IN THE SUPREME COURT OF FLORIDA

JACK DEMPSEY FERRELL,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 81,668

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION IN LIMINE, OVERRULING HIS OBJECTIONS, AND DENYING HIS MOTION FOR MISTRIAL AND ALLOWING INTO EVIDENCE TESTIMONY OF A COLLATERAL CRIME, THUS DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The state responds to this argument by asserting that the statements used by the prosecution were not Williams Rule evidence and therefore not subject to the ten day notice rule. Rather, the state argues that the statements were admissible under the state of mind exception to the hearsay rule. The key to this argument, however, which is overlooked by Appellee, is that even if the statements are admissible under the state of mind exception to the hearsay rule, they still refer to a prior crime and thus are clearly Williams Rule evidence subject to the

ten day notice rule. The state goes on to concede that no notice was given. Appellee never deals with the issue concerning the lack of a hearing to determine the admissibility of these statements where no notice is given as approved by the First District Court of Appeal in Distefano v. State, 526 So.2d 110 (Fla. 1st DCA 1988). Rather, the state merely states that the court heard the arguments of counsel and ruled for the state. Unfortunately, this falls well-short of the requirements that the trial court make specific findings when such a violation is alleged.

The state next argues that the statements were admissible to show premeditation on the part of Mr. Ferrell. The state concludes, "Since Ferrell raised an accidental death defense, his state of mind was at issue." (Brief of Appellee, Page 5) The key to this statement, however, is that the statements in question were admitted prior to Ferrell raising any defense at all. The state admitted these statements during their case-in-chief. Contrary to the state's assertion, the statements could certainly have been redacted to show only the second part which admittedly is relevant to show intent.

Finally, Appellant disputes Appellee's mere conclusory statement, "The state did not make these statements a feature of this trial." (Brief of Appellee, Page 6) The record certainly refutes this statement as noted by defense counsel in his motion for mistrial. The state elicited these comments or made comments upon these statements no fewer than eleven times during the

course of the trial. When viewed in the context of the entire trial proceedings it is hard to conclude otherwise than that these statements became a feature of the trial.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S SPECIAL REQUESTED JURY INSTRUCTION IN THE PENALTY PHASE.

In response to this issue, Appellee does not contend that the proposed instructions were incorrect statements of the law. Rather, Appellee merely argues that the standard jury instructions properly covered the matters requested and that there is no requirement in Florida law to give the requested instructions. Appellant contends that the standard jury instructions did not adequately cover the matters requested in the special requested instructions. While there may not be any "requirement in Florida law" for the trial court to give the special requested instructions, this argument misses the point. This Court has on numerous occasions allowed that there may be situations wherein a trial court must give an instruction in addition to the standard jury instruction in order to adequately inform the jury of the applicable law. Very recently, in Jackson v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994), this Court noted that the standard jury instruction on cold, calculated and premeditated, which this Court had for years approved, was in fact unconstitutionally vague. However, under Appellee's reasoning, since it was the standard jury instruction, nothing could possibly be wrong with it and no amplification

would be necessary. Obviously, this Court felt differently. This is the situation in the instant case also. The requested jury instructions were directly applicable to the instant case. Because of the paucity of aggravating circumstances, it was absolutely crucial for the jury to understand the meaning of mitigating circumstances and thus the definition was essential. So too was it necessary for the jury to understand the types of factors that are considered mitigating. Under the peculiar facts of this case, the error in refusing to give these instructions cannot be deemed harmless. Appellee's conclusory statement, "Any error in the court's instruction is harmless since the result of this sentencing hearing would have been the same had the jury been instructed as Appellant now contends it should have been," (Brief of Appellee, Page 11), is insufficient to prove that the failure by the trial court to give the requested instruction was harmless beyond a reasonable doubt.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT 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 A DEATH SENTENCE WITHOUT MAKING THE REQUISITE FINDINGS OF FACT TO SUPPORT THE SENTENCE IN WRITING AS REQUIRED.

Appellee argues that while perhaps the written order could have been more "artfully drawn" any failings are made up for in the oral pronouncement during sentencing. Such conclusion in untenable for several reasons.

