IN THE SUPREME COURT OF FLORIDA

CHARLIE THOMPSON, :

Appellant, :

vs. : Case No. 81,039

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This brief is filed on behalf of the appellant, CHARLIE THOMPSON, in reply to the Brief of the Appellee, the State of Florida. Appellant will rely upon the argument presented in the Initial Brief of Appellant with regard to Issues III, V, and VII.

References to the record on appeal are designated by "R" and the page number. References to the trial and sentencing transcript are designated by "T" and the page number.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN STATE WITNESS HERMAN SMITH TESTIFIED THAT MEMBERS OF HIS WORK CREW TOLD HIM THEY SAW APPELLANT REMOVE THE VICTIMS FROM THE CEMETERY OFFICE WITH A GUN IN HIS POCKET.

Appellee concedes in the Brief of the Appellee, at page 6, that Mr. Smith's remarks "were hearsay and had the effect of denying appellant the right to confront the members of the cemetery crew who [allegedly] saw appellant removing the victims from the cemetery." But appellee argues that the remarks were invited by defense counsel's question, specifically, "When did your crew see him?" (T 312)

Appellee's argument ignores the trial court's express finding that defense counsel was not at fault for Smith's act of volunteering the improper testimony:

> Well, it's certainly not Mr. Johnson's fault that the witness volunteered this information. That's just the way it is. He volunteered the information. He wanted to say it. He wanted to get it out and he got it out.

(T 315)

The record supports the trial court's finding that defense counsel was not at fault. Defense counsel asked Smith whether he saw Thompson at the cemetery three times. (T 312) Smith volunteered extraneous information each time. (T 312) First, Smith replied, "No. Everybody that appeared there know Mr. Thompson

because he was working in my crew at the time." (T 312) Next, Smith responded, "My crew have told me he was at that time. I got to explain myself." (T 312) The third time, Smith answered, "No, sir, but my crew did. My crew did." (T 312) Only then did counsel ask when the crew saw him. (T 312) This question was evidently the product of defense counsel's surprise and exasperation and was not intended to elicit the additional hearsay which followed: "I was the foreman out there this particular day. They was there working at the office when they seen Mr. Thompson go in there and carry Mr. Swack and Ms. Nancy. They said he had a gun in his pocket." (T 312-13)

Perhaps defense counsel would have been better prepared to deal with Smith's efforts to volunteer information if the prosecutor had disclosed it prior to trial. Although defense counsel failed to object to the State's discovery violation, the court's inquiry reveals that Smith told his story to the prosecutor about two weeks before trial, and there is no indication that he disclosed it to anyone. (T 314-16)

Appellee seeks to distinguish Geralds v. State, 601 So. 2d 1157 (1992), in which this Court recognized the futility of giving a curative instruction, on the ground that Geralds involved information extrinsic to the case, i.e., the defendant's prior felony convictions. Brief of Appellee, at p. 9. But improper hearsay identifying the accused as the perpetrator of the offense when there are no testifying eyewitnesses to do so is far more prejudicial than information about the accused's background.

Appellee's argument ignores district court cases holding that curative instructions are inadequate to remove the prejudice resulting from the admission of such hearsay. Asberry v. State, 568 So. 2d 86 (Fla. 1st DCA 1990); Graham v. State, 479 So. 2d 824 (Fla. 2d DCA 1985).

Appellee points to State evidence that a large man allegedly fitting Thompson's description was seen in the victims' office immediately prior to their disappearance. Brief of Appellee, at p. 9. In fact, Scott Hoffman, the manager of the monument shop, testified that he walked into the doorway of the office around 10:00 a.m. and noticed that someone else was present. (T 180) But when asked to describe the person, Hoffman could only say,

> I really couldn't tell you. Approximately they were six foot to six two, two hundred to two hundred twenty pounds, but I really just saw a big shadow in front of me and I wasn't looking to identify.
>
> * * *
>
> I assumed it was a male because of their size. That's all that I can say.

