IN THE SUPREME COURT OF FLORIDA

ELMER LEON CARROLL,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 79,829

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

SUMMARY OF ARGUMENT

Point I. The trial court erroneously denied the defendant's motion to suppress evidence seized following an illegal arrest or detention of the defendant. There was no probable cause to arrest the defendant based solely on the insufficient general description of a scruffy-looking man wearing a brown jacket, where the defendant was about two miles away from the abandoned truck and was doing nothing illegal or to arouse suspicion when the wildlife officer observed him.

Point II. During the prosecutor's questioning of a state's witness, that witness commented on the defendant's silence at the time of his arrest. This testimony infringes on the defendant's constitutional right to remain silent. The trial court should have granted the motions for mistrial.

Point V. The trial court erred in making its findings of fact in support of the death sentence where the findings were insufficient, where the court failed to consider appropriate mitigating factors, where the court erroneously found an inappropriate aggravating circumstance, and where a comparison to other capital cases reveals that the only appropriate sentence in the instant case is a life sentence.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED FOLLOWING HIS ILLEGAL ARREST WHERE PROBABLE CAUSE TO ARREST HIM WAS LACKING, IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12, FLORIDA CONSTITUTION.

In its brief, the state argues that the suppression issue was not adequately preserved for appeal, contending that the defendant did not renew his motion to suppress at trial. However, the record reveals that the defendant did renew his motion to suppress and the objections to the evidence at trial, and the trial court ruled once again at trial on the merits of the motion and objection. (R 557, 620) Thus, despite the objection not being made at the instant the objectionable evidence first came into evidence, the issue was preserved for appeal. The judge was given the opportunity at trial to review his prior denial of the motion to suppress and he ruled in conformity with that ruling on the merits. See Jackson v. State, 451 So.2d 458, 461 (Fla. 1984) (an objection need not always be made at the moment an examination enters into impermissible areas of inquiry); Castor v. State, 365 So.2d 701, 703 (Fla. 1978) (the purpose for a contemporaneous objection is met where it places the judge on judicial notice of the error and provides him an opportunity to correct it at an early stage of the proceedings). Moreover, the mandate of the United States Supreme Court of heightened reliability in capital cases requires that prejudicial errors be

reviewed on appeal, notwithstanding the hypertechnical lack of an immediate objection. See Beck v. Alabama, 447 U.S. 625, 637-638 (1980) (invalidating technical procedural rules which tend to diminish the reliability of the sentencing and guilt determination in a capital case); Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Cosby v. Commonwealth, 776 S.W.2d 367, 369 (Ky. 1989) (reviewing an unpreserved error on appeal in a capital case where there was no reasonable justification for counsel's failure to object).

Additionally, on the merits of the error, the state maintains that, because during a patdown of the defendant during a "temporary detention," the police officer discovered a box cutter razor, he then had probable cause to arrest the defendant for carrying a concealed weapon. (State's Answer Brief, pp. 27-29) First of all, the appellant still contends that a police officer ordering a defendant to the ground at gunpoint and then conducting a full search of his person is far more than a mere investigatory detention, it is an arrest. (See Initial Brief of Appellant, pp. 16-18)

Secondly, the state cannot be serious that discovery of a box cutter razor blade in the defendant pocket could provide probable cause to arrest him for carrying a concealed weapon. If that were the case, then every stock boy from every retail store in the state would be guilty of carrying a concealed weapon! A box cutter razor is a common household and retail store item which when carried on or about a person is not a concealed weapon

unless it is used in a threatening manner so that it might be considered deadly. Robinson v. State, 547 So.2d 321 (Fla. 5th DCA 1989). See also C.H. v. State, 548 So.2d 895 (Fla. 3d DCA 1989); Schnick v. State, 362 So.2d 423 (Fla. 4th DCA 1978) (search not justified merely because a pocket knife found on the suspect). Therefore, the discovery of the box cutter razor[1] cannot provide grounds to arrest or conduct a full search of the defendant here, where he was not using the razor blade in a threatening manner.

