IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 29 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

VICTOR MARCUS FARR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 82,894

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR COLUMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT BUTTERWORTH
ATTORNEY GENERAL

BARBARA J. YATES
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 293237

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGES

CONSTITUTIONS AND STATUTES PAGES

STATEMENT OF THE CASE AND FACTS

The state accepts Farr's statement of the case and facts with the following additions.

This Court set out the basic facts of this case in its original opinion:

> In December 1990, Farr attempted to kidnap and then shot and wounded two women outside a Lake City bar. He attempted to escape by forcibly taking a car in which a man and woman were sitting. The man fled, but Farr managed to crank the car and escape with the woman still inside. When he was pursued by officers later, Farr deliberately accelerated the car into a tree, hoping to kill himself and his hostage. The woman was severely injured in the crash and died of her injuries soon thereafter. Farr was only slightly injured.

Farr v. State, 621 So.2d 1368, 1369 (Fla. 1993). The grand jury returned a twelve-count indictment, charging Farr with, among other things, two counts of attempted first-degree murder, armed kidnapping, armed robbery, and first-degree murder. (R 124-127).[1] Farr pled guilty to all twelve counts on April 2, 1991. (R 1-38).

After the state indicted Farr in early January 1991, his counsel moved for an examination to determine Farr's competency. (R 132). The court granted that motion on February 7, 1991 and appointed Dr. Umesh Mhatre to examine Farr. (R 145). Dr. Mhatre examined Farr on February 19 and wrote his report on February 25, 1991. (R 261).

---

[1] The state will use the same record designations as Farr does, i.e., "R" refers to the original record and "SR" refers to the resentencing record.

Judge Agner accepted Farr's guilty plea on April 2, 1991 (R 35), and the penalty phase was set for May 13, 1991. On May 13 Farr specifically stated in open court that he did not want Dr. Mhatre to participate in the penalty proceedings. (R 54-55). He had no objection, however, to Dr. Mhatre's report being introduced into evidence. (R 56). The court asked Farr if he had any mental problems, and Farr indicated that he had been institutionalized but had never been adjudicated incompetent. (R 59-60). Both during the plea colloquy and the penalty proceedings Farr stated that he was not on medication, that he understood the nature of the crimes, and that he wanted to waive the penalty-phase jury.[2] (R 6-8, 19-20, 26-30, 33-36, 60-64). The court stated that, in spite of Farr's desires and based on Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), the court must look at all mitigating evidence. (R 65).

On April 2, 1991 Judge Agner ordered that a presentence investigation report (PSI) be prepared on Farr. (R 189). Pursuant to that order, Mike Dunn, a probation officer, interviewed Farr on April 9, 1991 (R 226) and signed the written PSI on April 26, 1991. (R 235). At the penalty proceedings on May 13 Dunn testified that Farr told him that he intended to kill the victim and that he intentionally crashed into the tree because he wanted to kill her but had no more ammunition for his

---

[2] In a letter to counsel dated March 28, 1991, Farr stated "that I want to waive and give up the right to have a jury hear evidence and argument and then recommend my sentence to the Judge" and instructed counsel "to make no statements, and to take no action which opposes the imposition of the death penalty upon me." (R 182).

pistol. (R 81). Farr asked Dunn to incorporate into the PSI two letters that Farr had written (R 83), and the state introduced those letters (dated February 20, 1991 and April 12, 1991) into evidence. (R 84).[3] Farr took the stand at the penalty phase and verified that he wrote the letters. (R 89). The defense introduced two other letters, both dated April 25, 1991, in which Farr set out the victim's pleas for her life. (R 89). Following the penalty phase, the court sentenced Farr to death, finding that four aggravators (previous conviction of violent felony, committed during the commission of other felonies, committed to hinder the enforcement of the law, and heinous, atrocious, or cruel) and no mitigators had been established. (R 116-21).

On appeal this Court held that the four aggravators found "by the trial court clearly were established beyond a reasonable doubt." Farr, 621 So.2d at 1370. This Court also, however, decided that the trial court had not considered all the available mitigating evidence and, therefore, vacated the death sentence and directed the trial court to "conduct a new penalty phase hearing in which it weighs all available mitigating evidence against the aggravating factors." Id. This direction came after noting that "the record contained a psychiatric report and presentence investigation report containing information about Farr's troubled childhood, numerous suicide attempts, the murder of his mother, psychological disorders resulting in hospitalization, sexual abuse suffered as a child, and his

---

[3] The letters reflected Farr's intention to kill the victim and described the course of events leading to her death.

chronic alcoholism and drug abuse, among other matters." Id. at 1369.