(T 180)

Hoffman could not say whether the person was black, white, or Asian. (T 181) He could not identify Thompson as the person. (T 182-83) He did not see the person's face. (T 183) He did not notice how the person was dressed. (T 184) He said, "I really just saw a shadow, a figure of a person, because I was thumbing through inventory sheets and I really wasn't paying attention." (T 184) If anything, Hoffman's testimony made Smith's hearsay testimony doubly prejudicial because Smith supplied a face, Charlie Thompson's, to fill the void in Hoffman's testimony.

Appellee contends that Smith's improper hearsay testimony was harmless because the State's circumstantial evidence pointed to Thompson as the perpetrator of the offense. Brief of Appellee, at p. 9-10. But juries tend to be skeptical about circumstantial evidence, and Thompson's defense was predicated on the absence of any other evidence of the identity of the perpetrator. The State has not carried its burden of proving beyond a reasonable doubt that Smith's testimony did not contribute to or affect the verdict. See State v. DiGuilio, 491 So. 2d 1129, 1135, 1139 (Fla. 1986). This Court should reverse Thompson's conviction and remand for a new trial.

ISSUE II

THE TRIAL COURT ERRED BY FINDING AND INSTRUCTING THE JURY UPON AGGRAVATING CIRCUMSTANCES WHICH WERE NOT PROVED BEYOND A REASONABLE DOUBT--AVOID ARREST, PECUNIARY GAIN, HEINOUS, ATROCIOUS, OR CRUEL, AND COLD, CALCULATED, AND PREMEDITATED.

Appellee's argument in support of the trial court's finding that the murder of Nancy Walker by a single gunshot to the head was heinous, atrocious, or cruel assumes that Mrs. Walker was alive when Mr. Swack was killed. Brief of Appellee, at p. 15-16. However, the State failed to prove which murder occurred first. The medical examiner testified that he could not determine the precise time of death for either victim. (T 271) In the sentencing order, the trial court expressly found that it was unclear which victim was killed first. (R 224)

ISSUE IV

THE TRIAL COURT ERRED BY FAILING TO FIND AND WEIGH MITIGATING CIRCUMSTANCES ESTABLISHED BY UNREFUTED EVIDENCE--MENTAL OR EMOTIONAL DISTURBANCE, IMPAIRED CAPACITY TO CONFORM CONDUCT TO THE REQUIREMENTS OF LAW, BRAIN DAMAGE, AND A HISTORY OF DRUG ABUSE.

Contrary to appellee's assertions that appellant has missed the point and that it does not matter whether the trial court considered Dr. Berland's testimony to have established statutory or nonstatutory mitigating factors, Brief of Appellee, at p. 22-23, it is appellee who has missed the point. Any fair reading of the trial court's sentencing order must result in the conclusion that the court assigned less weight to the evidence of appellant's mental illness precisely because the court found that the statutory mental mitigators were not proved. (R 225) Consequently, the court's error in finding that the statutory mental mitigating factors were not proved plainly affected the court's weighing process and was not harmless.

Lucas v. State, 568 So. 2d 18 (Fla. 1990), cited by appellee for the proposition that defense counsel has the obligation to identify the specific nonstatutory mitigating factors for the trial court's consideration, Brief of Appellee, at p. 24-25, actually supports appellant's argument. This Court did not procedurally bar appellate review of the trial court's failure to consider nonstatutory mitigating circumstances which defense counsel had failed to identify. Instead, the Court ruled that the trial court's findings

must be of unmistakable clarity. Id., at 24. The Court reversed Lucas's sentence and remanded for reconsideration and reweighing of the findings of fact because the sentencing order was unclear regarding the court's findings on statutory mitigating circumstances and because the order did not mention the nonstatutory mitigating circumstances shown by the record, including Lucas's history of drug and alcohol use. Id., at 23-24.

