IN THE SUPREME COURT OF FLORIDA

DEREK TODD THOMPSON,

Appellant,

v. CASE NO. 81,304

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY FLORIDA

REPLY BRIEF OF APPELLANT

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_____:

REPLY BRIEF OF APPELLANT

ARGUMENT

ISSUE II

THE COURT ERRED IN FINDING THAT THOMPSON COMMITTED THIS MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY MORAL OR LEGAL JUSTIFICATION.

The state, on page 21 of its brief, claims this case is "the typical execution-type murder" type found in the seven cases it cited. Hardly, and a brief discussion of them will show why this is so.

First, however, we should recognize that five of them are between nine and fifteen years old. Eutzy v. State, 458 So. 2d 755, 757 (Fla. 1984); Huff v. State, 495 So. 2d 145 (Fla. 1986); Burr v. State, 466 So. 2d 1051 (Fla. 1985); Parker v. State, 458 So. 2d 750 (Fla. 1984); Hargrave v. State, 366 So. 2d 1 (Fla. 1979). Time, of course, does not reverse decisions because even Marbury v. Madison is still good law. It does, however, refine the legal principles announced in them, and that is what has happened with the cold, calculated, and

premeditated aggravating factor. Jent v. State, 408 So. 2d 1024 (Fla. 1981) was one of the first cases which required the heightened level of premeditation, yet the real clarification of what this aggravator meant started with Rogers v. State, 511 So. 2d 526 (Fla. 1987) and subsequent cases. These more recent decisions have defined "calculation," and limited the reach of this aggravator. E.g. Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984) (A cold, calculated robbery does not necessary mean the murder was similarly cold and calculated.)

More significantly for this case, a later opinion of this court has strongly suggested that the convenience store killing in Burr v. State, 466 So. 2d 1051 (Fla. 1985) was not cold, calculated, and premeditated. Burr v. State, 576 So. 2d 278 (Fla. 1991). Time and different facts from this case have also eroded the persuasive strength of the remaining cases.

In Eutzy, for example, the jury returned a specific verdict that the defendant had deliberately murdered a cab driver so he could avoid paying the cab fare. He never contested the sufficiency of the evidence of premeditation, and the only conclusion this court could reach was that he had the increased level of intention necessary for the killing to have been cold and calculated.

In this case, we have first, no specific verdict of premeditation. Second, Thompson vigorously contested the sufficiency of the evidence proving this aggravating factor. Finally, the state presented nothing to rebut the reasonable

argument that Thompson's intent was only to rob and not to kill Lenzo.

Parker is distinguishable on its facts. There, the defendant, a drug dealer with a violent temper, murdered three people in one night because one of his victims could not pay him the drug money he owed Parker.

In Huff the defendant planned to kill his parents. He murdered them in a wooded and secluded area while they were in their car. Huff had carefully planned their execution because he brought a gun with him when he rode with them. That case obviously differs from this one because Huff had only one motive in mind: murder. Here Thompson's driving intention was to rob, or at least the state has presented no facts that show with the same clarity as those in Huff his cold, calculated intentions.

In Hargrave the trial court had not even considered this factor, probably because it was not one of the enumerated aggravators. In that case, the defendant during the course of a convenience store robbery shot the victim twice in the chest. Shortly after, a customer came into the store, but Hargrave managed to deceive the person so that he left a few minutes later unaware of what had just happened. The defendant then shot the clerk a third time to eliminate him as a witness. Id. at 5. He also admitted that he had killed before, and it did not bother him.

That case obviously differs from this one. Thompson shot his victim only one time for unknown reasons. The single

bullet wound also meant he did not have a lengthy time to consider what he had done and then shoot his victim again. Hargrave has no compelling similarities.

This court should reverse the trial court's sentence of death and remand for a new sentencing hearing before a new jury.

ISSUE III

THE COURT ERRED IN FINDING THAT THOMPSON COMMITTED THIS MURDER TO AVOID OR PREVENT A LAWFUL ARREST.

Neither the state's or Thompson's arguments on this issue are very long or complex, and the defendant's reply will follow suit. This court' opinion in Lawrence v. State, 614 So. 2d 1092 (Fla. 1992), as cited in the Initial Brief at p. 19, provides the greatest problem for the state. It distinguishes that case by noting that the only explanation for this murder, except for the robbery, was witness elimination (Appellee's Brief at p. 25). The same could have been said in Lawrence, only there the evidence, weak as it was, was stronger for witness elimination. That is, the victim's body had been found in a back room of the convenience store where she worked. She had been shot twice in the head. Money also had been taken. In that case, more so than here, "the only explanation" for the murder was witness elimination. Yet, if this court "cryptically held" the state had not proven this aggravating factor beyond a reasonable doubt it should similarly "cryptically" hold in this case.