Judge Agner held a new penalty hearing on December 8, 1993. The judge asked Farr about a letter that Farr wrote to the judge on November 13, 1993,[4] specifically if Farr wrote the letter and intended for the judge to receive it. (SR 451-53). Farr was then sworn in and identified a letter he wrote instructing defense counsel how to proceed on resentencing,[5] and defense counsel read that letter into the record. (SR 454-59). Among other things, that letter stated that it was Farr's "desire to again proceed to the penalty phase without a jury" (SR 456) and directed counsel "not to do or say anything which would in any way oppose the death penalty being given to me." (SR 456). The letter listed the possible mitigators noted by this Court and stated: "As my letters to the state attorney and others revealed, some of these 'mitigating circumstances' never existed, and those that did, had nothing whatsoever to do with any actions on the night I killed Shirley Bryant. I inform you I do not want you to present evidence or testimony or argument regarding any mitigating circumstances on my behalf." (SR 458). The defense also gave the court transcripts of two letters Farr wrote to the

---

[4] This letter is included in the record at SR 402-03 as defendant's exhibit no. 1.

[5] This letter is dated December 7, 1993 and is defendant's exhibit no. 2. (SR 404-05).

court that were read into the record at the original penalty phase.[6] (SR 460).

The prosecutor then cross-examined Farr and had him identify six letters that the prosecutor entered into evidence.[7] (SR 463-68). The prosecutor reserved the right to question Farr about the contents of those letters. (SR 469). Defense counsel suggested that the state proceed because "again pursuant to the instructions of my client, we intend to offer no mitigating circumstances. So I realize that the Supreme Court has addressed four or five, perhaps six possible mitigators. But again, pursuant to my client's instructions, I am not to bring those up." (SR 469). The state thereafter continued its cross-examination.

Regarding this Court's noting Farr's troubled childhood as a possible mitigator based on the PSI[8] and Dr. Mhatre's report,[9] the prosecutor read from Farr's April 21, 1991 letter to Judge

---

[6] These letters are dated April 25, 1991 and are defendant's exhibit no. 3. The transcripts containing these letters can be found at SR 406-11.

[7] Farr wrote four of these letters (dated November 21, 1991, November 22, 1991, December 2, 1991, and September 13, 1993) to Assistant State Attorney Tom Coleman. A fifth letter, dated August 21, 1991 was to State Attorney Jerry Blair, and the sixth, dated June 25, 1993, was from Farr to the victim's parents. These letters are located in the record at SR 386-401.

[8] The PSI stated that his natural father left when Farr was an infant, that his mother and stepfather divorced when Farr was 14, and that he dropped out of school in the seventh grade. (R 230).

[9] Besides including some of the items in the PSI, according to Dr. Mhatre's report the family moved around a lot, Farr lived with different family members, his stepfather was a chronic alcoholic, his mother suffered from depression and attempted suicide several times, and Farr ran away from home three times. (R 261-62).

Agner: "'I can say many things to cover up, but the truth is I was raised good, with lots of love and understanding. I was blessed with a father who tried to give his all and worked hard to take care of me, but I always turned wrong.'" (SR 471). Farr confirmed that he wrote those words and that they expressed his true feelings about his family. (SR 271). He also acknowledged that in his letter of August 21, 1991 to State Attorney Blair he stated: "'As for my childhood, it would only be a cop out to say that that played any part in that night, for it did not.'" (SR 472). After being read that quotation, Farr stated: "I wrote that and those words are true." (SR 472).

Turning to Farr's alleged suicide attempts,[10] the prosecutor read the following from Dr. Mhatre's report: "'Victor has made four suicide attempts so far by cutting his wrists and taking an overdose of medication.'" (SR 472). The prosecutor then asked: "Is that a fact, that four times in your past you attempted suicide, sir?" (SR 472). Farr responded: "No, that is a lie. You can look at my wrists (indicating) and there is no scars. I've used that to be put in state mental hospitals to get out of trouble before. And if you look at my past arrest record, you will find that the dates I was admitted to the hospital are the same dates there was charges filed against me." (SR 472-73).

Dr. Mhatre reported that Farr had "extensive inpatient hospitalization in 1985"[11] due to depression with suicidal

---

10 The PSI does not mention any suicide attempts.

11 In the PSI Farr said that he had been admitted to a hospital voluntarily for 30 days to avoid court proceedings. (R 231).

thoughts and visual hallucinations and that Farr "actually used to see his mother come alive and talk to him" and that Farr continued to experience depression because of his inability to see his children, his multiple broken relationships, and the loss of his mother. (R 263). When asked if he had told Dr. Mhatre the truth, Farr responded: "What I told Dr. Mhatre at the time was to dig myself out of a hole." (SR 473). Farr further stated that he lied to Dr. Mhatre about having had visual hallucinations and that his mother was killed in 1986 the year after he told the doctor he had been hospitalized with hallucinations of her coming back to life. (SR 473-78). Farr then confirmed that his hospitalization was to evade criminal charges. (SR 478-80).

