IN THE SUPREME COURT OF FLORIDA

CARLOS SANTOS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 79,860

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

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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ARGUMENT

ISSUE I

THE TRIAL COURT'S FINDING THAT THE INSTANT HOMICIDES WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION IS BARRED BY THE DOCTRINE OF LAW OF THE CASE, DOUBLE JEOPARDY, AND NOT SUPPORTED BY THE FACTS.

Appellee's initial contention is that the trial judge was of the belief that this Court's original rejection of the aggravating factor was not binding on him and he should "reconsider" this aggravator. Certainly, then, the trial court was the only one who entertained this belief. The Office of the State Attorney did not in any fashion urge the Court to reconsider this aggravator, rather the State Attorney conceded it did not apply by requesting that the Court find only one statutory aggravator. (R29-30) Obviously, defense counsel did not encourage the court in this "belief." Further, this Court's original opinion is clear: "As noted earlier, the trial court also erred in its finding on aggravating factors." Remand was for reconsideration of mitigation due to the trial court's previous failure. There is no support in the original opinion for the trial court's "belief."

Those cases cited by Appellee in support of the finding of CCP are distinguishable from Appellant's situation. In Klokoc v. State, 589 So. 2d 219 (Fla. 1991), the defendant made numerous threats to his ex-wife, but ultimately killed their daughter to achieve emotion satisfaction from the suffering of his estranged

wife. The defendant showed no signs of remorse. Despite approval of CCP, this Court found the death penalty disproportionate in part due to the domestic nature of the crime.

In Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), the defendant watched the victim's home for two days prior to the homicide and stole a gun specifically for the homicide. He told others they would read of him in the paper. Although the killing may have had some grounding in passion, it was planned well in advance. The defendant in Bowen v. State, 565 So. 2d 304 (Fla. 1990), killed not his lover, but her daughter, apparently for telling lies. Brown did not kill from passionate obsession or any deep-seated emotion. That homicide was either preplanned or impulsive with little motive.

Appellant further claims that CCP is established because Appellant had no colorable claim of legal or moral justification. This is not what is required under the statute. The statute requires a pretense, not a colorable claim of legal or moral justification.

Appellee further claims that the events surrounding the second child, Jose Torres, support the finding of CCP.

Counsel must point out that Mr. Santos was not convicted of the attempted murder of Jose Torres, Irma's son, as Appellee suggests. The jury returned a verdict of guilty to aggravated assault as opposed to attempted murder.

Appellee further states that "Appellant's contention in his brief that the infant child was killed merely because she was in

her mother's arms is totally belied by the fact that Appellant attempted to kill another child at the same time." (Appellee's brief, pg. 7). This "contention" was first enunciated in Justice Kogan's dissent and concurrence in this case in which Justice Barkett also concurred. The opinion states, "Both the killings occurred virtually in the same moment, and the evidence is consistent with the conclusion that Santos' daughter died only because her mother happened to be holding the child in her arms." Santos v. State, 591 So. 2d 160, 166 (Fla. 1991).

Appellee's contention that the finding of CCP is harmless beyond a reasonable doubt is completely erroneous. The striking of this aggravator leaves only one, a contemporaneous homicide. Certainly, the striking of this aggravator weighs heavily into any proportionality analysis and severely diminishes the weight of the aggravation used to offset the extensive and meaningful mitigation in this case.

ISSUE II

THE TRIAL COURT ERRED IN ITS FINDING THAT TWO STATUTORY MITIGATORS WERE NOT ESTABLISHED BY THE GREATER WEIGHT OF THE EVIDENCE WHERE THEIR EXISTENCE WAS UNREBUTTED.

While it is within a trial court's province to decide whether a mitigating circumstance is proven as Appellee argues, it is not, however, entitled to disregard mitigation which has been established by a greater weight of the evidence. The trial court's rejection of the expert testimony is not supported by the record.

The instant case is distinguishable from Lucas v. State, 613

So. 2d 408 (Fla. 1992). Lucas did not recede from the rule regarding mitigation announced in Campbell v. State, 571 So. 2d 415 (Fla. 1990). Campbell requires that the court must find as a mitigating circumstance each factor which is mitigating in nature and has been established by the greater weight of the evidence. As always, a trial court's findings will not be upheld if they are not supported by the record. Apparently, in Lucas, the trial court concluded that a mitigator was not established by psychiatric opinion given the defendant's actions leading to and during the murder. Lucas threatened the 16-year-old victim days before her death causing her to attempt to arm herself, to seek company, and to conceal her vehicle. Lucas went to her home, armed himself, and stalked the victim. He shot her at night outside her residence, severely wounding her. While she attempted to escape, he pursued her and savagely beat her while she begged him not to kill her. The victim resisted in such a fashion that she incurred defensive wounds. Lucas then shot her, killing her with a shot to the head. The victim's death was immensely painful and horrifying. She suffered great physical pain as well as extreme mental anguish over the realization that she was about to die.

Lucas was carrying out his mortal threats. In contrast, Irma died instantly from a single shot. She was not "stalked." The findings related in the opinion do not contain a detailed basis by which or what factors were present which formed the basis for the psychiatric opinion, so it is impossible to compare the validity of the psychiatric opinion in Lucas with the opinions reached by Dr.

Kremper and Dr. Ainsworth. As detailed in the initial brief, their findings were supported by the evidence and were consistent with and supported by lay witnesses. The Campbell court found that the trial court erred in rejecting a mental mitigator where the mitigator was clearly established by the evidence. Likewise, both mental mitigators were clearly established by the evidence in Mr. Santos' case. It is not Appellant who is seeking to reinterpret facts to fit his conclusions; rather it is the trial court who engaged in that exercise.

ISSUE III

THE TRIAL COURT ERRED IN FAILING TO FIND AS A MITIGATING FACTOR THAT APPELLANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

Appellee incorrectly argues that a trial court has discretion to ignore this mitigating factor if the defendant has contemporaneous crimes such as a multiple murder or attempted murder. First, it must be noted that Appellant was convicted of aggravated assault, not attempted murder.

The type of crime which is contemporaneous makes no difference in this mitigating factor. Prior cases do not impose such a restriction on the applicability of this factor. For instance, in Bello v. State, 547 So. 2d 914 (Fla. 1989), the defendant's contemporaneous convictions included the attempted first degree murder of a police officer. Appellee's contention is completely misplaced.

ISSUE IV

THE SENTENCE OF DEATH IS DISPROPORTIONATE WHEN COMPARED WITH OTHER CAPITAL PENALTY DECISIONS OF THIS COURT.

The Appellee acknowledges that Appellant cited to "several" cases where death has been found to be a disproportional penalty where the murders resulted from "passionate obsession." For the sake of accuracy, Appellant's initial brief cited around fifteen such cases. Justice Barkett, in her partial dissent in Porter v. State, 564 So. 2d 1060, 1065 (Fla. 1990) cites to fifteen such cases.

As previously discussed in Issue III of this Reply Brief and Issue IV of our Initial Brief, Porter is clearly distinguishable, as is Occhicone v. State, 570 So. 2d 902 (Fla. 1990). This case is plainly aligned with those discussed in the initial brief. This Court should vacate the death sentences as disproportionate.

ISSUE V

Appellant relies on the Initial Brief for this Issue.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert A. Krauss, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 15th day of September, 1993.

Respectfully submitted,

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