Both federal and Florida law prohibit the trial court from refusing to consider any mitigating evidence. Parker v. Dugger, 498 U.S. 308, 315, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991). The trial court is obligated to consider all mitigating circumstances shown by the record, even when the defendant expressly asks the court not to consider any mitigating evidence. Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993). Moreover, this Court is obligated to conduct meaningful appellate review of death sentences, including consideration of the defendant's actual record. Parker, 498 U.S. at 321.

Thus, appellate review of the trial court's failure to expressly consider nonstatutory mitigating factors is not procedurally barred by defense counsel's failure to identify those factors. Because the record contained believable, unrefuted testimony by Dr. Berland that Thompson suffered from brain damage and drug abuse, (T 491-92, 498-99, 501-02) the trial court committed reversible error by failing to expressly find and weigh these factors in the sentencing order. (R 225-26)

ISSUE VI

IMPOSITION OF THE DEATH PENALTY UPON A MENTALLY RETARDED DEFENDANT LIKE APPELLANT VIOLATES THE CRUEL AND/OR UNUSUAL PUNISHMENT PROHIBITIONS OF THE STATE AND FEDERAL CONSTITUTIONS.

Appellee seeks to minimize the evidence of Charlie Thompson's mental retardation by characterizing Thompson as "borderline mentally retarded," and equating this with the finding in Carter v. State, 576 So. 2d 1291 (Fla. 1989), Brief of Appellee, at p. 29. In Carter, this Court rejected claims based on mental retardation because only one of four experts who examined Carter found him to be "borderline" retarded. Id., at 1292-94.

But Dr. Charles Logan, a psychologist used by the State of Florida's Department of Health and Rehabilitative Services to assess intellectual and adaptive competency, (T 452-53) testified that borderline intelligence is a distinct and higher level of intellectual functioning than the mild range of mental retardation:

> There is an average range which is from the nineties to about one ten, and then there is lower average range which is about eighty-five to ninety-five, and borderline range which is only one standard deviation is seventy to eighty-four, and then mild range is fifty-five to sixty-nine, and then there are two retardation levels below that.

(T 455)

Furthermore, both experts who examined Thompson found that he was in fact retarded. Dr. Logan administered the Wechsler Adult Intelligence Scale Revised (WAISR) to Thompson and determined that his IQ was 56 and that he met the criteria for mild retardation.

(T 454-55) Dr. Berland also found that Thompson was retarded, with an IQ of 62 or 63. (T 491-92)

Appellee seeks to minimize Dr. Berland's findings by saying, at p. 29 n. 2 of the Brief of Appellee,

> For some reason, Dr. Berland did not administer the newer, revised Wechsler Adult Intelligence Scale. He speculated that if he had, appellant's I.Q. would have been in the range of 62 or 63, a range he described as well into the retarded level (T 490-491, 504-505).

Dr. Berland explained that he used the older WAIS rather than the newer WAISR because "it has a long research literature which allows you to use it to measure for brain damage." (T 490) Dr. Berland also explained that research literature has shown that the WAIS measures IQ seven to eight points higher than the WAISR, so if your primary concern is intelligence, you subtract seven or eight points from the WAIS score. (T 490, 504) Because Thompson's overall IQ score on the WAIS was 70, his IQ on the WAISR scale should be 62 or 63. (T 490-91) Thus, Dr. Berland had a very specific reason to use the older test, and his estimate of Thompson's IQ had a scientific basis beyond speculation.

Despite appellee's efforts to disparage it, the evidence before the trial court was unrefuted and established that Charlie Thompson is retarded. The trial court expressly found that Thompson is retarded and gave this fact considerable weight in determining the sentence to be imposed. (T 226) The question now before this Court is whether the execution of an undeniably retarded person constitutes cruel or unusual punishment. Appellant

continues to rely upon Chief Justice Barkett's dissent in Hall v. State, 614 So. 2d 473, 480-82 (Fla. 1993).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Krauss, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 7th day of January, 1994.

Respectfully submitted,

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