IN THE SUPREME COURT OF FLORIDA

DONALD VOORHEES,

Appellant, :

vs. Case No. 83,380

STATE OF FLORIDA, :

Appellee. :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant, Donald Voorhees, will rely upon his initial brief in reply to the arguments Appellee makes in its brief as to Issues 111, IV, VI, VII, X, and XI.

STATEMENT OF THE CASE AND FACTS

On page 13 of its brief, Appellee says, "Appellant opined that neither of the two statutory mental mitigators was present, nor was Voorhees under the domination of Sager (Tr 1254-1255)." This is obviously a typographical error. "Dr. Merin" should be substituted in place of "Appellant."

ARGUMENT

ISSUE I--THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS.[1]

At pages 25-26 of its brief, Appellee discusses County of Riverside v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991), and totally misses its import. Appellee apparently is saying that McLaughlin is inapplicable here because, according to the trial court, the illegal detention of Appellant lasted for "only" a few hours. However, McLaughlin deals with how soon a person arrested without a warrant must be brought before a magistrate for a judicial determination of probable cause, not with how long one may be incarcerated illegally. Appellant never had a judicial hearing to establish probable cause all the time he was in jail in Mississippi, which was much more than a few hours.

With regard to the detention of Appellant supposedly being justified by what was communicated by the detectives in Pasco County to the jail personnel in Mississippi, this Court's recent opinion in State v. White, 660 So. 2d 664 (Fla. 1995) is instructive. The Court discussed the "fellow officer" or "collective knowledge" rule at 660 So. 2d 667:

> The rule generally works to the officer's advantage by providing that when making an arrest, an officer may rely upon information supplied by fellow officers, However, if the information fails to support a legal arrest, evidence seized as a result of the arrest

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[1] Appellant's codefendant, Robert Sager, has also raised the denial of the joint motion to suppress as an issue in his pending appeal in this Court, case number 84,539. Appellant hereby adopts and incorporates herein by reference the arguments made in Sager's brief to the extent they apply to Appellant's cause.

> cannot be insulated from challenge on the grounds that the instigating officer relied on information furnished by fellow officers. [Citations omitted.]

At the suppression hearing below, there was no evidence to indicate that the Pasco County detectives conveyed sufficient information to the Mississippi deputy to justify his continued detention of Appellant. It does not appear that Detective Spears communicated to Deputy Walker what information Pasco detectives had that might establish probable cause to arrest Appellant, or even that Spears asserted that Pasco County had probable cause to arrest Appellant.[2] Rather, it appears that Spears essentially told Walker that **Pasco** detectives wanted to talk to Appellant; however, this desire to investigate Appellant did not justify his continued detention. The information communicated to Deputy Walker "fail[ed] to support a legal arrest," and so "evidence seized as a result of the arrest cannot be insulated from challenge on the grounds that the instigating officer relied on information furnished by fellow officers." White, 660 So. 2d at 667. ***See*** also Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 91 S. Ct. 1031, **28** L. Ed. 2d 306 (1971).

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[2] Thus, Appellant's cause is readily distinguishable from State v. Gifford, 558 So. 2d **444** (Fla. 4th DCA 1990), relied upon by Appellee at pages 28-30 of its brief, because in Gifford the officer instructed jail authorities to continue to detain the appellant since the officer had probable cause to make an arrest. Here, there was no such specific directive to Deputy Sheriff Bidmer Walker in Wayne County, Mississippi from Detective Spears in **Pasco** County.

ISSUE 11--APPELLANT'S ABSENCE FROM SEVERAL OF THE PROCEEDINGS BELOW VIOLATED HIS CONSTITUTIONAL RIGHT TO BE PRESENT.