Additionally, the state does not explain, other than the officer's bald assertion, how it is that the seemingly innocuous item of truck keys could be thought by the officer to be a weapon. (State's Answer Brief, pp. 28-29) What could it possibly be about truck keys that feels like a weapon? What kind of weapon did the officer reasonably believe it was? The appellant maintains, as argued in his initial brief, that the officer possessed no probable cause to believe that the defendant was armed merely from the feel of truck keys. (See Initial Brief of Appellant, p. 21)

The police lacked probable cause to arrest the defendant and even lacked reasonable founded suspicion to stop him and search for weapons two hours later and two miles from the scene based solely upon the generalized vague description of a scruffy-looking man in a brown jacket somewhere in the vicinity (a mile away) of the truck. Further, there existed no reasonable belief

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[1]It is interesting to note that, while everything else taken from the defendant during this search was placed into evidence, the alleged box cutter knife never was.

that the keys and change in the defendant's front pocket could be a weapon to justify the further intrusion and seizure. The keys and any and all evidence seized from the defendant's person, including the hair and blood samples and the DNA tests must be suppressed as fruits of the poisonous tree.

POINT II.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR MISTRIAL FOLLOWING TWO COMMENTS ON HIS POST-ARREST SILENCE, IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

The state amazingly contends that defense counsel "invited the error" merely because he believed that a mistrial was called for and that a curative instruction would not help. (State's Answer Brief, p. 36) Here, the defendant specifically objected to all of the comments made by the officer concerning the defendant's silence; the issue is properly preserved by a contemporaneous objections and repeated motions for mistrial. (R 344, 349, 620-621) A curative instruction would merely have emphasized the erroneous testimony to the jury.

The testimony could very well have been taken by the jury this silence as an indication of guilt, since the average juror may believe that at such moment an accused who felt himself innocent would have protested the stop and the arrest and would have questioned the officers about it. (See Initial Brief of Appellant, pp. 22-23 and the cases cited therein.)

The court should have granted the motions for mistrial. Reversal is warranted.

POINT V.

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED AN IMPROPER AGGRAVATING CIRCUMSTANCE, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §17 OF THE FLORIDA CONSTITUTION.

The state argues that the trial court may reject a mitigating factor (here, the mental mitigators) despite unrefuted evidence establishing those factors. (State's Answer Brief, pp. 89-90) The state bases this argument on the fact that the defendant did not call expert witnesses during the penalty phase of the trial. However, the mental experts, both for the state and the defense, testified extensively during the guilt phase of the trial. Of course, evidence adduced at the guilt phase shall be considered regarding the appropriate penalty in a capital case. As noted in the initial brief, all of the experts testimony, as well as that of lay witnesses, agreed that the defendant suffered from a mental illness and was acting bizarre on the night of the crime. (Initial Brief of Appellant, pp. 47-52)

Campbell v. State, 571 So.2d 415 (Fla. 1990), and Nibert v. State, 574 So.2d 1059 (Fla. 1990), require that the trial court accept unrefuted evidence of a mitigating factor and find that factor (although then it may assign it the weight it deems appropriate. The case cited by the trial court and by the state, Bates v. State, 506 So.2d 1033 (Fla. 1987), precedes

Campbell and its progeny; hence the appellant submits that it is not the current law on the topic of receiving and considering mitigating evidence and that Campbell and Nibert apply here.

Judge Belvin Perry, in his sentencing here, appears to summarily dismiss the evidence and the mitigating factors concerning the defendant's mental state, using an incorrect standard. (See Initial Brief of Appellant, pp. 46-52) Undersigned counsel would note that in the two capital cases which he has handled from Judge Perry, both of them suffer from the same infirmity. It appears, then, to be a disturbing and impermissible trend for Judge Perry to summarily reject unrefuted mental mitigation. (Compare the instant findings of fact at R 1290-1295 with those in Dusty Ray Spencer v. State, Fla. Sup. Court Case No. 80,987, at R1237-1240, 1241 of that record.)

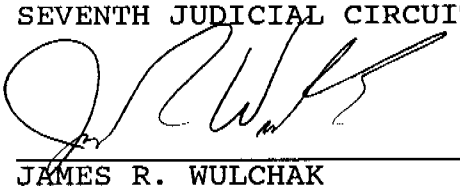
When the trial court follows the formula set out in Campbell v. State, supra, it is without doubt that the only possible conclusion is that the state cannot support a sentence of death. The proper mitigating factors clearly outweigh the appropriate aggravating factors. The punishment must be reduced to life imprisonment, or, at least, sent back to the trial court for a new consideration that more fully weighs the available mitigating evidence.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein and in the initial brief, the appellant requests that this Honorable Court reverse the judgment and sentence of death and, as to Points I, II, III, and VI, reverse the judgments and sentences and remand for a new trial, and, as to Point IV, vacate the death sentence remand for imposition of a life sentence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: Mr. Richard Martell, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050; and to Mr. Elmer L. Carroll, No. B-835908 (44-1242), P.O. Box 221, Raiford, FL 32083, this 13th day of August, 1993.

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