IN THE SUPREME COURT OF FLORIDA

ERIC DUANE TURNER

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 79,895
APPEAL FROM JUDGMENT
SENTENCE OF DEATH

REPLY BRIEF OF APPELLANT

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ARGUMENT

I.

THE TRIAL COURT ERRED IN OVERRIDING THE JURY RECOMMENDATION OF LIFE

The State attempts to explain the jury override in this case by separating the two deaths and putting the following gloss on the trial court's sentencing order, "Although Judge Foster did proceed to override both jury recommendations in this case, he made it clear that his focus was upon the sentence imposed for the murder of Teresa Clements". (State's Answer Brief, page 15).

The State says the trial court found only two aggravating factors as to Lola Toombs. Although this is not clear from the judge's sentencing order, Mr. Turner will accept this concession. (State's Answer Brief - pages, 15-16). There can be no question that the override of this life recommendation was patently improper. The quantum of mitigation presented to the jury in this case was not "insignificant". The cases cited by the State, *Coleman v. State,* 610 So.2d 1283 (Fla. 1992) and *Robinson v. State,* 610 So.2d 1288 (Fla. 1992) are simply inapplicable to Mr. Turner's situation. Coleman and Robinson were co-defendants in revenge killings after a drug ripoff.

> Late in the evening of September 19, 1988 Robinson, Coleman, and Bruce Frazier, accompanied by McCormick, pushed their way into Hill and Douglas' apartment. They forced Hill and Douglas,

> along with their visitors Crenshaw and Amanda Merrell, as well as McCormick, to remove their jewelry and clothes and tied them up with electrical cords. Darrell Frazier then brought Mildred Baker, McCormick's girlfriend, to the apartment. Robinson demanded the drugs and money from the safe and, when no one answered, started stabbing Hill. Crenshaw said she could take them to the drugs and money and left with the Fraziers. Coleman and Robinson each sexually assaulted both Merrell and Baker.
>
> After giving them the drugs and money, Crenshaw escaped from the Fraziers, who returned to the apartment. Coleman and Robinson then slashed and shot their five prisoners, after which they and the Fraziers left. Despite having had her throat slashed three times and having been shot in the head, Merrell freed herself and summoned the authorities. The four other victims were dead at the scene.

Coleman v. State, 610 So.2d at 1284, 1285.

In those cases, both the trial court and this court characterized the offered mitigation as "minor" or of "little weight". In addition, each case cited by this Court in support of the jury override involved the killing of four or more people. *Coleman v. State*, 619 So.2d at 1287 [(*Thompson v. State*, 553 So.2d 153 (Fla. 1989); *Bolender v. State*, 422 So.2d 153 (Fla. 1989); *White v. State*, 403 So.2d 331 (Fla. 1981); *Correll v. State*, 523 So.2d 562 (Fla. 1988); *Ferguson v. State*, 474 So.2d 208 (Fla. 1985); *Francois v. State*, 407 So.2d 885 (Fla. 1981).]

In *Marshall v. State*, 604 So.2d 799 (Fla. 1992), the defendant was a state prisoner when he killed another prisoner in Martin Correctional institution. This Court

said the mitigation testimony "pales in significance when weighed against the four statutory aggravating circumstances including Marshall's record of nine violent felonies consisting of kidnapping, sexual battery, and seven armed robberies." *Marshall v. State,* 604 So.2d at 806. In addition, this Court noted the manner of death as the "victim received no less than twenty-five separate wounds . . . "

Mr. Turner, of course, had no prior criminal record and the deaths were accomplished by a single gun shot.

Thomas v. State, 456 So.2d 454 (Fla. 1984) does not support the trial judge's override in this case. Unlike *Thomas,* the trial judge did not discriminate between victims even though the State believes he decided the killing of Teresa Clements was more aggravated than that of Mrs. Toombs. In addition, the manner in which the second victim died in *Thomas* was significantly more brutal than Mrs. Clements' death. Finally, the case in mitigation in Mr. Turner's case was substantially stronger than the case Mr. Thomas presented. Mr. Turner provided the jury with significant mental health evidence which could have been used by the jury to decide that life was appropriate.

In *Burch v. State,* 522 So.2d 810, 813 (Fla. 1988), this Court stated that even though "the trial judge found only one of the three mitigating factors on which *Burch* relies and gave little weight to the factor which he did find, we

agree that the jury could have found all these factors and might have concluded that the mitigation outweighed the aggravation." See also *Stevens v. State*, 613 So.2d 402 (Fla. 1992). To the question of whether there is a reasonable basis for the jury's recommendation of life discernible from the record, the only answer is a resounding yes.

In his 22-page sentencing order, the trial court never mentions the legal standard which he was bound by law to follow. The State Attorney's office that prosecuted the case wrote a "Memorandum on Jury Override" for the trial court's benefit, prior to sentencing. (R3049-3052) Although this memorandum contains numerous misstatements of the law, it concludes as follows: "there is one statutory reason and several non-statutory reasons upon which the jury could have based its recommendation. Jury override in this case cannot survive." (R 3052) None of this information was absorbed by the trial court who sought to establish an entirely independent standard of life or death decision making.

