IN THE SUPREME COURT OF FLORIDA

MICHAEL ALAN LAWRENCE,

Appellant,

v. CASE NO. 82,256

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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TABLE OF CONTENTS

TABLE OF CITATIONS

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant files this reply brief in response to the arguments presented by the state as to Issues I and III. Appellant will rely on the arguments presented in his initial brief as to Issues II, IV, V, VI, VII, and VIII.

ARGUMENT

ISSUE I

THE TRIAL COURT'S FAILURE TO GIVE AN INSTRUCTION DEFINING REASONABLE DOUBT DEPRIVED LAWRENCE OF A RELIABLE PENALTY PHASE PROCEEDING, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION.

The state's first argument is that this claim is procedurally barred because Lawrence did not raise it at his first trial, which included both guilt and penalty phases. This argument must be rejected for two reasons. First, the issue of whether it is error not to reinstruct a capital jury on

the definition of reasonable doubt prior to penalty phase deliberations where the definition was given prior to guilt phase deliberations is not the issue in this case, and its resolution is unnecessary to the resolution of the issue here, whether it is error to fail to instruct the jury on reasonable doubt in a resentencing proceeding where the jury has never been instructed on the definition of reasonable doubt. Second, even if Lawrence could have raised the issue in his first trial, but did not, he would not be precluded from raising it here. A resentencing is a completely new proceeding. The notion that a defendant must utilize the same strategy at a retrial that he pursued during an earlier trial, or that he must adhere to the same mistakes made in an earlier trial, defies logic and is not what is meant by the law of the case.

The state's second argument is that the failure to object to the lack of a reasonable doubt instruction is not fundamental error, citing Esty v. State, 642 So. 2d 1074 (Fla. 1994); Armstrong v. State, 642 So. 2d 730 (Fla. 1994); Parker v. State, 641 So. 2d 369 (Fla. 1994); Knight v. State, 60 Fla. 19, 53 So. 541 (1910). Esty and Armstrong are distinguishable because in those cases, the standard jury instruction on reasonable doubt was given and the Court found that instruction to be constitutional. Esty, 642 So. 2d at 1080 ("'taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury.'"); accord Armstrong, 642 So. 2d at 737. Although it is not clear from the opinion, it is likely that the standard reasonable doubt instruction was given in Parker as well. In Knight, an arson case, this Court held the instruction on alibi, which contained reasonable doubt language, was adequate even though Knight had not requested a definition of reasonable doubt. Knight was decided prior to the United States Supreme Court's decisions in Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), and Sullivan v. Louisiana, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), and is no longer good law.

Furthermore, in none of these cases did this Court address the question of whether the giving of a defective reasonable doubt instruction, or the failure to give any instruction, is fundamental error.

The state's final arguments are that Lawrence's claim fails because the standard jury instruction on reasonable doubt, by its wording, specifically applies only to guilt phase proceedings; there is no standard jury instruction on reasonable doubt in the standard penalty phase instructions; and no federal court has held the failure to define reasonable doubt in a criminal trial is constitutional error. That the guilt phase reasonable doubt instruction has not been modified for purposes of penalty phase-only proceedings in the Standard Jury Instructions does not mean the instruction is not constitutionally required in such proceedings. Furthermore, although the Court has not been faced with a case in which no definition of reasonable doubt was given, the Court has said that although due process does not require "any particular form of words, the instructions "'taken as a whole . . . [must] correctly convey[] the concept of reasonable doubt to the jury.'" Victor v. Nebraska, 114 S.Ct. 1239, 127 L.Ed.2d 583, 590 (1994)(quoting Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed.2d 150 (1954)). Here, the instructions as a whole plainly did not correctly convey the concept of reasonable doubt to the jury. Indeed, the instructions did not convey the concept at all. This defect requires reversal for a new penalty phase proceeding.

ISSUE III

THE TRIAL COURT REVERSIBLY ERRED IN ALLOWING THE PROSECUTOR TO READ THE TESTIMONY GIVEN BY SONYA GARDNER AT LAWRENCE'S PRIOR TRIAL WHERE THE STATE DID NOT DEMONSTRATE HER UNAVAILABILITY.

The state contends first that Gardner's former testimony was admissible because the state exercised due diligence in making a good faith effort to locate Gardner but could not subpoena her because Gardner's boyfriend, with whom she was camping, never called back the state's investigator, Tom Tucker, to give Tucker directions to their campsite. State's Answer Brief at 16, 19.

In fact, the record demonstrates the state located Gardner and very easily could have obtained directions to her campsite and served her with a subpoena the day before trial, but simply failed to do so. Tucker testified that when he spoke to Gardner's boyfriend the evening before trial, the boyfriend told Tucker that Gardner would appear only if forced to be there. (T 66-67). Tucker then testified, "But I was never able to get her a subpoena and, you know, only that if, you know, nothing else could be done would she be here. And then I don't know, he said I'll call back tomorrow, and it's just been a mess." (T 67). When asked whether the boyfriend called back after that, Tucker responded:

> I haven't heard from them today. I was supposed to call back to a number again in Milton. They were going to call that number to check in to see if I had tried to reach them sometime today in the morning I expect, and then I was going to let them know on whether or not, you know, we would be able to get around her being here.

(T 67). Later, when the court inquired of Tucker, Tucker stated that when he talked to the boyfriend, the boyfriend volunteered to direct him back to where they were camping, if Gardner's

presence were necessary. (T 69). When the court asked whether he had gotten those directions, Tucker said, "I hadn't yet, no, sir."

This testimony makes clear the state dropped the ball after it located Gardner. Tucker could have obtained the directions to her location the day before trial and served her with a subpoena. The trial court correctly ruled initially that Gardner was available under the rule.

The trial court erred in admitting Gardner's testimony, over defense objection, as relevant to his state of mind at the time the crime was committed, that is, as relevant to mitigation. It is a defendant's prerogative to decide what evidence will be admitted to the advisory jury in mitigation, not the trial judge's. Lawrence decided Gardner's prior testimony was more prejudicial than it was mitigating, and the trial judge's decision to allow the testimony on the basis that it was relevant in mitigation encroached on Lawrence's right to the effective assistance of counsel. This error requires reversal for a new trial.

CONCLUSION

Based upon the argument, reasoning, and citation of authority in this and the initial brief, appellant asks that this Court grant the relief requested in his initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Gypsy Bailey, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, MICHAEL ALAN LAWRENCE, #056903, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this 5th day of January, 1996.

NADA M. CAREY