IN THE SUPREME COURT OF FLORIDA

ANTON KRAWCZUK,

Appellant,

v.

Case No. 79,491

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

As to Issue I: The precedent of this Honorable Court dictates that review is not available of a pretrial motion to suppress a confession where appellant entered a guilty plea to the first degree murder charge. Alternatively, if the merits of this claim could be reached, appellant would not prevail based upon the rule announced in New York v. Harris, a rule which renders his confession admissible.

As to Issue II: The plea colloquy conducted in the instant case is legally sufficient to support the conviction and sentence. Nothing in this record put the trial court on notice that there may have been a necessity for further inquiry as to appellant's competency. From all of the evidence and other factors in this case, the trial judge conducted a proper and constitutionally adequate colloquy.

As to Issue III: Appellant's claim concerning the purported invalid jury instruction on the heinous, atrocious or cruel aggravating factor is clearly procedurally barred. Alternatively, any error is harmless beyond a reasonable doubt where the evidence available to the trial judge clearly revealed that a conscious victim was strangled by appellant.

As to Issue IV: Where appellant waived his right to present mitigating evidence at the penalty phase proceedings in this case, the trial court nevertheless conducted an adequate analysis of the aggravating and mitigating factors apparent in the record. The review of the factors by the trial court adequately protected

society's interest in seeing that a death sentence was not improperly imposed in the instant case.

ARGUMENT

ISSUE I

WHETHER APPELLATE REVIEW OF A PRETRIAL DENIAL OF A MOTION TO SUPPRESS A CONFESSION MAY BE ACCORDED APPELLANT, AND, IF SO, WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION.

A. Appellate review of a pretrial motion to suppress confession is precluded by the entry of a guilty plea.

The trial court below denied a motion to suppress appellant's confession. As demonstrated by the argument presented below under Section B, the trial court correctly, in accordance with constitutional authorities, denied the motion to suppress the confession. As a threshold matter, however, your respondent submits that appellate review of a pretrial motion to suppress is not available where a defendant enters a guilty plea.

Appellant contends that because this is a capital case where "death is different" he should be entitled to have appellate review of a pretrial motion to suppress notwithstanding the entry of a valid guilty plea. Your appellee submits that appellate review is foreclosed by virtue of clear Florida precedent. In Robinson v. State, 373 So. 2d 898, 902 (Fla. 1979), this Court succinctly determined that:

> . . . A plea of guilty cuts off any right to an appeal from court rulings that preceded the plea in the criminal process including independent claims relating to deprivations of constitutional rights that occur prior to the entry of the guilty plea.

Notwithstanding this clear rule of law, appellant contends that because this is a capital case review is warranted. Appellant also relies on Robinson where this Court discussed that a death penalty case requires automatic review from a guilty plea. Id. However, the language in Robinson pertaining to review in a death penalty case concerns the ability of a capital appellant to have the voluntary and intelligent character of the plea reviewed by an appellate court notwithstanding the failure to move to withdraw the plea or in any other way present the matter to the attention of the trial court. Indeed, this type of rationale is illustrated by this Court's recent decision in Koenig v. State, 597 So. 2d 256 (Fla. 1992). Thus, Koenig was able to have the voluntariness of his plea reviewed by this Court even though no motion to withdraw had been filed or no indication had ever been given by Koenig that he wished to contest the circumstances surrounding his plea. Indeed, the decision in Koenig deals with review of the entry of the plea and not with pretrial motions to suppress. The rule announced in Robinson precluding appellate review of all matters which occurred prior to the entry of a plea is the proper rule to be applied in the instant case.

In support of his argument, appellant relies upon the decision in Anderson v. State, 420 So. 2d 524 (Fla. 1982). Reliance upon this authority is misplaced. In Anderson, the defendant entered a plea of nolo contendere specifically conditioned on the right to appeal the denial of a pretrial motion. This Court observed that the decision to plead in that

case may have been prompted by the denial of the trial court of a motion to suppress statement. In his brief, appellant makes the unsupported assertion that "Mr. Krawczuk's decision to plead [was] due to the denial of his motion to suppress confession." (Appellant's brief at page 27). There is absolutely no evidence that the denial of the motion to suppress confession in the instant case was the basis for the entry of the guilty plea. To the contrary, appellant clearly expressed his intention to plead because he did not believe he should be permitted to live after what he had done.

Appellant in his brief also attempts to corollate the suppression of his confession and the circumstances and events surrounding the plea colloquy. Your appellee submits that there is no provision of law which requires a plea colloquy to contain specific advisement of all minute details pertaining to a denied motion to suppress a confession. As will be discussed under Issue II, infra, the plea colloquy conducted in the instant case was constitutionally sufficient to support the entry of the conviction and sentence in this case.

