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IN THE SUPREME COURT OF FLORIDA

JACK DEMPSEY FERRELL,)
)
Appellant,)
)
vs.) CASE NO. 81,668
)
STATE OF FLORIDA,)
)
Appellee.)
)

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

JACK DEMPSEY FERRELL,)
Appellant,)
vs.) CASE NO. 81,668
STATE OF FLORIDA,)
Appellee.)

STATEMENT OF THE CASE AND FACTS

On June 20, 1995, pursuant to a remand from this Court, a hearing was conducted before the Honorable Daniel P. Dawson, Circuit Judge. (ST20-49) All parties seemed to exhibit confusion as to what was required on remand. The trial court noted that apparently the first four pages of the original sentencing order somehow did not get included in the record. The court then brought out the original sentencing order and entered it into evidence as a court exhibit. (ST30, Court Exhibit #1) The court then retired to generate a new order and upon returning entered the original order into evidence and presented the parties with a new proposed order for sentencing. (ST31, Court Exhibit #1, Defense Exhibit #1) Before beginning to read this order, the state questioned whether the court really intended to make the findings it apparently did in this order. The court then held discussion with the state attorney as to what was

required by Campbell[1] in a sentencing order. Defense counsel stated that it was his understanding that pursuant to this Court's remand, the court was simply to enter a more complete sentencing order and that no debate was to be allowed. The court then took another recess and upon returning to court, read from a new sentencing order which again found one aggravating circumstance, listed the mitigating factors found and resentenced Appellant to death. Defense counsel then asked that the second generated sentencing order be placed in the court file as an exhibit, which the court granted. (ST37) This brief is submitted pursuant to this Court's order of January 5, 1996.

[1] Campbell v. State, 571 So. 2d 415 (Fla. 1990).

SUMMARY OF THE ARGUMENT

The procedure followed by the trial court on remand was constitutionally deficient in that his order imposing the death penalty remains lacking in clarity as to the facts supporting his ruling on mitigating circumstances. Further, the record indicates that the trial court may have abandoned his constitutional duty by capitulating to the requests of the assistant state attorney concerning the applicability of the statutory mitigating factors. The confusing nature of the three orders generated by the trial court regarding the applicability of the mental mitigating factors renders the death penalty improper.

POINT I

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, AS WELL AS SECTION 921.141(3), FLORIDA STATUTES (1991), THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE.

In Campbell v. State, 571 So. 2d 415 (Fla. 1990), this Court provided guidelines to assist the trial judges in making their decisions to impose the death penalty. These guidelines were further re-emphasized in the instant case wherein this Court ruled:

> The sentencing judge must expressly evaluate in his or her written sentencing order each statutory and non-statutory mitigating circumstance proposed by the defendant. This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature. A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. Once established, the mitigator is weighed against any aggravating circumstances. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.

Ferrell v. State, 20 Fla. L. Weekly S74, 75 (Fla. February 16,

1995). Following this pronouncement, this Court deemed that the order below was insufficient to provide adequate appellate review and remanded the cause for clarification of the order. Appellant contends that rather than clarifying the order, the trial court merely confused the issue with the procedures employed below.

At the outset of the hearing on remand, it was clear that neither the trial court nor the parties understood exactly what was required of them on this remand. The only thing that is apparent is that the parties understood that this Court was not satisfied with the clarity of the order of the trial court imposing the death penalty in the instant case. What this Court now has before it are in fact three separate orders which were generated by the trial court and which attempted to justify the imposition of the death penalty. Serious deficiencies exist in all three orders and serious contradictions within the orders render the sentence imposed in the instant case unreliable, arbitrary, and thus unconstitutional.

Apparently, the trial court had compiled an order originally supporting his decision to impose the death penalty. For unknown reasons, this order never got entered into the record except for the final summary page. However, the trial court did enter as a court exhibit this original order. From this original order the trial court lists the aggravating circumstance that was proven and lists the mitigation which was presented by the defense. In so doing the trial court stated:

> Circumstances in mitigation that the Defendants [sic] ability to conform his

> conduct to the requirements of the law was substantially impaired at the time of the crime, that he was under the influence of extreme mental or emotional disturbance at the time of the killing and that the Defendant was under the influence of alcohol at the time of the killing, are based on testimony from the guilt phase of the trial. The Court has reviewed and weighed this testimony and circumstances.

(Court Exhibit #1, Page 4) In the next sentencing order, which the trial court generated after taking a break, the trial court stated:

> Circumstances in mitigation that the Defendants [sic] ability to conform his conduct to the requirements of the law was substantially impaired at the time of the crime, that he was under the influence of extreme mental or emotional disturbance at the time of the killing and that the Defendant was under the influence of alcohol at the time of the killing, are based on testimony from the guilt phase of the trial. The Court has reviewed and weighed this testimony and circumstances. <u>The Court does find these mitigating factors present</u> but after considering all the testimony and circumstances, the Court finds that the level of mitigation to be given to these factors to be very low. Therefore, little weight is given to these mitigating factors.

(Defense Exhibit #1, Page 4) (Emphasis added). Without hearing any additional testimony, and only after the state disputed the "clarity" of the order, did the trial court again after taking a break, issue what ultimately was the signed order in the instant case wherein he stated:

> Circumstances in mitigation that the Defendants [sic] ability to conform his conduct to the requirements of the

> law was substantially impaired that the time of the crime is based on testimony from the guilt phase of the trial. The Court does not find the Defendant was substantially impaired. The Court does find that there was some impairment that gives this mitigating circumstance little weight.
>
> Circumstances in mitigation that the Defendant was under the influence of extreme mental or emotional disturbance at the time of the killing is based on testimony from the guilt phase of the trial. The court does not find that the Defendant was under the influence of extreme mental or emotional disturbance at the time of the killing. The Court does find that the Defendant was under some mental or emotional disturbance but gives this mitigating circumstance little weight.