Appellee faults Appellant for not raising this issue in the lower court. (Answer Brief of the Appellee, p. 31) However, the defendant's right to be present is a fundamental right, personal waiver of which must affirmatively appear in the record; objection is not necessary to preserve the matter for appeal. This was recognized in Coney v. State, 653 So. 2d 1009 (Fla. 1995). Besides addressing the issue of Coney's absence from a voir dire bench conference when there was (apparently) no objection to said absence, this Court found error in the trial judge having conducted a pretrial meeting in Coney's absence even thoush defense counsel purported to waive his client's Presence at the meeting. (The Court found the error to be harmless.) Thus, it is clear that where a defendant is absent from a portion of criminal proceedings where his presence is required to ensure fundamental fairness, there must be a personal, on-the-record waiver by the defendant if reversible error is to be avoided.

Appellee challenges the applicability of Conev to Appellant's cause because Coney was decided after Appellant's trial, and this Court announced that the rule in Coney was to be "prospective only." (Answer Brief of the Appellee, p. 31) However, Coney should be applied here because that case did not announce a new rule of criminal procedure, but merely synthesized and reaffirmed prior precedent. The Coney Court recognized that the result was dictated by the plain language of Florida Rule of Criminal Procedure 3.180. "We conclude that the rule means just what it

says: The defendant has a right to be physically present at the immediate site where pre-trial juror challenges are exercised." 653 So. 2d at 1013. (Therefore, even before Coney, Appellant had a right to be present at the exercise of juror challenges pursuant to Rule 3.180. See pre-Coney cases cited in Appellant's initial brief at pages 58-59.)

In the alternative, if Coney did establish a new rule, it must nevertheless be applied to Appellant, because constitutional norms of adjudication require that a new rule be applied to all cases pending at trial or on direct appeal at the time the rule is announced. See Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) and cases cited on page 59 of Appellant's initial brief in footnote 16.

On page 33 of its brief, Appellee asserts that the record does not reflect that Appellant was absent on the morning of November 22, 1993 when the court and counsel discussed various matters. This is incorrect. At one point in the proceedings, the trial judge remarked, "...as soon as the defendant arrives, then I think we're pretty much set..." (T 976--emphasis supplied) Thus, contrary to Appellee's contention, the record clearly shows that Appellant was not privy to the discussion taking place.

ISSUE V--THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL, AS THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATED MURDER.

Appellant discussed in his initial brief how the evidence showed that the victim herein was killed as a result of panic

and/or rage when Appellant and his codefendant were unable to secure his silence. As this Court noted in Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988), "A rage is inconsistent with the premeditated intent to kill someone[.]"

ISSUE VIII--THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS NOT SUPPORTED BY THE EVIDENCE AND WAS SUBMITTED TO APPELLANT'S PENALTY PHASE JURY UPON AN IMPROPER INSTRUCTION.

In addition to the cases cited in Appellant's initial brief, Preston v. State, 444 So. 2d 939 (Fla. 1984) is instructive on this issue. The victim there had been robbed at a convenience store, forced to accompany the defendant on a mile-and-a-half journey, forced to walk at knifepoint for a considerable distance, and then killed by multiple stab wounds and lacerations resulting in near decapitation. The trial court found that CCP was justified, particularly because of the cutting of the victim's throat from one side to the other, but this Court disagreed, ruling that the facts did not show the heightened form of premeditation necessary for this aggravator to apply. The facts in Appellant's case are somewhat similar with regard to the manner of killing, but Audrey Bostic was not subjected to the type of protracted ordeal involving an abduction that occurred in Preston, and so CCP is even more inappropriate here than it was in Preston.

On page 60 of its brief, Appellee asserts that the instruction the trial court gave to the jury on CCP was "one submitted by the defense," and that Appellant's claim regarding the instruction is therefore barred. However, as Appellant discussed in his initial

brief at pages 95-98, the instruction given was a modified version of Appellant's requested penalty instruction number 6. Surely the State is not suggesting that the trial judge can take an instruction proposed by the defense, give an emasculated form thereof as the court below did, and thereby insulate himself from being reversed due to error in the jury instruction. Such a proposition is clearly untenable.

ISSUE IX--THE COURT BELOW ERRED IN INSTRUCTING THE JURY ON, AND FINDING AS AN AGGRAVATING CIRCUMSTANCE, THAT THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN COMMISSION OF A ROBBERY, BECAUSE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THIS CIRCUMSTANCE.