Based upon clear Florida precedent which mandates that no appellate review be conducted of matters occurring prior to the entry of a guilty plea, including review of alleged constitutional deprivation which occurred before the entry of the plea, this Honorable Court should decline to review the merits of appellant's claim that the trial court improperly denied the motion to suppress a confession.

B. Merits of the motion to suppress confession.

Even if this Honorable Court could reach the merits of appellant's claim that the trial judge improperly denied the motion to suppress confession, appellant's point would have no merit. The trial judge found that police officers effectively arrested appellant in his home without a warrant and without legal consent in violation of Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). However, by virtue of the decision in New York v. Harris, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990), the trial judge ruled that appellant's statements were voluntary and occurred after advisement and waiver of Miranda rights. Thus, Harris precludes the application of the exclusionary rule where a statement is voluntary given at a time subsequent to a Payton violation.

In his brief, appellant relies on Brown v. Illinois, 422 U.S. 200, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), and Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), in support of his argument. However, Brown and Dunaway were distinguished by the Court in New York v. Harris, wherein a lack of probable cause was evident under the facts of those cases. Indeed, the Harris rule is predicated upon the police having probable cause to arrest even though they effectuate the arrest without a warrant. Thus, appellant attempts to show that no probable cause existed in the instant case. However, appellant ignores the fact that probable cause is evident in this case,

and, therefore, the Harris rule applies. The body of the victim, David Staker, was found in south Charlotte County (R 278). Authorities in Lee County advised that property had been taken from Mr. Staker's home. Gary Sigelmier testified that appellant and his codefendant brought many items of property to Mr. Sigelmier for sale or for storage (R 44 - 46). At that time, appellant stated that he had gotten enough evil out of his system to last a long time (R 47). The property brought to Mr. Sigelmier was eventually identified as the victim's by the victim's former roommate. Indeed, these facts have never been disputed and they certainly justify a reasonable belief that appellant had committed the homicide. Significantly, the issue of probable cause was never contested below. Indeed, it was stipulated by counsel for both parties that probable cause existed in this case (R 362, 374). Where probable cause clearly existed which would have supported an arrest warrant, the rule of New York v. Harris applies and appellant's confession was constitutionally admissible. Appellant's point has no merit.

C. Conclusion.

The entry of a guilty plea by appellant cut off his right to have any pretrial suppression motions considered on appellate review. Even if review were proper, the rule of New York v. Harris applies in the instant case and appellant's confession is admissible.

ISSUE II

WHETHER APPELLANT WAS DENIED HIS RIGHT TO DUE PROCESS BY VIRTUE OF THE CIRCUMSTANCES SURROUNDING THE PLEA COLLOQUY CONDUCTED IN THE INSTANT CASE.

As his second point on appeal, appellant contends that the colloquy conducted in the instant case surrounding the entry of the guilty plea was not sufficient. The gist of appellant's complaint revolves around the unsubstantiated assertion that appellant became increasingly depressed so as to somehow require the trial court to conduct new proceedings pertaining to the issue of appellant's competency. Your appellee respectfully submits that the instant record reveals that the trial court conducted a proper, sufficient plea colloquy and was able to satisfy himself that appellant was, indeed, competent to enter the plea.

It is significant to observe that appellant was psychiatrically evaluated in April, 1991. See R 606A. At that time, appellant was found competent although he suffered from mild depression not requiring medication. It was also observed in that April, 1991, psychiatric evaluation that appellant had previously been diagnosed as mildly depressed and passive. The April, 1991, evaluation was consistent with the prior evaluation done of appellant while he was in the military. Based upon these evaluations and the subsequent desire of appellant to plead guilty, appellate counsel now contends that appellant became increasingly depressed, even though there is no evidence in the

record to support this bald assertion. The plea colloquy adequately shows what occurred with respect to appellant's state of mind as trial approached:

> THE COURT: As you stand here right not are you under the influence of any kind of drugs, alcohol or medication?
>
> THE DEFENDANT: Only medication from the jail psychiatrist, it's Elavil.
>
> MS. LEGRANDE: Your Honor, he has been examined by Dr. Keown and in that report Dr. Keown indicated that he had some depression but did not feel at that time he needed any medication.
>
> Subsequent to that, he has been examined by what I understand is Lee Mental Health psychiatrist who tends to the prisoners who indicated he should be treated to the antidepressant Elavil. He was currently under that, but that would better have him in a mental state to make a reasoned decision that if he was in depression
>
> THE COURT: All right. How does that drug affect you?
>
> THE DEFENDANT: It's a calming effect, helps me go to sleep.
>
> THE COURT: All right.
>
> MR. BOWER: Judge, could you inquire as to when the last time he took that medication was?
>
> THE DEFENDANT: Last night about 8:00 p.m.
>
> THE COURT: What is your prescription, how often?
>
> THE DEFENDANT: Just once per day, evening at eight o'clock each night?
>
> THE COURT: Okay. Se we're at almost four o'clock in the following afternoon. So your next dose would be at eight o'clock tonight?