This court should reverse the trial court's sentence of death and remand for a new sentencing hearing before a new jury.

ISSUE IV

THE COURT ERRED IN FINDING THOMPSON WAS UNDER SENTENCE OF IMPRISONMENT BECAUSE HE WAS ON COMMUNITY CONTROL WHEN HE COMMITTED THE MURDER.

The state concedes, at least, that Thompson was improperly on Community Control for the 1987 case (87-1401). It argued, regarding the 1991 offense (91-1720), that a court had legitimately placed him on that form of restriction. That, of course, ignores the order of 24 August 1993 granting the defendant's Motion to Dismiss the Violation of Community Control Affidavit filed in both cases (R 630). Judge Parnham concluded the trial court had erroneously placed Thompson on Community Control for both cases, not simply 87-1401. The judge who had placed him on that restriction, in short, erred in giving him a one year term of community control for 91-1720. The sentencer in the capital case, therefore, erred when it allowed the state to present evidence of Thompson's legal status to the jury, it instructed them they could find he was so limited at the time of the murder, and it found he was under legal restraint as an aggravating factor.

ISSUE V

UNDER A PROPORTIONALITY REVIEW, THOMPSON DOES NOT DESERVE A DEATH SENTENCE.

The state on pages 27-28 of its brief agrees with Thompson that in a proportionality review "the numbers of aggravating and mitigating circumstances are not important but rather what weight is given each aggravating and mitigating circumstance. . . ." It then noted that the trial court cited this court's opinion in Preston v. State, 607 So. 2d 404 (Fla. 1992), in which this court concluded that death was proportionally warranted.

> We also reject Preston's claim that the death penalty is not proportionally warranted. The four aggravating factors present in this case outweigh the single statutory mitigating factor and the minimal non-statutory mitigation offered by Preston. This cruel, cold-blooded killing clearly falls within the class of murder for which the death penalty may be properly administered.

Id. at 412.

Casually read, as apparently the court did here, this holding would suggest that merely finding the aggravators outnumbered whatever mitigation existed satisfied this court's proportionality review obligation. That, of course, would be an incorrect reading of that case because the essence of death penalty sentencing requires a guided weighing of the aggravating factors (however many) against the mitigating circumstances (however few). Merely adding up the aggravators and subtracting the mitigators does not satisfy any duty of the

trial or appellate court in death sentencing. State v. Dixon, 283 So. 2d 1 (Fla. 1972).

The trial court must have misunderstood what this court meant in Preston, otherwise it would not have cited it. In that case, the defendant kidnapped the clerk of a convenience store, took her to a remote location, walked her at knife point through a dark field, forced her to take off her clothes, and then brutally stabbed her several times. Weighed against these horrible facts the court considered Preston's age and some minimally important non-statutory evidence as mitigation. What Preston did compelled an affirmance of the death sentence, not that the aggravating outnumbered the mitigating.

Thompson suggests the trial court misunderstood the quoted language in Preston because the facts in that case have so few similarities to those here. Preston abducted his victim, Thompson did not. Preston drove the store clerk to a remote location, forced her to disrobe, then slit her throat and stabbed her several times; Thompson shot a fully clothed Lenzo in the store. In this case, there was no prolonged fear, no terror of anticipation.[1]

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[1]Despite the prolonged suffering Preston inflicted, and that he killed his victim by cutting her throat, this court found the murder not to have been cold, calculated, and premeditated. Preston v. State, 444 So. 2d 939, 947 (Fla. 1984).

This case, if anything, is the negative of Preston: whatever Preston did, Thompson did not. Preston also deserved a death sentence. Thompson does not.

The cases cited by the state at the end of its argument, although claimed to be "similarly circumstanced" are readily distinguishable. In Randolph v. State, 562 So. 2d 331 (Fla. 1990), the victim was bludgeoned, kicked, strangled and knifed. The defendant also made no proportionality argument. In Mendyk v. State, 545 So. 2d 846 (Fla. 1989), "The murder described in gruesome detail in this record is a most heinous, and calculated slaying. Prior to the murder, appellant kidnapped, repeatedly abused, sexually molested, bound and gagged, and literally toyed with the victim." Id at. 850. In Remeta v. State, 522 So. 2d 825 (Fla. 1988), the defendant's Florida victim was only one of four people Remeta robbed and murdered over two a week crime spree. In Swafford v. State, 533 So. 2d 270 (Fla. 1988) the victim was a gas station clerk whom Swafford and his buddies had kidnapped, sexually battered, and then killed by shooting her nine times. The defendant had to reload his gun at least once. In Garcia v. State, 492 So. 2d 363 (Fla. 1986) Garcia and four other men, acting on a plan to rob and kill, took the husband and wife owners of farm market into a back room. The husband was murdered when he refused to tell Garcia and his band where he had hidden his large stash of money. The wife was also shot in the back of her head, and an employee was shot, but he survived to testify against Garcia. In Carter v. State, 576 So. 2d 1291 (Fla. 1989), the defendant