As to the possible mitigating effect of his mother's being murdered, Farr acknowledged that her live-in boyfriend killed her. (SR 474). When the prosecutor asked if he suffered any mental illness or effects from his mother's death, Farr responded: "Just natural sadness and natural depression." (SR 475). Farr also confirmed that, in his April 21, 1991 letter to Blair, he wrote that his mother's death did not play any part in events leading up to the victim's death. (SR 476-77).

Farr acknowledged that he told Dr. Mhatre that he had been sexually abused as a child.[12] (SR 480). However, Farr also stated that he did not tell Dr. Mhatre the truth and denied ever having been sexually abused. (SR 480).

---

12 The PSI contains no mention of sexual abuse.

As a sixth possible mitigator, this Court listed Farr's alleged chronic alcoholism and drug abuse. Farr testified that he started drinking around age thirteen, but stated: "I've never had a black-out and I've never had the DTs." (SR 481). He said that he had gone for periods of one and one-half to two years without drinking. (SR 482). The PSI reported Farr's consumption of alcohol as three cases of beer and a fifth of liquor per week, but Farr testified that he actually drank only about a case of beer and no hard liquor per week. (SR 482-83). Also, rather than the reported twenty-five pills of speed per day, Farr stated that he ingested one "twenty-five-cent piece, not pills," of speed per week. (SR 483). Farr acknowledged that he used marijuana sparingly (SR 484) and stated that the only time in his life that he ever used cocaine was in August 1990. (SR 485). Farr denied using any narcotic or drug the evening he committed these crimes, confirmed that he had a detailed memory of that evening's events, and acknowledged that his telling Dr. Mhatre he could not remember those events was a lie. (SR 486).

At the end of Farr's testimony, the prosecutor asked if he could think of any circumstances that would mitigate Farr's killing the victim, and Farr responded: "Truthfully, no, sir." (SR 487). Defense counsel then stated that, in spite of Farr's instructions, he had gone through the entire record and could find no other potential mitigators than those that had been addressed at the hearing. (SR 488). The prosecutor noted that this Court affirmed the four aggravators originally found by the trial court and asked that the court again find those

aggravators. (SR 489-90). The prosecutor also argued that the evidence negated the possible mitigators noted by this Court. (SR 490-91). After a recess, the court returned and read into the record its new sentencing order, in which it found again the four originally found aggravators and discussed in detail the possible mitigators. (SR 494-511).[13] The court found "that no mitigating circumstances, either statutory or nonstatutory, exist to outweigh or offset the aggravating circumstances which have been proven to the Court beyond and to the exclusion of every reasonable doubt." (SR 511). Thereafter, the court sentenced Farr to death (SR 512), and this appeal ensued.

---

13 The written findings are at SR 414-21.

SUMMARY OF ARGUMENT

The trial court conscientiously considered all of the evidence about the possible mitigators and correctly concluded that no mitigators had been established. Farr's appellate counsel's argument that the court should not have relied on Farr's testimony and letters to negate the possible mitigators ignores the fact that the only evidence of those possible mitigators comes from Farr's uncorroborated self-reporting. On the initial appeal this Court properly refused Farr's request to recede from Hamblen v. State, 527 So.2d 800 (Fla. 1988), and it should not revisit this issue. This Court held that all of the aggravators found by the trial court had been established beyond a reasonable doubt when it considered the issue in the original appeal. Farr's reargument that two of those aggravators should not have been found is, therefore, not cognizable in the instant appeal.

ARGUMENT

ISSUE

THE TRIAL COURT DID NOT ERR IN ALLOWING FARR TO WAIVE THE PRESENTATION OF MITIGATING EVIDENCE AND PROPERLY AND CORRECTLY SENTENCED FARR TO DEATH

The trial court gave all due consideration to the mitigating evidence and properly sentenced Farr to death. Contrary to Farr's contentions, this Court should not recede from Hamblen v. State, 527 So.2d 800 (Fla. 1988). As this Court correctly held on direct appeal of the original sentence, the four aggravators that the trial court found "clearly were established beyond a reasonable doubt." Farr, 621 So.2d at 1370.

(A) The Trial Court Properly Weighed and Evaluated the Mitigating Evidence

In remanding for resentencing this Court called the trial court's attention to Santos v. State, 591 So.2d 160 (Fla. 1991); Campbell v. State, 571 So.2d 415 (Fla. 1990); and Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). In Santos this Court stated: "Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence." 591 So.2d at 164. This quote from Santos echoes the statement in Campbell that a trial "court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence." 571 So.2d 419 (footnote omitted). Thus, both Santos and Campbell recognize that mitigators must be

established by evidence presented at the trial. As this Court stated in Rogers, "the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence." 511 So.2d at 534. Therefore, the teaching that can be gleaned from the cases cited by this Court on Farr's first appeal is that whether a proposed mitigator has been reasonably established by the greater weight of the evidence "is a question of fact." Campbell, 571 So.2d at 419 n.5.; Lucas v. State, 613 So.2d 408 (Fla. 1992).