(ST70) The question which arises immediately is did the court find the statutory mitigating factors to be present or not? From the first two orders that were generated by the trial court, it appears that the court was finding the statutory mitigating factors to be present. However, and only at the urging of the state, did the court ultimately recede from this finding. It is clear that a trial court must make an independent determination of the aggravating and mitigating circumstances and may not delegate such task to the prosecutor. See Patterson v. State, 513 So. 2d 1257 (Fla. 1987). Yet in the instant case, it appears that the trial court changed his mind simply at the request of the state attorney. Thus, in effect, the state attorney determined the existence and/or applicability of the statutory mitigating circumstances. Further, a trial court in evaluating the mitigating circumstances, must set forth the facts upon which

such conclusions are based. In the instant case, the trial court stated that he was relying on the evidence with regard to this mitigating factor that was presented during the guilt phase. In actuality, the evidence concerning this mitigating factor was presented at the penalty phase through the testimony of Dr. Upson. Dr. Upson testified that he believed that Appellant was under the influence of extreme mental or emotional disturbance at the time of the shooting, and that this was based on his observance that Appellant has brain damage probably induced from his long history of alcoholism and had a volatile relationship with the victim. (R82) Dr. Upson further stated that he believed that when Appellant drinks heavily his judgment is critically impaired and his behavior is impulsive thus making Appellant incapable of making rational decisions. (R82) Appellant's alcohol consumption aggravates his brain damage and makes it very difficult for him to conform his behavior to that required by law. (R82-83) Thus, it is unclear whether the trial court considered this evidence in determining the applicability of the statutory mitigating factors. If he did not consider this evidence, then that was clearly error under this Court's dictates in Campbell and its progeny. If he did consider this evidence and simply rejected it, that was also improper since this evidence of Dr. Upson was presented without contradiction. Since the only evidence presented was that indeed Appellant met the criteria for the statutory mitigating factors then the trial court was bound to accept them since the evidence presented

constituted as a matter of law a reasonable quantity of evidence.

A reasonable reading of the record below indicates that the trial court did not review the sentencing transcript from the original proceeding before he reimposed the death penalty. Thus, it is quite probable that the trial court simply did not adequately remember the evidence presented. Certainly in his final order wherein he states that the evidence that was relied upon for these statutory mitigating factors was presented in the guilt phase of the trial is an incorrect statement since Dr. Upson clearly testified during the penalty phase. While the state attorney below disputed these findings, no evidence was presented which contradicted it. In King v. State, 623 So. 2d 486 (Fla. 1993), this Court disapproved of the trial court's confusing treatment of mitigation, pointing out the need for "unmistakable clarity" in the sentencing order. See also Morgan v. State, 639 So. 2d 6 (Fla. 1994) [disapproving of trial court's confusing findings regarding mitigation]; Santos v. State, 629 So. 2d 838 (Fla. 1994).

In the instant case, the trial court's order is fraught with inconsistencies and ambiguities. The procedure below emphasized the apparent confusion on the part of the trial court as to what his proper role upon remand was. The same ambiguities that existed prior to the remand, continue to exist in the instant case. Having been given a second bite at the apple, certainly this Court cannot permit the trial court any further opportunity to justify his clearly unwarranted actions.

Therefore, this Court has no option but to vacate Appellant's death sentence and remand for imposition of a life sentence.

POINT II

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, AND INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

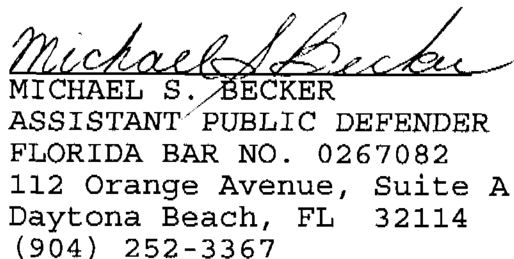
Appellant will not make any further argument with regard to the proportionality of the death sentence in the instant case inasmuch as this issue was fully argued in the Initial Brief under Point V, as well as in the Reply Brief also filed in this case. However, in its initial opinion in this case, this Court did not reach the proportionality issue. Therefore, Appellant urges this Court to give full consideration to the issue as presented in the Initial and Reply Briefs of Appellant. Appellant does not wish to have this Court consider his failure to again raise this issue in this Supplemental Brief as any indication that this issue is waived.

CONCLUSION

Based on the foregoing reasons and authorities stated in this Supplemental Brief as well as in the Initial and Reply Briefs in this cause, Appellant respectfully requests this Honorable Court to vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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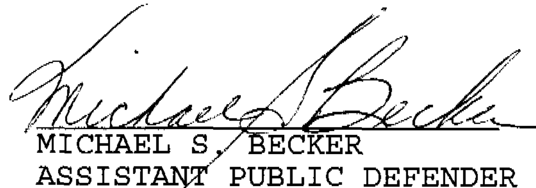
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118 in his basket at the Fifth District Court of Appeal and mailed to Mr. Jack D. Ferrell, #A-083905 (44-1240-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 29th day of January, 1996.



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