In *Amazon v. State*, 487 So.2d 8, 13 (Fla. 1986), the defendant was convicted of killing a mother and her daughter, who lived next door to him, by stabbing them repeatedly. The mother had been raped. In overriding the jury recommendation of life, the trial court found "no mitigating factors." This Court reversed.

> However, we are persuaded that the jury could have properly found and weighed mitigating factors and reached a valid recommendation of life imprisonment. We believe there was sufficient evidence for the jury to have found that Amazon acted under extreme mental or emotional disturbance. The defense theory in the guilt phase was that Amazon had acted from a "depraved mind," i.e. committed second-degree murder. There was some inconclusive evidence that Amazon that Amazon had taken drugs the night of the murders, stronger evidence that Amazon had a history of drug abuse, and testimony from a psychologist indicated Amazon was an "emotional cripple" who had been bought up in a negative family setting and had the emotional maturity of a thirteen-year-old with some emotional development at the level of a one-year-old. Age could also be found as a mitigating factor. Although Amazon was nineteen, an age which we have held is not per se a mitigating factor. *Peek v. State*, 395 So.2d 492 (Fla. 1980), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), the expert testimony about Amazon's emotional maturity suggests that the jury could have properly found age a mitigating factor in this case.

The case in mitigation for Mr. Turner was at least as strong, if not stronger, than for Amazon. As this Court noted, "the facts are not so clear and convincing that no reasonable person could differ that death was the appropriate penalty." **See also** *Jackson v. State*, 599 So.2d 103, 109-110 (Fla. 1992)(Convictions for five murders, death sentences for two after jury recommendations of life; this Court reversed).

The trial court never asked if there was a reasonable basis for the jury's recommendations in this case. Instead, he played the role of a juror and fashioned his own view of the evidence to support his result. This was error. *Reilly v. State*, 601 So.2d 222, 224 (Fla. 1992); *Scott v. State*, 603 So.2d 1275, 1277 (Fla. 1992)

> We choose juries to serve as democratic representatives of the community, expressing the community's will regarding the penalty to be imposed. A judge cannot ignore this expression of the public will except under the *Tedder* standard . . .

Stevens (Rufus) v. State, 613 So.2d 402, 403 (Fla. 1992).

The trial court simply substituted its judgment for the community of jurors and in doing so ignored their expressed belief that Mr. Turner should not die.

II.

MR. TURNER WAS NOT COMPETENT TO STAND TRIAL

The State's answer brief relies on the accepted standard of review to support the trial court's finding that Mr. Turner was competent to stand trial. (State's Answer Brief, pages 32-33). It should be remembered that the trial judge's initial order on this issue found Mr. Turner incompetent to proceed with the trial in this case. (R 2648-2650) This order was based on the reports of Dr. Walker, Dr. Blau and Dr. McClaren. While Drs. Walker (R3067) and Blau (R3063) determined that Mr. Turner was not presently competent to stand trial, Dr. McClaren disagreed. (R3036) Although the doctors disagreed as to their ultimate conclusions, much of their underlying data was consistent.

After spending 30 days at Florida State Hospital, Mr. Turner was returned to court with a recommendation that he was now competent to stand trial. (R3031) This recommendation was based on a one hour interview conducted three weeks after Mr. Turner was initially committed to the hospital. (R3029) It was also a recommendation made while Mr. Turner was in a therapeutic setting and taking 15 mgs. a day of Navane, a major tranquilizer. (R3069) He was

discharged from the hospital setting with a diagnosis of, among other disorders, a paranoid personality. (R3070)

Although the state's brief says that this examiner, Dr. D'Errico, saw "Turner frequently during the month that he had been at Florida State Hospital", this is not exactly the case. Dr. D'Errico stated "In, in talking with him that day, ***and on several other occasions***, both informally and formally . . ." (emphasis supplied) (R-361) Other than the one-hour competency interview done on April 23, 1991, the only formal contat he had with Mr. Turner was on the day Mr. Turner was admitted. (R-358) Dr. D'Errico's other contacts (if they can be described as such) occurred as follows:

> Q. Now, you indicated -- how often do you go to the pad that Mr. Turner was on there in the hospital? How often do you, do you make those rounds?
>
> A. Every morning I'm at the hospital, and I go on the pod or the ward to, to get a patient for an interview, either an initial interview or a competency evaluation interview, and while I'm there I spend a few minutes observing some of the other patients. Especially if you've got a, patient charged with very serious offenses. I check on all those folks if they're in, in view.(R-362)

Dr. McClaren had an opportunity to see Mr. Turner after his return from Florida State Hospital on July 10, 1991. (R 388) Apparently he also talked with Mr. Turner on July 31, 1991. (R 394).

While Dr. McClaren testified he thought Mr. Turner was competent at the time of the July 31, 1991 hearing (R 396), his belief was qualified.

> Q. Okay. Is it your opinion that, that Mr. Turner has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding?
>
> A. I think that is--
>
> Q. And understand the proceedings against him.
>
> A. Well, the second part, he definitely understands the proceedings against him. The questionable part has to do with whether he is unwilling or unable to consult with his lawyer.