A trial court's finding that a mitigator is not supported by the facts "will be presumed correct and upheld on review if supported by 'sufficient competent evidence in the record.'" Campbell, 571 So.2d at 419 n.5 (quoting Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981)); Lucas; Johnson v. State, 608 So.2d 4 (Fla. 1992), cert. denied, 124 L.Ed.2d 273 (1993); Ponticelli v. State, 593 So.2d 483 (Fla. 1991), aff'd on remand, 618 So.2d 154 (Fla.), cert. denied, 114 S.Ct. 352 (1993); see Clark v. State, 613 So.2d 412 (Fla. 1992), cert. denied, 114 S.Ct. 114, 126 L.Ed.2d 79 (1993). Thus, the decision on whether the facts establish a particular mitigator lies with the trial court and will not be reversed merely because an appellant, or this Court, reaches a different conclusion. Preston v. State, 604 So.2d 404 (Fla. 1992); Sireci v. State, 587 So.2d 450 (Fla. 1991). Furthermore, resolving conflicts in the evidence is the trial court's duty, and its resolution is final if supported by competent substantial evidence. Parker v. State, 19 Fla. L. Weekly S322 (Fla. June 16, 1994); Lucas; Johnson; Sireci.

The trial court applied the above-stated principles to the possible mitigators mentioned by this Court and properly found that they had not been established. The court made the following findings as to the possible mitigators:

> 1) Farr's troubled childhood.
>
> FINDING: Farr told Dr. Mhatre that he ran away from home on three different occasions as a teenager because, "I did not feel like I belonged in my family". From that Dr. Mhatre concluded that Farr felt rejected both emotionally and every other way by his family. Later, however, in a letter that Farr acknowledged writing and requested be read to the Court at his original sentencing, Farr stated: "I could say many things to cover up. But the truth is I was rased (sic) good. With lots of love. And understanding. I was blessed with a farther (sic) who tryed (sic) to give his all. And worked hard to take care of me. But I always turned wrong." Farr further states in his letter of August 21, 1991, to Jerry Blair, State Attorney, "As for my childhood. . . it would only be a cop out to say that played any part in that night. For it did not." The Defendant testified at resentencing that his statement to Dr. Mhatre was not true, but that his statement in his letter of August 21, 1991, was, in fact, true.
>
> 2) Farr's numerous suicide attempts.
>
> FINDING: As part of his report, Dr. Mhatre reports that, "Victor has made 4 suicide attempts so far by cutting his writs [sic] and taking an overdose of medication". No further mention is made of these events or any effect they had on Farr on the night of the crime. Dr. Mhatre does note later in his report that Farr denied any present suicidal or homicidal thoughts. The Defendant testified at resentencing that he had made no suicide attempts and that he had lied to Dr. Mhatre.
>
> 3) The murder of Farr's mother.
>
> FINDING: According to Dr. Mhatre's report, Farr told him that his mother was murdered in

January of 1986 by her live-in boyfriend who is now in prison. Later in his report, Dr. Mhatre quotes Farr as telling him that, "I learned that alcohol was good for hiding things like my mother being gone". Later Dr. Mhatre refers to Farr's psychiatric hospitalization and stated that Farr reported visual hallucinations at that time; claiming that he actually used to see his mother come alive and talk to him. Given the fact that the same report states that the psychiatric hospitalization occurred in March, April, and May of 1985, which is prior to Farr's mother's death, this statement of Farr is suspect in its veracity. Farr further states in his letter of August 21, 1991, to Jerry Blair, State Attorney, "As for . . . Mother being killed . . . it would only be a cop out to say that played any part in that night. For it did not." The Defendant testified at resentencing that his mother was in fact murdered and that he experienced normal grief, but denied any visual hallucinations regarding his mother and denied that her death had any impact on his decisions on the night that he committed the murder for which he now faces sentencing.

4) Farr's psychological disorders resulting in hospitalization.