THE DEFENDANT: Yes, sir.

THE COURT: All right. However -- let me ask you this with respect to mental health, have you ever suffered from or been treated for any kind of mental disorder?

THE DEFENDANT: No, I haven't.

THE COURT: Never had any mental health problems?

THE DEFENDANT: No, sir.

THE COURT: Now, you mentioned the fact that you had seen this psychiatrist over there?

THE DEFENDANT: Yes, sir.

THE COURT: Can you tell me what the purpose of that was?

THE DEFENDANT: It was just I was real restless and anxious the last couple of weeks, maybe four weeks because I knew the trial was coming. And I just was trying to get something for -- actually, a mile sedative to sleep better.

(R 393 - 395)

It cannot be clearer from the above colloquy that Elavil was given to appellant at his request based upon his increasing anxiety as the trial day approached. Certainly it is "normal" for any competent person who is facing a prospective death sentence to become apprehensive as trial approaches. Indeed, there is no indication that the dosage of Elavil was inconsistent with anything more than a mild sedative enabling appellant to rest peacefully. "The sedative effects of amitriptyline (Elavil) . . . produce adequate sleep without the necessity of giving a sleeping medication." H. Kaplan and B. Sadock, Comprehensive

Text Book of Psychiatry, 1634 (5th ed. 1989). Indeed, even appellant's trial counsel acknowledged that taking Elavil put appellant in a better mental state to make a reasoned decision (R 394).

There is no indication in this record that the demeanor and actions of appellant were inconsistent with the prior determination of competency made in April, 1991. Thus, your appellee submits that there was no evidence or any other indication that appellant was incompetent to proceed sufficient to put the trial court on notice that further inquiry might be necessary. The instant case must be contrasted with Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), where there were various factors which should have led the trial judge to make further inquiry into the defendant's competence. Indeed, in Drope, the defendant shot himself to avoid trial thereby evidencing suicidal tendencies. In the instant case, however, appellant did not attempt to commit suicide and, in fact, had been previously diagnosed as non-suicidal (R 606A at page 2).

Appellate counsel further complains that more should have been done when a public defender representing the codefendant, William Poirer, filed a motion to have appellant examined for competency. Your appellee submits that counsel for a codefendant had no right to insist that one other than his client should be examined for competency. The public defender's attempt to inject potential error into this case must be rejected. It is apparent

that defense counsel cannot accept the notion that a competent defendant would want to have the death penalty imposed, even though case law squarely supports a defendant's right to so elect. See Hamblen v. State, 527 So. 2d 800 (Fla. 1988); Durocher v. State, 604 So. 2d 810 (1992).

In conclusion, your appellee submits that there is no indication in this record that appellant was anything but competent to enter the plea of guilty. Appellant's demeanor and actions surrounding the proceedings in this cases were totally consistent with every psychiatric evaluation that had previously been conducted. Although mildly depressed, appellant was correctly found by the trial judge to have the capacity to reason and to understand the nature of all proceedings. The trial court's determination that appellant was competent (and sane at the time of the commission of the homicide) is sustainable on the record. There simply was nothing in this record to indicate that the trial judge needed to make further inquiry into the established competency of appellant. Appellant's second point must fail.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS OR CRUEL AND IN FINDING THE AGGRAVATOR APPLICABLE IN THIS CASE.

Appellant's third point concerns the "error" described by the trial judge in an order entered in this cause. The trial judge entered an order stating that the word "heinous" was not defined for the jury, but that since the word "heinous" would have been defined to mean extremely wicked or shockingly evil, the instructions given did not significantly differ from what the trial judge perceived to be a correct instruction (R 585 - 586). Appellant relies upon the trial court's order acknowledging minute error in the jury instruction and opines that this error was not harmless and, therefore, a new jury should be empaneled for a new penalty phase. For the reasons expressed below, appellant's third point must fail.

It is highly significant to observe that defense counsel, during the charge conference, agreed with the trial court that the definition of "heinous" should be stricken from the instruction to be given the jury (R 208 - 209). Thus, in addition to the fact that no objection was lodged as to the jury instruction, the instant record reveals defense acquiescence to the heinous, atrocious or cruel jury instruction. Thus, this claim is clearly procedurally barred. Kennedy v. Singletary, 602 So. 2d 1285 (Fla. 1992); Sochor v. Florida, 504 U.S. ___, 112 S.Ct. ___, 119 L.Ed.2d 326 (1992).