First, in its oral pronouncement, the trial court gives lip service to the mitigating factors put forth by defense counsel. However, there is no way for this Court to determine whether the trial court considered these factors to be mitigating and if so what weight it assigned to them. It is respectfully submitted that while defense counsel may have argued that these factors were mitigating, the trial court could have chosen to ignore them. If this is the case, clear error is present since each of the factors set forth were established by a reasonable quantum of evidence. Under this Court's holdings in Campbell v. State, 571 So.2d 415 (Fla. 1990) and Nibert v. State, 574 So.2d 1063 (Fla. 1990) a trial court must find the existence of mitigating circumstances when a reasonable quantum of competent uncontroverted evidence of the mitigating circumstance is presented. The trial court's oral pronouncement gives no clue

whatsoever as to whether in fact the trial court found the factors put forth by defense counsel to be mitigating, and, if so, what weight was assigned to them. The mere conclusion that the aggravating circumstances outweigh the mitigating does not satisfy this test.

Secondly, the trial court had to be aware of this Court's prior pronouncements in Van Royal v. State, 497 So.2d 625 (Fla. 1986) and Bouie v. State, 559 So.2d 1113 (Fla. 1990) wherein this Court admonished trial courts of the necessity for specific written findings of fact with regard to the aggravating and mitigating factors so that meaningful appellate review thereof could be conducted. This requirement certainly was not a new requirement and the trial judge in the instant case was not a novice when it came to death penalty. The trial judge in the instant case was the same trial judge in Duncan v. State, 619 So.2d 279 (Fla. 1993). This Court, in taking judicial notice of its own records, can review the findings of fact entered by Judge Dawson in the Duncan case, compare them to the findings of fact entered in the instant case, and observe the glaring deficiency of the findings of fact in the instant case. This Court should not lightly excuse trial courts from complying with procedural requirements particularly in death cases where the consequences are so utterly important. This Court must vacate Appellant's death sentence and remand for imposition of a life sentence.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT 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.

In arguing that the death penalty is proportionate in the instant case, Appellee argues that this Court has placed great emphasis on the propriety of the death sentence where the defendant had a prior conviction for a violent felony and that violent felony was another murder. While Appellant is certainly not attempting to minimize the importance of this aggravating circumstance, this Court has never held that a prior murder conviction automatically calls for the imposition of the death penalty. Indeed, such a holding would violate the very dictates of due process. Rather, this Court has continued to emphasize the need to evaluate any aggravating circumstance in the context of the mitigation that is presented. When this is done in the instant case, the conclusion that must be reached is that the death penalty is disproportionate.

The only reasonable way to conduct a proportionality review is by comparing the instant case to other cases decided by this Court. Numerous cases are set forth in the Initial Brief of Appellant. Additionally, Appellant draws this Court's attention to White v. State, 616 So.2d 21 (Fla. 1993), wherein this Court reduced a death sentence to life. In White the trial court found

a single aggravating circumstance, a prior violent felony committed on the same victim. The trial court found three mitigating factors, the two statutory mental mitigators and the defendant's drug usage. The jury in White recommended death by an 11 to 1 vote. In reducing the death sentence to life, this Court noted that the situation was a result of a domestic dispute and that the death sentence was just not proportionate. This conclusion was notwithstanding the history of violent altercations between appellant and the victim and despite the fact that while in jail for assaulting the victim, White told another inmate that he would kill the victim. Surely, the facts in the instant case are not nearly as egregious as those in White. Yet this Court still found that death was not appropriate in that case.

Another case to be considered is Deangelo v. State, 616 So.2d 440 (Fla. 1993). The trial court found one aggravating factor, cold, calculated and premeditated. The jury recommended death by a 7 to 5 vote. On review, this Court held that the death sentence was disproportionate in light of the substantial evidence of an ongoing quarrel between the defendant and the victim which ultimately culminated in the killing. This Court noted the history of conflict is relevant mitigation. This exact factor is clearly present in the instant case. Numerous state witnesses testified that Appellant and the victim constantly quarreled and constantly drank. In light of this, and as this Court found in Deangelo, the death penalty is not proportionate.

As noted previously, numerous mitigating factors were presented in the instant case. Appellant's history of alcohol abuse which resulted in brain injury, is uncontroverted. Appellant's work history was similarly unrebutted. The mental mitigators are indeed present in the instant case and must be weighed heavily in determining the propriety of a death sentence. Simply put, this case presents one of the least aggravated and most mitigated of all cases to come before this Court. The death penalty must be vacated.

CONCLUSION

Based on the reasons and authorities presented in this brief, Appellant respectfully requests this Honorable Court to grant the following relief:

As to Points I and II, reverse his judgment and sentence and remand for a new trial;

As to Point III, vacate the death sentence and remand for a new penalty phase;

As to Points IV and V, vacate the death sentence and remand with instructions to sentence Appellant to life imprisonment.

Respectfully submitted,

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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 (44-1237-A1), P.O. Box 221, Raiford, FL 32083, this 20th day of June, 1994.

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