(R-399-400)

Dr. McClaren reiterated that Mr. Turner and his attorneys had a consistent and complete failure to communicate (R 400). Dr. McClaren could not opine as to whether Mr. Turner had the ability to consult with his lawyer. (R416-417)

Contrary to the State's brief (See page 26), Dr. McClaren never testified that Turner was trying to "exaggerate his mental problems." Although this proposition was suggested by the State Attorney in his questioning of Dr. McClaren (R-392), Dr. McClaren ultimately stated that

> A. It was not, I, I don't believe that he was trying to fool me. Rather, I think he was under a great deal of pressure and was feeling emotionally badly and was responding in a way that elevated almost all the scales to a

> very marked degree. And when people do this, they're usually not really mentally ill, but rather a person that's not mentally ill under tremendous pressure.

(R-394)

As a consequence of the hearing, the trial court ordered an additional evaluation, which was done by Dr. Annis. (R 3068) At the time of this evaluation, Mr. Turner was taking 15 mg. of Navane each day along with 4 mg. of Cogentin (R 3070). He was also depressed. (R 3070) Dr. Annis' evaluation is unlike any other. Although each other examiner had a difficult, if not impossible time of communicating with Mr. Turner, Dr. Annis states that "Mr. Turner's conversation is articulate and coherent." (R 3070) It is difficult to know what to make of Dr. Annis' evaluation and 60 days after this evaluation, the trial court found Mr. Turner competent. The trial court's decision in this regard says in its entirety

> THIS CAUSE came to be considered upon the issue of whether Defendant is competent to proceed. The Court having considered the evidence and the testimony of witnesses and after having considered argument of counsel, the Court finds Defendant, Eric Duane Turner, is competent to proceed within the meaning of Rule 3.211(a)(1), Florida Rules of Criminal Procedure and is not incompetent within the meaning of Florida Statute Section 916.12(1). It is therefore
>
> ORDERED AND ADJUDGED that defendant, Eric Duane Turner, is competent to proceed and this case is returned to the trial docket for the week of November 18, 1991.(R 2735)

This order does not inform the parties or this Court as to what choices were made about what information was reliable. In *LaPuma v. State*, 456 So.2d 933, 934 (Fla. 3d DCA 1984) the initial determination of competency of LaPuma was in part based on the conclusion that he was "malingering or consciously attempting to convince the doctors that he was incompetent." In Mr. Turner's case, the reverse appears to be true. Mr. Turner was specifically tricked into cooperating with Dr. McClaren by being told by Dr. McClaren that "these guys [the prior two examiners] are saying you're incompetent, you don't look incompetent to me. How about giving me some ammunition so we can prove they're wrong?" (R 462)

Mr. Turner's lawyer at the time characterized Turner's response as "After Eric realized that Dr. McClaren was apparently actively trying to help him prove that he was competent, he then opened up to Dr. McClaren--spoke to him as well as he could." (R 462) Although the State seems to believe that Mr. Turner's failure to communicate with his attorney was his own choice, (Answer Brief, pg. 36) the objective evidence was to the contrary. See *Scott v. State*, 420 So.2d 595, 597-598 (Fla. 1982)(Scott was a "psychotic personality who malingers in the direction of good health.") Dr. McClaren confirmed that Mr. Turner was "attempting to present himself in the best possible light." (R3036)

Incredibly, there was no finding regarding Mr. Turner's consumption of Navane, a major tranquilizer whose primary purpose "is to take away psychotic symptoms." (R 409-410)

It is true that it is ultimately the trial judge's call; however, a finding of competency must be informed and supported by the record. Consistent with due process, Mr. Turner was not able to effectively consult with his lawyer to prepare a defense. *Pridgen v. State,* 531 So.2d 951, 954 (Fla. 1988).

In Medina v. California, 505 U.S. ___, 120 L.Ed. 2d. 353, 366 (1992), the United States Supreme Court considered the question of whether the burden of proof may be placed on the defendant to establish competency.

> The rule announced in *Pate* was driven by our concern that it is impossible to say whether a defendant whose competence is in doubt has made a knowing and intelligent waiver of his right to a competency hearing. Once a competency hearing is held, however, the defendant is entitled to the assistance of counsel (citation omitted). Although an impaired defendant might be limited in his ability to assist counsel in demonstrating incompetence, the defendant's inability to assist counsel can, in and of itself, constitute probative evidence of incompetence, and defense counsel will often have the best-informed view of the defendant's ability to participate in his defense.

CONCLUSION

For the reasons stated in Mr. Turner's Reply brief, in conjunction with those arguments made in his initial brief, this Court should reverse Mr. Turner's convictions and sentences of remand to the trial court with instructions to enter a life sentence on each first-degree conviction.

Mr. Turner specifically notes that Arguments III through X in his initial brief are not waived by only presenting a reply in Arguments I and II.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent by United States mail to Mr. Richard B. Martell, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050.

5/27/93

STEVEN L. SELIGER