IN THE SUPREME COURT OF FLORIDA

JACK DEMPSEY FERRELL,

Appellant,

vs. CASE NO. 81,668

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Fla. Bar. #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE

This case is before the Court following remand to the Circuit Court of Orange County for the purpose of entering a sentencing order in compliance with this Court's *Campbell* decision. *Ferrell v. State*, 653 So.2d 367 (Fla. 1995). The resentencing proceeding was conducted on June 20, 1995, and a written order was entered on that day sentencing Ferrell to death. *(R 67-72)*. Notice of appeal was given by Ferrell on June 23, 1995, and the record was certified as complete and transmitted on July 31, 1995. *(R 75; 82)*. On January 5, 1996, this Court entered its order directing the parties to file supplemental briefs as to the resentencing.

STATEMENT OF THE FACTS

The State does not accept the statement of the facts contained in Ferrell's Supplemental Brief.

The resentence proceeding ordered by this court in the original opinion was conducted on June 20, 1995.[1] *(TR 20)*. When that hearing began, the trial court stated that a review of the court file showed that the entire sentence order prepared at the

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[1]The State recognizes that the proceedings in the trial court were not, technically speaking, "resentencing proceedings". Those proceedings are, however, referred to by that term in this brief for simplicity.

time of the first sentence proceeding had not been included in the record on appeal. *(TR 22-23)*. A copy of that order was placed in the record as Court Exhibit 1. *(TR 30)*. The trial court then prepared another order, but, when the assistant state attorney questioned the clarity of that order, the court further refined that order to state with particularity the mitigating and aggravating circumstances found by the court. *(TR 33; 36)*. Specifically, the assistant state attorney questioned whether the order was of sufficient clarity as to whether or not the court found the existence of the statutory mental mitigators. *(TR 33-4)*. The trial court gave **both** parties the opportunity to voice any complaints about the legal sufficiency of the order, but Ferrell voiced no complaint. *(TR 35)*.

Ferrell's attorney did state that he was confused as to whether debate was contemplated by this Court, but at no time did he object to the course the proceedings followed. *(TR 35-6)*. The trial court stated that, upon review of the draft order (Defense Exhibit 1), he believed that his findings as to the mental mitigators could be more clearly stated. *(TR 36)*.

The court then prepared the final sentencing order, finding in aggravation that the defendant had previously been convicted of a crime of violence (Murder in the Second Degree), and finding, as

mitigation, various non-statutory factors. *(R 67-73)*.

As to the guilt phase facts, to the extent that those facts are relevant to the proportionality of Ferrell's sentence, the State relies on the facts set out in this Court's direct appeal opinion. *See, Ferrell v. State*, 653 So.2d 367 (Fla. 1995).

SUMMARY OF ARGUMENT

Ferrell's claim that the sentencing order entered by the trial court does not comply with *Campbell v. State* is procedurally barred because he voiced no complaint about the order even though he was given the opportunity to do so. Likewise, the claim that the sentencing court changed its mind "simply at the request of the state attorney" is procedurally barred because that claim could have been but was not raised below. Alternatively, neither claim has merit. The sentencing order entered in this case fully complies with the requirements of *Campbell*, and is sufficient to allow this Court to review the propriety of the death sentence. The claim that the trial court delegated any "responsibility" to the state attorney is rebutted by the record. A fair reading of the record shows that the state attorney did no more than question the clarity of certain language contained in the first draft order. That is not improper, and, in view of the need for clear findings

to allow review by this Court, should not be a basis for complaint.

The claim that Ferrell's sentence of death is disproportionate was addressed in the opening briefs. However, when the findings of the sentencing court are reviewed, the correctness of the death sentence is clear. None of the "mitigation" is entitled to more than the minimal weight given it by the trial court, and the aggravation is, under these facts, of great weight. Death is the proper penalty.

ARGUMENT

I. THE TRIAL COURT PROPERLY SENTENCED FERRELL TO DEATH

On pp. 4-10 of his brief, Ferrell argues that the sentencing order does not comply with *Campbell*, and also argues that "it appears that the trial court changed his mind simply at the request of the state attorney". *Appellant's brief at* 7. Neither of those arguments are preserved for review, and, alternatively, both are meritless.