killed two people in a small grocery store. Among the aggravation found was that Carter was on parole at the time of the murders, and that he had prior convictions for an armed robbery and murder. In Shriner v. State, 386 So. 2d 525 (Fla. 1980), the defendant shot a store clerk. He had a prior conviction for an armed robbery in Dade County. Nothing mitigated a death sentence. In Hargrave v. State, 366 So. 2d 1 (Fla. 1979), the convenience store clerk was shot twice after he could not open the cash register. A customer came in, but Hargrave managed to get him to leave. The defendant then shot the victim a third time to silence him.

The only similarity between this case and those cited by the state is that the persons killed were clerk/owners of convenience type stores. In every case relied on by the state, there are significant, distinguishing facts. As mentioned in the Initial Brief, this was as stripped down and simple a robbery/murder as can be imagined. A defendant walks into a store, shoots the clerk, takes money, flees, and is immediately arrested. If this falls outside the norm of capital felonies, then any robbery/murder of a convenience store will make the defendants who commit those crimes eligible for a death sentence.

This court should not affirm Thompson's death sentence. Instead it should remand with directions to sentence the defendant to life in prison without the possibility of parole for twenty-five years.

ISSUE VI

THE COURT ERRED IN ADMITTING EVIDENCE OF THE IMPACT THE VICTIM'S MURDER HAD ON HIS FAMILY, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1 SECTION 17 OF THE FLORIDA CONSTITUTION.

The state has several arguments on this issue, but its most serious are that 1) Thompson failed to preserve this issue for appellate review, and 2) Section 921.141 (7) Fla. Stat. (1992) is merely a procedural change to Florida's death penalty statute, so the ex post facto proscription does not apply.

As to the preservation claim, Thompson filed the following pre-trial motions challenging the admission of the victim impact evidence:

1. Motion to Exclude Evidence or Argument Designed to Create sympathy for the Deceased (R 493-511).

2. Motion to Prohibit Application of Florida Statute 921.141(7) (R 512-14).

3. Motion in Limine to Prohibit Use of Victim Impact Evidence (R 487-88).

They were denied, and Thompson eventually went to trial. After the jury had returned its guilty verdicts on the charged crimes, the court recessed for the night. Before the jury heard any sentencing phase testimony the next morning, defense counsel objected to the state proving he was on community control when he killed Lenzo (R 318-323). The trial judge denied that complaint, and defense counsel then said:

MR. KILLAM: We would also ask, again, that this victim impact evidence not be considered by the jury for the reasons stated in the previous motions.

> THE COURT: All right. Well, the Court has considered that and will allow victim impact evidence to be received. I think that it's a matter of essential and fundamental fairness that the jury hear both sides.

(R 323-24).

The court then swore all the witnesses and applied the rule of sequestration (R 325-27). It made sure both sides understood how this portion of the trial was to be conducted and gave the jury some additional instructions (R 327-29). After that the state called Robert Nathan who established Thompson's community control status (R 329-31). Following his testimony Carol Lenzo presented the objectionable victim impact evidence (R 331-34).

Thompson admittedly did not object to Mrs. Lenzo's testimony at the moment the state began its examination of her. But then, why should he have done so? The court had denied his motions before trial to exclude her testimony (R 487-88). He had, only moments before Mrs. Lenzo took the stand, renewed his complaint, and the court reiterated its earlier decision (R 323-24). Nothing happened in the five minutes between the objection and her testimony that could have alerted the most vigilant defense counsel that the court would have changed its ruling. Likewise, nothing occurred in that brief period that would have given the most sympathetic court reason to reverse the ruling it had just made. If this court rejects Thompson's argument because he has failed to preserve it then it will have surely exalted procedural nitpicking over substantive justice. Thompson, however, has great faith that this court will not

succumb to the state's siren call and will like a modern day Ulysses tie itself to the mast of right thinking.

As to the ex post facto claim, the state characterizes section 921.141(7) as affecting merely a procedural change in Florida's death sentencing statute. Assuming that is all it did, however, does not mean Thompson loses. As this court said in Dugger v. Williams, 593 So. 2d 180, 181 (Fla. 1991):

> As is obvious from this discussion, it is too simplistic to say that an ex post factor violation can occur only with regard to substantive law, not procedural law. Clearly, some procedural matters have a substantive effect. Where this is so, an ex post facto violation also is possible, even though the general rule is that the ex post factor provision of the state Constitution does not apply to purely procedural matters.

Instead, as this court noted a few paragraphs later, "The real question is whether the [change in the law] had the effect of diminishing a substantial substantive advantage that [the Defendant] would have enjoyed under the law existing at the time he committed his offense. Id. at 182.