FINDING: Dr. Mhatre reports one psychiatric hospitalization of Farr and apparently relies on Farr's report of the incident. This period of hospitalization occurred in March, April, and May of 1985, and Farr apparently told Dr. Mhatre that he was diagnosed as suffering from depression and suicidal thoughts with visual hallucinations. Dr. Mhatre stated that Farr was mildly depressed at the time that he examined him, but the depression was due to his legal status at that time. Dr. Mhatre went on to state that Farr's affect was appropriate and found no evidence of psychosis. Dr. Mhatre found that Farr was oriented as to time, place, and person, and that his memory for immediate, recent, and remote events was fairly intact. Farr indicated in the Pre-Sentence Investigation Report that he voluntarily admitted himself to the mental health center in San Antonio, Texas to avoid court proceedings; stating that he remained in the program for thirty

days and was released. Farr further states in his letter of August 21, 1991, to Jerry Blair, State Attorney,

> ". . . the State Hospital, I was in I said I seen things, that I plained (sic) to kill myself, that I heard things. The reason it was a way for me to keep out of jail. For I was wanted for stilling (sic) a truck. So I put or had myself put in the mental hospital to help have the charges droped (sic). I used the mental hospital twice to bet (sic) charges as that and charges was droped (sic) each time".

The Defendant testified at resentencing that he had been psychiatrically hospitalized on two occasions, but claimed that both were at his instigation in efforts to avoid the consequences of criminal conduct. The Defendant further testified that he told the staff where he was hospitalized that he was depressed, suicidal, and having visual hallucinations of his mother, but that these statements were not true.

5) The sexual abuse Farr suffered as a child.

FINDING: Dr. Mhatre reports that Farr "claims that he was sexually abused by a stranger when he was 14 years old, this abuse consisted mostly of fondling". This claim of abuse is not mentioned again by Dr. Mhatre and appears to have had no clinical significance in the conclusions reached by Dr. Mhatre that Farr was sane at the time of the alleged offense and competent to proceed at the time of the examination. At resentencing the Defendant denied a history of abuse and specifically denied that he had ever been sexually abused. He further testified that he lied to Dr. Mhatre about this.

6) Farr's chronic alcohol and drug abuse.

FINDING: In the Psychiatric Evaluation Report, Farr stated that he had begun drinking alcohol at the age of 13. Farr claimed at times in his life he drank as much as a case of beer in a day. Farr stated that his longest period of abstinence was 4

months, but denied ever having any black out spells or any delirium tremens. This murder occurred on December 11, 1990. In the Pre-Sentence Investigation Report, Farr stated that he was consuming about 3 cases of beer and a fifth of liquor per week in December of 1990. Until November of 1990, he used "speed" at the rate of about 25 pills per day. Farr stated that he used marijuana sparingly, usually 1 cigarette at a time, and last smoked marijuana in December of 1990. Farr further stated that he had used cocaine in the past and last used cocaine in August of 1990. Dr. Mhatre, upon examining Farr pursuant to order of this Court, found no evidence of psychosis, induced by prolonged alcohol or drug abuse or otherwise. Dr. Mhatre goes on to discuss the amount of beer consumed by Farr on the night of this murder and to conclude that Farr was "heavily intoxicated" at the time of the murder which, in Dr. Mhatre's opinion, did not constitute insanity, but was ". . . strong mitigating circumstances. . .". The Court finds it noteworthy that Farr detailed his ingestion of alcohol to Dr. Mhatre and then claimed not to remember anything after arriving at the bar where this murder and the associated crimes to which Farr has pled guilty began. It is reasonable to conclude that Dr. Mhatre based his opinion that Farr was "heavily intoxicated", at least in part, on Farr's apparent lack of memory of the crimes. Later, Farr recounted the circumstances of his crimes on the night in question in great detail in letters which he has admitted authoring. Farr further states in his letter of August 21, 1991, to Jerry Blair, State Attorney, ". . . I was not so drunk I don't remember, for I knew what I was doing. At first I said, I did not know what happen (sic) it was away (sic) to lie my way out of trouble. But then I told the truth in all my letters to you." It is evident to the Court that Farr misled Dr. Mhatre as to the extent of his intoxication the night of the murder. There is no evidence in the record to indicate that Farr ingested any controlled substances on the night in question. At resentencing the Defendant confirmed a history of alcohol abuse, but denied extensive abuse of illegal drugs and testified that he fully recalled all of the events of the December 11, 1990, contrary to what he had told Dr. Mhatre earlier.

7) "Other matters".

> FINDING: The Court has carefully searched the complete record in this matter and finds no other circumstances that would serve to mitigate the Defendant's conduct on the night in question. Further, the Defendant testified at resentencing that he had no knowledge of any circumstances that mitigate his conduct on December 11, 1990.

(SR 418-21). After making these findings, the court went on to state: "Having considered the entire record in this case, including all matters presented at the original sentencing hearing, it is the Court's reasoned judgment that no mitigating circumstances, either statutory or nonstatutory, exist to outweigh or offset the aggravating circumstances which have been proven to the Court beyond and to the exclusion of every reasonable doubt." (SR 421).