Florida law is settled that a timely objection at trial is required to preserve an issue for review on appeal. *See, e.g., Steinhorst v. State*, 636 So.2d 23 (Fla. 1994). A defendant cannot remain silent, allow an error to occur, and then gain reversal based on that error. In this case, the record leaves no doubt that Ferrell specifically stated that he had no comments to offer as to

whether the trial court's order did, in fact, comply with *Campbell*. *(TR 35-6)*. Because counsel specifically stated that he had nothing to add to the comments of the assistant state attorney, he has waived any complaint associated not only with the first order drafted by the court at the June 20 hearing, but also with the final sentencing order. Insofar as the claim that the court "delegated" his responsibility to the assistant state attorney is concerned, that claim should have been raised at the time of the circuit court proceedings. Because that claim was not timely raised (even though all of the facts were known), it is barred from appellate review. *Steinhorst, supra*. No such claim was raised below, and Ferrell cannot resurrect it at this late stage. Alternatively, none of the claims contained in Ferrell's brief have merit.

Florida law is settled that, in evaluating mitigating circumstances, "the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature." *Campbell v. State*, 571 So.2d 415, 419 (Fla. 1990); *see also, Ferrell, supra*, at 371; *Rogers v. State*, 511 So.2d 526 (Fla. 1987). Each **established** mitigator must be expressly

considered in the sentencing order, but "the relative weight given each mitigating factor is within the province of the sentencing court...". *Id., at* 420; *see also, Wuornos v. State*, 644 So.2d 1000, 1010 n. 6 (Fla. 1994).[2] The sentencing court in this case was well aware of, and complied with, the requirements of *Campbell*. *See, e.g., TR 26-30; 32-36.*

Ferrell identified seven proposed mitigating factors:

> 1. Defendant was under the influence of extreme mental or emotional disturbance at the time of the killing;
>
> 2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired;
>
> 3. The age of the Defendant at the time of the crime;
>
> 4. Defendant was a good, dependable, and capable employee;
>
> 5. The Defendant's prior record as a model prisoner;
>
> 6. The Defendant's remorsefulness;
>
> 7. Defendant was under the influence of alcohol at the time of the killing.

(Supp. R. 69). The sentencing court clearly recognized its responsibility to consider each matter proposed in mitigation, as

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[2]As this Court's original opinion made clear, a non-statutory mitigator is not "established" if it is not "truly of a mitigating nature". *Ferrell, supra,* at 371. There is no doubt that the weight given to each *established mitigator* is for the sentencing court to determine. *Id.*

evidenced by the sentencing order itself, which addresses each proposed mitigator.

The sentencing court found that Ferrell was not substantially impaired in his ability to conform his conduct to the requirements of the law, but did find that there was "some impairment". *(Supp. R. 70)*. The court gave this matter little weight in mitigation. *(Id.)*. Likewise, the sentencing court found that Ferrell was not "under the influence of *extreme* mental or emotional disturbance at the time of the killing." *(Id.)* [emphasis in original] The court found that Ferrell was under some mental or emotional disturbance, but gave little weight to this mitigator. *(Id.)*. The sentencing order leaves no doubt that the court found that neither statutory mental mitigator was established, but that the court did find, in mitigation, that non-statutory mitigation was established. That finding is fully in accord with *Campbell*, as is the court's finding that little weight should be given to this evidence. The sentencing order entered after remand expressly evaluated each proposed mitigator; determined whether each mitigator was supported by the evidence (and, in the case of non-statutory mitigation, whether it was truly mitigating); and weighed the mitigation against the aggravation. That is what the trial court was required to do, and the order that resulted complies with Florida law. *See,*

Ferrell, supra. There is no error in the sentencing order, and the death sentence should be affirmed. *See, Lucas v. State*, 613 So.2d 408, 410 (Fla. 1992); *Sireci v. State*, 587 So.2d 450 (Fla. 1991).

To the extent that Ferrell argues that the sentencing court delegated the finding as to the mental mitigators to the prosecutor, the record belies that claim. While it is true that the prosecutor questioned whether the court meant to find the statutory mental mitigators, it is also true that the court itself clearly stated that he was having difficulty articulating the finding of a ***non-statutory level*** of mental mitigation. *(Supp. R. 32-33)*. Based upon the statements in the record, it is clear that the court made an independent determination that the statutory mental mitigating circumstances did not apply, but that a lesser, non-statutory level of mental mitigation had been proven. The fact that the trial court had some difficulty in articulating that finding does not mean that anything improper took place, nor does it mean that the court changed its mind at the request of the state.

