.1988); Victim abducted, raped, cut, shot nine times with most shots in the torso and extremities.

(13) Chandler v. State, 534 So.2d 701 (Fla.1988); Elderly couple abducted from their home and beaten to death in each other's presence.

Clearly the above cases cited by Appellee contained the "additional acts" as referred to in State v. Dixon, 283 So.2d 1 (Fla.1973), cited in the Initial Brief of Appellant (p.23), that qualify a murder as being especially heinous, atrocious and cruel. Those "additional acts" are not present in this case.

The Appellee's theory that "mental anguish" of the victim in this case qualifies this murder as being especially heinous, atrocious and cruel is not supported by case law authority. The "mental anguish" referred to by this Court in prior discussions refers to heightened mental anguish that is brought about by these "additional acts" of the murderer. The time element of this robbery is not established in the record but there were no interruptions or delays and the time involved was simply the time consumed by cutting locks and grabbing the money. Obviously, this murder did not involve the abduction of the victim, the physical torture or rape of the victim, or any of the other factors this Court has looked to in determining whether the aggravating circumstance of the murder being especially heinous, atrocious and cruel exists. These "additional acts" obviously add to the time frame of the crime and to the "mental anguish" suffered by the victim.

The case authority cited by Appellee on page fourteen (14) of the Answer Brief merely cite cases in which the death penalty was

upheld in which the murder being especially heinous, atrocious and cruel was not found to be a factor. This case obviously must be considered in light of this Court's ruling in regard to the aggravating and mitigating circumstances that are found to exist after this Court's review of the matter.

This court should, therefore, reverse the trial court's sentence and remand for a new sentencing hearing or with instructions to impose a sentence of life imprisonment without possibility of parole for twenty-five years.

ISSUE III

THE TRIAL COURT ERRED IN FINDING TWO SEPARATE AGGRAVATING CIRCUMSTANCES; THAT THE CAPITAL FELONY WAS COMMITTED WHILE THE APPELLANT WAS ENGAGED OR WAS AN ACCOMPLICE IN THE COMMISSION OF ROBBERY AND THAT THE CAPITAL FELONY WAS COMMITTED FOR FINANCIAL GAIN.

The Appellee in the Answer Brief does not dispute the Appellant's contention that this would be an improper doubling of aggravating circumstances if the trial court based it's finding of the existence of the aggravating circumstance "that the capital felony was committed for financial gain" upon the fact that money was taken during the robbery. That obviously would refer to the same aspect of the Appellant's crime. Instead, the Appellee's response to this issue is based upon the proposition that the trial court found this aggravating circumstance to exist because of a promise of money by Robin Archer. However, it is certainly not

clear from the record whether this was the basis for the court's finding. The trial court, in it's written findings to support this particular circumstance, stated first of all that:

> "the evidence is clear that the murder was committed to gain the receipts from Trout Auto Parts that was split among the three on-scene participants, including the defendant."

An aggravating circumstance must be proven beyond a reasonable doubt, Fla. Std. Jury Instr. Crim. p. 81. The Appellant, in his testimony at the penalty phase of the trial, stated:

> "I was suppose to go there Friday night to do it for the money and I didn't, so he got mad." (R. 420).

The Appellant further testified that Robin Archer said things that the Appellant understood were threats to have his mother and girlfriend killed if he didn't go back to Trout Auto and that the Appellant was not promised any money the second time when the murder occurred (R. 421).

It is certainly not clear on the record which aspect the trial court was basing it's finding of this aggravating circumstance upon in that the court referred to the proceeds from the robbery.

This court, based upon the above error, should remand this matter for a new sentencing hearing.

ISSUE IV

THE COURT ERRED IN FINDING THAT THE NON-STATUTORY MITIGATING CIRCUMSTANCE OF THE APPELLANT'S COOPERATION WITH LAW ENFORCEMENT HAD NOT BEEN PROVEN.

A mitigating circumstance need not be proven beyond a reasonable doubt by a Defendant, Fla. Std. Jury Instr. Crim. p. 81. The Appellant's position in regard to the trial court rejecting the finding of this mitigating factor is very simple; that the trial court misconstrued undisputed facts. Once the trial court found this mitigating circumstance not to exist, it could not then weigh such circumstance and determine a proper sentence.

A brief summary of the Appellant's cooperation with law enforcement as contained in pages twenty-seven (27) through twenty-nine (29) of the Initial Brief of Appellant is as follows:

> (1) Appellant gave a taped confession admitting the robbery of Trout Auto and that he fired the shots that killed Billy Coker;
>
> (2) Appellant told law enforcement the names and involvement of the three co-defendants;
>
> (3) Appellant told law enforcement where he obtained the murder weapon and where the murder weapon might be found;
>
> (4) Appellant took law enforcement officers to the location of physical evidence;
>
> (5) The investigating officer testified at trial that Appellant had been cooperative with law enforcement;
>
> (6) Appellant testified for the State of Florida against the co-defendant, Robin Archer, who was convicted and sentenced to death.

It is the Appellant's contention that the State of Florida would not have had enough evidence to convict Robin Archer without the testimony of the Appellant and the Appellant refers this court to the transcript of this testimony in that matter (R. 486-533).