As directed in Pettit v. State, 591 So.2d 618, 620 (Fla.), cert. denied, 113 S.Ct. 110, 121 L.Ed.2d 68 (1992), trial courts are to "carefully analyze the possible statutory and nonstatutory mitigating factors against the aggravators to assure that death is appropriate." Farr argues that the careful analysis and consideration required by Pettit did not occur. This argument's lack of merit, however, is readily apparent, and a reading of the record demonstrates that the trial court's findings of fact and conclusion that death is the appropriate penalty are supported by competent substantial evidence.

Appellate counsel chides the trial court for relying on Farr's testimony and letters to reject the possible mitigators. The contention that Farr's testimony should not be taken at face value, however, ignores the fact that the possible mitigators in

the psychiatric report and the PSI are also based solely on Farr's uncorroborated self-reporting. It also ignores the fact that, immediately after making his statements to Dr. Mhatre and Mr. Dunn, Farr began repudiating those statements and did so continuously and repeatedly thereafter.

Turning to the court's findings, appellate counsel argues that nothing refuted the fact that Farr never knew his natural father, that his stepfather was an alcoholic, and that he was raised by various relatives, moved around a lot, and ran away from home. As required by Rogers, "the trial court's first task in reaching its conclusion is to consider whether the facts alleged in mitigation are supported by the evidence." 511 So.2d at 534. Thereafter, "the court must determine whether the established facts are of a kind capable of mitigating the defendant's punishment." Id. Merely stating the items now complained about does not prove them. Sentencing is an individualized process, and what may be proved as a mitigating factor for one defendant may not be supported by the record for another. There are no "hard-and-fast rules about what must be found in mitigation in any particular case." Lucas v. State, 568 So.2d 18, 23 (Fla. 1990). Nothing in this record corroborates the existence of the complained-about items as established mitigators or demonstrates how they "extenuat[e] or reduc[e] the degree of moral culpability for the crime committed" by Farr. Rogers, 511 So.2d at 534. The trial court, therefore, properly rejected Farr's "troubled childhood" as a mitigating circumstance because the facts did not establish it.

The argument that Farr's alleged suicide attempts should have been found as a mitigator is refuted by Farr's statements that such attempts did not occur. Exhibiting his unscarred wrists showed the absence of a factual basis for this possible mitigator.

Likewise, the court's discussion of the third and fourth possible mitigators, the death of Farr's mother and his hospitalization, shows that the facts did not support them. Instead, the record demonstrates Farr's familiarity with the criminal justice system and his knowledge that he could manipulate that system to his benefit. Rather than suporting the existence of these possible mitigators, the record shows that, finally, Farr decided to take responsibility for his crimes.

As with the other possible mitigators, the argument on Farr's alleged sexual abuse as a child consists solely of the complaint that the court's finding was based on Farr's testimony. Dr. Mhatre made a single reference to this item and drew no conclusions from it. Farr's testimony that he lied about the alleged sexual abuse and that he had never been abused was credible testimony and amply supports the court's conclusion that the alleged abuse was not a mitigator.

In rejecting Farr's alleged alcohol and drug use as a mitigator the court detailed what Farr said in the doctor's report, in the PSI, and at the resentencing hearing. Although Farr had been drinking earlier on December 11, he was well aware of what he did that night. As the court found evident, "Farr misled Dr. Mhatre as to the extent of his intoxication the night

of the murder." (SR 420). Thus, the record refutes the claim that the court should have found that Farr's drug and alcohol abuse mitigated his culpability for this killing. Reliance on Nibert v. State, 574 So.2d 1059 (Fla. 1990), and Ross v. State, 474 So.2d 1170 (Fla. 1985), is misplaced because those cases are factually distinguishable. In Ross numerous family members testified to Ross' drinking problems and the state's key witness testified that Ross told him he had been drinking heavily when he killed his wife during a domestic dispute. Nibert, likewise, had been drinking heavily on the day of the murder and was drinking when he attacked the victim. This case, howver, is much closer to Johnson v. State, 608 So.2d 4, 13 (Fla. 1992), cert. denied, 124 L.Ed.2d 273 (1993), in which this Court held:

> While voluntary intoxication or drug use might be a mitigator, whether it actually is depends upon the particular facts of a case. Here, the evidence showed less and less drug influence on Johnson's actions as the night's events progressed and supports the trial court's findings. There was too much purposeful conduct for the court to have given any significant weight to Johnson's alleged drug intoxication, a self-imposed disability that the facts show not to have been a mitigator in this case.

The same is true of the instant case. Farr testified that he took no drugs on December 11 and his clear memory of the events of that day and night shows that he did not suffer any incapacitating effect from the alcohol he drank earlier in the day.