To the extent that Ferrell argues that the evidence establishing the statutory mental mitigating circumstances is uncontroverted, and that, therefore, those mitigators must be found

by the court, that claim is incorrect. Ferrell's mental state expert (Dr. Upson) testified that, in his opinion, "it was difficult for him to conform his behavior. I do not feel that Mr. Ferrell did not know that his behavior was inappropriate or wrong." (R83). Likewise, Ferrell's claim that the crime was impulsive is rebutted by the facts, which established that he had sought after a handgun some weeks prior to the murder for the express purpose of killing the victim. *(Supp. R. 68)*. On the day of the murder, Ferrell left the apartment that he shared with the victim, went downstairs to his car and retreived the murder weapon, and then returned to the apartment and shot the victim twice in the head. *(Supp. R. 68)*. Ferrell then left the apartment, commented to a passing neighbor that she should "call the police [because] I just killed my old lady", and went to a bar. *(TR445)*[3]; *Ferrell v. State, supra,* at 369. The facts of the murder contradict Ferrell's claim of "impulsivity"--that factual contradiction is as strong as the rebuttal testimony of a counter-expert would have been. The testimony of Ferrell's expert is far from "uncontroverted", and any argument that the trial court was required to accept that testimony is wrong as a matter of law.

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[3]That neighbor testified that Ferrell did not appear to be intoxicated. *(TR 445)*.

See, e.g., Wuornos, supra.

To the extent that Ferrell complains that "the trial court merely confused the issue with the procedures employed below", that argument does not establish any basis for reversal of Ferrell's death sentence. *Appellant's brief at 5.* While it is true that the trial court seems to have experienced difficulty in drafting the sentencing order, it does not follow that some impropriety took place. The sentencing court clearly stated, regarding the mental state mitigation, "[t]he court was finding a nonstatutory level of mental or emotional disturbance as opposed to statutory extreme level of mental or emotional disturbance...". *(Supp. R. 33).* While the draft order of June 20, 1995, is unclear, the final order, which is the one imposing sentence, leaves no doubt that the court did not find the existence of either statutory mental mitigator. That finding is supported by the evidence, and should not be disturbed.[4] *See, e.g., Lucas, supra.*

Ferrell complains that the "order is fraught with inconsistencies and ambiguities", and that the trial court was

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[4]There is no question as to whether the court found any statutory mental mitigation. The trial court's statements on the record, and the sentencing order which imposed a death sentence, leave no doubt that no such mitigation was found, nor was it ever **intended** to be found.

confused as to "his proper role". *Appellant's brief at 9.* That is an overstatement of the course of the proceedings which indicate that, while the court apparently had difficulty in drafting the sentencing order to comply with *Campbell*, once he did so, an order that is sufficient under the precedent of this Court was entered. Whether or not the draft order is consistent with the final order is not the issue--the final order clearly expresses the findings of the sentencing court, as set out in the colloquy between counsel and in the order itself. *(Supp. R. 33).*[5] Those findings have, at all times, been consistent. The sentencing order entered on remand to the trial court fully complies with *Campbell* and *Rogers*, and the death sentence should be affirmed.

II. FERRELL'S DEATH SENTENCE IS NOT DISPROPORTIONATE UNDER THE FACTS

As set out above, the sentencing court properly weighed the aggravation against the mitigation and found that the jury's sentencing recommendation of death should be followed. Under the

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[5]To the extent that Ferrell argues that the mental state expert testified at the penalty phase rather than the guilt phase and the the court's error in this regard in the sentencing order is fatal, that is an obvious typographical error on the part of the trial court. In any event, Ferrell received the benefit of that testimony. Any error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986).

particular facts of this case, none of Ferrell's "mitigation" is entitled to more than the slight weight it was given by the sentencing court. To the contrary, the aggravating circumstance of a prior murder conviction, under similar circumstances, is due great weight in aggravation, as the trial court found. Death is not a disproportionate punishment in this case. *See, e.g., Duncan v. State*, 619 So.2d 279 (Fla. 1993); *Dougan v. State*, 595 So.2d 1 (Fla. 1992); *Lemon v. State*, 456 So.2d 885 (Fla. 1984); *King v. State*, 436 So.2d 50 (Fla. 1983). Ferrell's death sentence should be affirmed.

CONCLUSION

Based upon the foregoing arguments and authorities, the State submits that the death sentence should be affirmed.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
FLA. BAR #0998818
444 Seabreeze Blvd., 5th FL
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Answer Brief of Appellee has been furnished by Delivery to Michael S. Becker, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 10th Day of February, 1996.

Kenneth S. Nunnelley
Of Counsel