Thus, if the proper inquiry examines the "effect" on the substantial substantive rights of a defendant, this court can only conclude the court erred in letting the jury in this case hear the victim impact evidence. Thompson obviously had a recognized interest in staying alive, and as obviously, the victim impact evidence "effected" that right in that it increased the likelihood the jury would have returned a death recommendation. The court accordingly would have had to give it "great weight." Only if no reasonable person could have

disagreed that the verdict was improper could it have imposed a life sentence. See, Tedder v. State, 322 So. 2d 908 (Fla. 1975).[2]

The state has another problem with its ex post facto argument. It completely ignored Article X Section 9 of the Florida Constitution which provides that "Repeal or amendment of a criminal statute shall not affect prosecution for any crime previously affected." Castle v. State, 330 So. 2d 10 (Fla. 1976); Ellis v. State, 622 So. 2d 991, 1002 (Fla. 1993) (Kogan, dissenting.)

The state, on page 31 of its brief, says "the only reference to the "victim impact" which may be gleaned is Mrs. Lenzo's remark that she 'felt her son's loss greatly' (TR 333)" That is hardly true:

> We have all felt his loss so deeply. I see such a difference in everyone in our family. We don't trust the way we did trust. We are not open to people the way we were. We have a huge wound in our hearts that will never heal.
>
> Q. Was Carl married?
>
> A. Yes. Carl met his wife when they were in high school and they waited five years to get married, and he had been married for six months when he was killed. He had just found out three weeks before his death that his wife was pregnant, and they were so excited about that baby.
>
> Q. Has that child subsequently been born?

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[2] In light of Dugger v. Williams, Glendening v. State, 536 So. 2d 212, 214-15 (Fla. 1988), which the state relied on, should be limited to its facts.

A. Yes. Her name is Amber and that's the name that Carl picked for her. He wanted a daughter.

(T 333-34).

This mother's poignant testimony was so potent that the prosecutor needed only to close his argument by referring to it. "You cannot help but feel sorry for his [Thompson's] family, but certainly that is outweighed by the fact that Carl Lenzo left a child who will never see him, never know her father." (T 405) This comment and Mrs. Lenzo's testimony could only have skewed the reliability of the jury's recommendation.

The state on pages 31 forward repeatedly complains about the defendant introducing his own victim impact evidence, thereby seeking to justify what it did by pointing at Thompson and crying "See, he did it too!" Yet the tears come too late for him or this court to now search for our handkerchiefs. If what the defendant did at trial was error, the state surely should have and could have objected. But, do we hear the plaintive cry of the wronged party? Is the wounded prosecutor gasping for breath, moaning "Objection, Objection?" No. Instead only an eerie silence covers its corner. The thunderous cries of the Appellee cannot preserve the complaint that a short bleat at trial would have saved. C.f. Cannady v. State, 620 So. 2d 165 (Fla. 1993).

As to the merits of Thompson's argument, the state says precious little, convinced that its ex post facto argument, if repeated, will solve its problems. It needs more. For example, it claims on page 34 of its brief that Payne v.

Tennessee, 501 U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) merely balanced the scales because "virtually no limits are placed on irrelevant mitigating evidence a capital defendant may introduce regarding his circumstances. . . " Defendants, of course, have a significant restriction, relevancy, placed on what they can used to persuade a jury to recommend a life sentence. Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). If what Thompson introduced here was irrelevant, the state should have objected.

Finally, the state predictably claims this error was harmless because because "the prosecution, except for a fleeting comment, made no reference to any victim impact." (Appellee's Brief at pp. 35-6) It goes further and blames Thompson for "continually remind[ing] the jury of victim impact evidence suggesting that victim impact evidence went both ways, not only for the victim's family but also for the accused's family." (Id. p.36) First, the prosecution's comment, as quoted above, was not fleeting. More significantly, Mrs. Lenzo talked with the pathos of a greaving mother, and that cannot have been missed by the jury, no matter how "fleeting" it may have been. Thus, this experienced prosecutor knew he needed only a brief reminder for the jurors to recall what she had said. Finally, if Thompson continually reminded the jury of the victim impact evidence, he did so only to minimize its damage, a good defense strategy in any case. This court cannot say the trial court's error in admitting the victim impact evidence was harmless beyond a reasonable doubt.

CONCLUSION

Based on the arguments raised above, the Appellant, Derek Thompson, respectfully asks this honorable court to reverse the trial court's judgment and sentence and remand for a new trial, reverse the trial court's sentence and either remand for resentencing by the court or for a new sentencing hearing before a new jury or with instructions to sentence him to life in prison without the possibility of parole for twenty-five years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Carolyn Snurkowski, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, DEREK TODD THOMPSON, #212336, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this 23rd day of March, 1994.

DAVID A. DAVIS