The trial court conscientiously followed this Court's directions on remand and carefully examined the record in light of the possible mitigators. Competent substantial evidence

supports the trial court's findings, and no abuse of discretion has been demonstrated. "Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion." Lucas, 568 So.2d at 23. Appellate counsel suggests that the state is assisting a suicide, but the record shows that Farr's taking responsibility for his actions is not a death wish.[14] As this court recognized in Hamblen v. State, 527 So.2d 800, 804 (Fla. 1988), "all competent defendants have a right to control their own destinies." Therefore, this Court should affirm the trial court's findings of fact and Farr's death sentence.

(B) This Court Correctly Refused to Recede from Hamblen

On direct appeal from his original sentence Farr argued that this Court should recede from Hamblen v. State, 527 So.2d 800 (Fla. 1988), and now concedes that this Court refused to do so. As stated by this Court:

> On appeal Farr raises three issues. First, Farr argues that our decision in Hamblen v. State, 527 So.2d 800 (Fla. 1988), is inconsistent with our decision in Klokoc v. State, 589 So.2d 219 (Fla. 1991), and that to cure this inconsistency we should recede from Hamblen. We disagree. We have rejected a similar argument elsewhere. E.g., Durocher v. State, 604 So.2d 810 (Fla. 1992).

---

14 For example, in his August 21, 1991 letter to Blair, Farr stated that he does not have a death wish. (SR 388). In the April 25, 1991 letter to Judge Agner, Farr said that he did not want to die, but that he wanted to pay for his crimes. (SR 408-09). In his letter to the victim's parents, dated June 25, 1993, Farr stated: "I feel I must pay with my life, so others will think before they pick to end a life." (SR 399). In another letter to Judge Agner, dated November 13, 1993, Farr wrote: "I'm just man enough to face the rightful price to my wrong." (SR 403).

Farr, 621 So.2d at 1369. In spite of this Court's disagreement with his argument on the first appeal, Farr repeats that argument. The state agrees with the Court's resolution of this issue on the first appeal and urges the Court to deny this issue summarily.

Hamblen, as Farr did, pled guilty to first-degree murder and refused to allow the presentation of mitigating evidence at his penalty proceeding. This Court, in affirming Hamblen's death sentence, held that defendants have the right and the power to control their destinies by refusing to participate in a penalty phase. Numerous defendants other than Farr and Hamblen have refused to allow the presentation of mitigating evidence, and this Court has upheld their death sentences. E.g., Krawczuk v. State, 634 So.2d 1070 (Fla. 1994); Henry v. State, 613 So.2d 429 (Fla. 1992); Clark v. State, 613 So.2d 412 (Fla. 1992), cert. denied, 114 S.Ct. 114, 126 L.Ed.2d 79 (1993); Durocher v. State, 604 So.2d 810 (Fla. 1992), cert. denied, 113 S.Ct. 1660, 123 L.Ed.2d 279 (1993); Pettit v. State, 591 So.2d 618 (Fla.), cert. denied, 113 S.Ct. 110, 121 L.Ed.2d 68 (1992); Anderson v. State, 574 So.2d 87 (Fla.), cert. denied, 112 S.Ct. 114, 116 L.Ed.2d 83 (1991). In Durocher and Clark the Court specifically rejected the argument that it should recede from Hamblen and, in Durocher, stated that it has "consistently held that a defendant may, if done knowingly and voluntarily, waive participation in the penalty phase." 604 So.2d at 812.

It appears that Farr is the only defendant who refused to participate in the penalty phase that has been remanded for

resentencing. On remand the trial court conscientiously followed this Court's direction, properly found that no mitigators had been established by the facts, and correctly sentenced Farr to death. Any problem perceived by the Court on the first appeal has been cured. This Court, therefore, again should refuse to recede from Hamblen and should affirm Farr's sentence.

(C) The Court Correctly Found Four Aggravators

The trial court found that four aggravators had been established: prior conviction of a violent felony, committed during commission of a felony, committed to disrupt or hinder the enforcement of the law, and heinous, atrocious, or cruel. (SR 415-16). §921.141(5)(b), (d), (g), (h), Fla. Stat. (1993). These are the same aggravators found at the original sentencing. In the original appeal Farr argued that the trial court should not have found the murder to have been committed to disrupt or hinder the enforcement of laws and that it was not especially heinous, atrocious, or cruel. This Court, however, agreed "with the trial court's conclusions respecting aggravating factors" and held: "The four factors cited by the trial court clearly were established beyond a reasonable doubt." Farr, 621 So.2d at 1370. In spite of this, Farr repeats his arguments on the applicability of the two aggravators he attacked in the first appeal.

Similar situations have occurred before. In Waterhouse v. State, 590 So.2d 1008 (Fla.), cert. denied, 113 S.Ct. 418, 121 L.Ed.2d 341 (1992), this Court considered the appeal of a death sentence imposed on resentencing. Waterhouse raised the same challenges to the aggravators that he raised on his first appeal, and this Court held:

> We previously rejected on direct appeal two of the arguments Waterhouse raises in this appeal. For that reason we reject his claim that the evidence does not support a finding that the crime was especially heinous, atrocious, or cruel. Similarly, we reject the argument that the trial court improperly doubled aggravators in finding, as two separate aggravators, that Waterhouse had been sentenced to life imprisonment for second-degree murder and that he was on parole at the time of the murder.