Again, as stated in Nibert v. State, 574 So.2d 1059, 1062 (Fla.1990):

> "When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved."

This court should, therefore, reverse the trial court's sentence, and remand for a new sentencing hearing.

ISSUE V

THE TRIAL COURT ERRED IN FINDING THAT THE NON-STATUTORY MITIGATING CIRCUMSTANCE OF APPELLANT'S GOOD ATTITUDE AND CONDUCT WHILE INCARCERATED HAD NOT BEEN PROVEN.

The Appellee and Appellant differ on their understanding of the trial court's findings as to the nonstatutory mitigating circumstances. The Appellant understands that the trial court found the mitigating circumstance of unhappy childhood and weighed that factor. This is based upon the statements of the trial court as follows:

> "Now the defendant offered six nonstatutory mitigating circumstances. The court is reasonably convinced of only one. Now this defendant has had an unhappy childhood." (R. 612).

The court went on then to discuss the various aspects of the Appellant's unhappy childhood. The Appellee contends that the one nonstatutory mitigating circumstance found by the trial court was that the Appellant demonstrated good attitude and conduct while

incarcerated. Appellant understands the trial court to have found this nonstatutory mitigating circumstance not to exist and urges this court to find the trial court in error for so doing based on the argument made and authority cited in Appellant's Initial Brief (pages 30-31).

If the Appellee is correct and the trial court did find this nonstatutory mitigating circumstance to exist, then Appellant urges this court to find that the trial court erred by summarily dismissing or giving little weight to that circumstance based upon only the grounds that Appellant had been incarcerated only a "short time" and that he was awaiting trial for first degree murder. As stated in Appellant's Initial Brief (page 30), the United States Supreme Court has held, in a case in which that defendant was incarcerated for almost the same length of time as the Appellant, and on the same charge of first degree murder, that the defendant's good behavior while in jail was a mitigating circumstance that must be considered and weighed by the trial court, Skipper v. South Carolina, 476 U.S. 1, 90 L.Ed. 2d 1, 106 S.Ct. 1669 (1986).

This court should, therefore, reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE VI

THE TRIAL COURT ERRED IN ALLOWING THE STATE, OVER OBJECTION OF THE DEFENSE, TO INTRODUCE EVIDENCE OF PRIOR CRIMINAL ACTIVITY OF THE APPELLANT AFTER THE APPELLANT HAD WAIVED THE PRESENTATION OF ANY EVIDENCE THAT WOULD PROVE THE STATUTORY MITIGATING CIRCUMSTANCE THAT APPELLANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

The Appellant's and Appellee's disagreement on this issue is apparent from the drastically different headings used to describe this issue. The Appellee contends the State was only cross-examining Appellant's mother about his rehabilitation potential. Appellant's mother testified that she felt her son could be rehabilitated without giving any details. She specifically had not made any statements that Appellant had been law abiding or that he had never had any prior problems with law violations. Twice before the defense objection at trial, the Appellant's mother, in response to State questions, answered that she was aware of the things her son had done wrong (R. 414). The State went on to ask the Appellant's mother about the details of these wrongdoings, including asking her about injuries to other persons.

This was obviously an attempt by the State to place before the jury, at the penalty phase, evidence of prior violent criminal activity by the Appellant. The State's actions in this case, after objection by the defense, were improper as this court has so held in Maggard v. State, 399 So.2d 973 (Fla. 1981, Robinson v. State, 487 So.2d 1040 (1986), and in Garron v. State, 528 So.2d 353 (Fla. 1988).

This court should, based upon the above error, remand this matter for a new sentencing hearing before a jury.

ISSUE VII

THE TRIAL COURT ERRED IN IMPOSING APPELLANT DEATH SENTENCE THAT IS DISPROPORTIONAL TO OTHER DECISIONS RENDERED BY THIS COURT.

The Appellant has urged this court to strike two aggravating circumstances found by the trial court and has also asked this court to find that the trial court committed error in it's failure to find two nonstatutory mitigating circumstances. There is also dispute between the Appellant and Appellee as to which nonstatutory mitigating circumstance the trial court found to exist.

Without the benefit of this court's ruling in regard to the above circumstances, the Appellant, in his Initial Brief, outlined case authority to show the death sentence of the Appellant to be disproportional. The Appellant again urges this Court to consider that authority, and all other authority this court deems appropriate, in conducting it's proportionality review which must be done in each case.

CONCLUSION

For the reasons presented in Issue I, Appellant asks this court to reverse his convictions and to grant him a new trial.

For the reasons presented in Issues II, III, IV, V, VI, and VII, Appellant asks this court to; (1) remand this matter for a new sentencing hearing; or (2) reverse the trial court's death sentence and remand this matter with directions that Appellant be sentenced to life imprisonment with no possibility of parole for twenty-five years.

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 to Barbara C. Davis, Assistant Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, and James Patrick Bonifay, #216302, R-2-N-3, Florida State Prison, P.O. Box 747, Starke, Florida 32091, by U.S. Mail, this 21st day of July, 1992.

PETER W. MITCHELL