Even if this claim could be reached on the merits, appellant's point would fail. He contends that the trial judge should not have been able to consider the confession because it was inadmissible. However, for the reasons asserted above under Issue I, the confession was admissible and properly considered. Appellant additionally contends that the principle of corpus delicti should apply to findings of aggravating circumstances (footnote 15 at page 50 of appellant's brief). This contention is particularly unavailing where an aggravator "is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty.'" Hildwin v. Florida, 490 U.S. 638, 640 (1989), quoting McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986). Your appellee submits that the confession was properly considered by the trial judge where the matters contained therein pertained to the "circumstances of the offense" which must be considered when determining the proper sentence to be imposed.

Appellant's claim that the facts of the instant case do not support a finding of the heinous, atrocious or cruel aggravating factor is also unavailing. This aggravating factor is properly found based on the clear finding that a conscious victim had been strangled to death. See e.g., Sochor v. State, 580 So. 2d 595 (Fla. 1991); Holton v. State, 573 So. 2d 284, 292 (Fla. 1990); Dudley v. State, 545 So. 2d 857 (Fla. 1989); Tompkins v. State, 502 So. 2d 415 (Fla. 1986); Deaton v. State, 480 So. 2d 1279 (Fla. 1985); Adams v. State, 412 So. 2d 850 (Fla. 1982); Alvord v. State, 322 So. 2d 533 (Fla. 1975).

Even if this claim had been preserved for review, and even should this Honorable Court determine that error occurred, such error is clearly harmless beyond a reasonable doubt. The strangling of a conscious victim is clearly encompassed within the class of cases where heinous, atrocious, or cruel is properly found. The trial court applied a properly narrowed construction and the facts of this case squarely fit within that construction.

Your appellee respectfully submits that appellant's attacks on the heinous, atrocious or cruel aggravating factor are procedurally barred. Alternatively, appellant's point is without merit where the aggravating factor was properly applied to the facts of the instant case.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FAILING TO PROPERLY CONSIDER AND FIND NONSTATUTORY MITIGATING FACTORS.

As his last point on appeal, appellate counsel claims that the trial judge failed to properly consider and find nonstatutory mitigating circumstances. He claims that because there was some allusion to possible mitigators in the record as found in other cases the trial judge erred by not finding these factors established in the instant case. For the reasons expressed below, appellant's point is without merit.

Your respondent submits that the trial judge did, indeed, carefully analyze the aggravating factors and potential mitigating factors in this case. Appellate counsel's concern as expressed in appellant's brief revolves around the notion that the trial judge should have found as established certain nonstatutory mitigating circumstances merely because these factors were mentioned in a psychological report and the presentence investigation report filed in this case. Merely because certain matters were mentioned in the documents filed in this case which might have warranted the establishment of such factors if evidence had been adduced pertaining to those factors, it does not follow that the trial judge erred by failing to find them established in the instant case. Where no evidence was presented by appellant by his own choosing it cannot be said that the trial court erred in failing to find that the now-proposed mitigators were established by the evidence. See Campbell v.

State, 571 So. 2d 415 (Fla. 1990). Here, as in Hamblen v. State, 527 So. 2d 800 (Fla. 1988), and Durocher v. State, 604 So. 2d 810 (Fla. 1992), the trial judge performed his duty by determining whether mitigators were established by the evidence. For example, the trial court's rejection of the allegation that the defendant was the more passive of the two actors was warranted based upon matters contained in the psychologist's report (R 592).

In the instant case, the trial judge was advised by defense counsel that appellant did not wish to present mitigating evidence. Indeed, appellant did not even wish to have the psychologist's report admitted into evidence (R 229). Here, defense counsel advised the trial judge that mitigators could be presented on behalf of appellant but that appellant chose not to present evidence of any mitigating factors. The trial judge, based upon all matters before him, adequately reviewed all matters contained within the court file and made a reasoned decision insofar as the weighing of aggravating and mitigating factors. Merely because the trial court did not accord the weight to the mitigators as desired by the defendant's appellate counsel does not mean that the trial court didn't comply with the applicable provisions of law.

Inasmuch as the trial court reviewed all matters in the record and credited appellant with only that mitigator which was established by the evidence, the trial court did not err. The trial judge adequately fulfilled the interests of society by

assuring that the death penalty was not imposed improperly in the instant case. Therefore, appellant's final point must fail.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 8th day of September, 1993.

OF COUNSEL FOR APPELLEE.