Id. at 1017. Similarly, in Magill v. State, 428 So.2d 649, 652 (Fla.), cert. denied, 464 U.S. 865, 104 S.Ct. 198, 78 L.Ed.2d 173 (1983), on appeal from resentencing this Court held:

> Appellant next argues that the trial court erred in finding applicable three of the aggravating circumstances. He argues that the first, second, and fourth aggravating factors are supported by the same evidence and thus are improperly cumulative. The validity of these aggravating circumstances was approved of in Magill I and was not a factor in our remand to the trial court. We need not, therefore, address this issue.

(Citations omitted.) This Court also addressed this issue in Menendez v. State, 419 So.2d 312, 315 (Fla. 1982), and held:

> Appellant contends that there is no evidence to support the finding that the murder was committed for pecuniary gain. We noted in our original opinion in this case that the trial court did not give separate consideration to pecuniary gain as an aggravating circumstance but, rather, properly merged it with the factor of the murder having been committed in the course of a robbery. We expressly concluded that, as so merged, this single aggravating factor was supported by the evidence. The state accordingly responds to this argument by saying that appellant may not attempt to reopen this issue which was settled in the initial appeal. We agree and adhere to our earlier conclusion that there was sufficient evidence to establish that the murder was committed in the course of a robbery.

(Emphasis supplied, footnote omitted.)

Relying on this Court's holding that the aggravators had been properly found, the state presented no evidence in aggravation at the resentencing and, instead, relied on the aggravating evidence presented at the original penalty phase. (SR 490-91). If that evidence was sufficient to support the establishment of the four aggravators at that time, it is likewise sufficient to support them now. Because this Court approved the aggravators on the initial appeal, this issue is not cognizable now.

If this Court decides to look at the challenged aggravators again, however, it should find that they were established beyond a reasonable doubt. The trial court correctly found that the "unrefuted testimony established beyond a reasonable doubt that the Defendant intended to thwart the police's ability to prove that he had Kidnapped the victim, SHIRLEY BRYANT, as evidenced by the Defendant's statement that 'Dead people don't talk.'" (SR 415). Throughout Farr's letters and testimony and in the factual finding for the plea, unrefuted evidence showed that Farr intended to kill the victim in order to extricate himself from his criminal actions and that he intended to leave no witnesses. His actions defined the very nature of the conduct contemplated by this aggravator, i.e., hindering law enforcement and eliminating a witness was a dominant reason for this murder. Cf. Henry; Correll v. State, 523 So.2d 562 (Fla), cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988).

The evidence also fully supports the trial court's finding that the murder was heinous, atrocious, or cruel. As found by that court: "The unrefuted testimony established beyond a reasonable doubt that the Defendant told the victim BRYANT that he was going to kill her; that the victim BRYANT begged for her life several times and was praying; that the Defendant put the gun to the victim BRYANT's head several times and pulled the trigger; that the Defendant removed the victim BRYANT's shoes so she could not escape from him; all of said circumstances establishing that the crime carried out was conscienceless and pitiless and caused the victim BRYANT to agonize over her impending death for a period of time. See, Douglas v. State, 575 So.2d 165 (Fla. 1991)." (SR 416). Farr's testimony as to this aggravator was unrefuted. Farr kidnapped the seventeen-year-old victim at gunpoint and subjected her to a high-speed car chase that ended when he purposefully crashed the car. The pitiless and conscienceless nature of this murder and the agony and terror the victim suffered are apparent from the facts. Cf. Bryan v. State, 533 So.2d 744 (Fla. 1988), cert. denied, 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989); Parker v. State, 476 So.2d 134 (Fla. 1985). Thus, the trial court correctly found that the challenged aggravators had been established beyond a reasonable doubt. Even assuming that one or both of these aggravators should not have been found, however, any error would be harmless in light of the remaining valid aggravators and the complete absence of mitigators. Cf. Capehart v. State, 583 So.2d 1009 (Fla. 1991), cert. denied, 112 S.Ct. 955, 117 L.Ed.2d 122 (1992); Holton v. State, 573 So.2d 284 (Fla. 1990).

CONCLUSION

Therefore, the state asks this Court to affirm Farr's death sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BARBARA J. YATES
Assistant Attorney General
Florida Bar No. 293237

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL. 32399-1050
(904)488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. W. C. McClain, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 29th day of June, 1994.

Barbara J. Yates

BARBARA J. YATES
Assistant Attorney General