In his sentencing order, the court below found much significance in the fact that the victim herein had withdrawn $100.00 from his bank account and had purchased only a bottle of rum, and so he "should have had a reasonable amount of cash after deducting the price of the bottle of alcoholic beverage from his $100.00 withdrawal." (R 359) However, the court ignored the fact that the three men (Appellant, Sager, and Bostic) went to a bar after Bostic withdrew the cash, and that it was apparently Bostic's money that paid for the drinks at the bar. (R 214) Therefore, by the time the trio arrived at Bostic's apartment, his funds may well have been substantially depleted, having paid for not only the bottle of Captain Morgan's, but drinks at the little bar between Hudson and New Port Richey as well.

On page 65 of its brief, the State says that its witness at guilt phase, Jean Womack, "who gave appellant his paycheck on January 6, 1992, in Madison, Mississippi saw appellant and his

companion get into the maroon Monte Carlo [which belonged to the victim]." However, one must remember that Womack could **not** identify Appellant, Donald Voorhees, in court as the person she saw in Madison, which prompted defense counsel to move, unsuccessfully, to strike Womack's testimony. (T 461-465)

ISSUE XII--THE COURT BELOW SHOULD HAVE GRANTED APPELLANT'S MOTION FOR MISTRIAL AFTER JUROR ZAGURSKI'S HUSBAND WAS HOSPITALIZED AS AN EMERGENCY PATIENT WITH HEART PROBLEMS, AS IT WAS IMPOSSIBLE FOR THIS JUROR TO GIVE HER FULL ATTENTION TO THE PENALTY PROCEEDINGS.

ISSUE XIII--THE COURT BELOW ERRED IN INSTRUCTING THE JURY ON, AND FINDING AS AN AGGRAVATING CIRCUMSTANCE, THAT THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN COMMISSION OF A ROBBERY, BECAUSE THE FELONY MURDER AGGRAVATING FACTOR IS UNCONSTITUTIONAL, AS IT DOES NOT GENUINELY NARROW THE CLASS OF INDIVIDUALS WHO MAY BE SENTENCED TO DEATH.

ISSUE XIV--THE COURT BELOW ERRED IN GIVING THE JURY'S DEATH RECOMMENDATION UNDUE WEIGHT, THUS FAILING TO EXERCISE HIS INDEPENDENT JUDGMENT CONCERNING THE SENTENCE TO BE IMPOSED, AND ABROGATING FLORIDA'S DEATH PENALTY SENTENCING SCHEME, RESULTING IN A DEATH SENTENCE VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION.

ISSUE XV--THE COURT BELOW ERRED IN SENTENCING APPELLANT TO DEATH BECAUSE HIS SENTENCE IS DISPROPORTIONATE, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENT.

Appellee claims in its brief at pages 78-80 that Appellant has abandoned the above four issues (Issues XII-XV) because he did not brief them fully. Of course, Appellant **did** fully brief all four issues in his initial brief as it was originally submitted to this Court. However, the Court refused to let Appellant file the brief in its original form because it was 142 pages long. The Court's decision in this regard violated Appellant's Eighth Amendment right to full appellate review in this capital case, his Sixth Amendment

right to the effective assistance of counsel for his appeal, and his Fourteenth Amendment rights to due process and equal protection, as well as corresponding provisions of the Florida Constitution, namely, Article I, Sections 9, 16, 17, and 22. The denial of equal protection is particularly egregious in light of this Court's ruling in Danny Harold Rolling v. State of Florida, Case No. 83,638, to allow the appellant to file a brief that was 251 pages long. How can a decision to deny Appellant the right to file a brief of a mere 142 pages be justified when the Court allowed Danny Rolling to file a brief that was more than 100 pages longer than the brief Appellant sought to file? Appellant hereby renews his motion to file his initial brief of 142 pages in its original form. In the alternative, Appellant moves that he be permitted to file a supplemental brief herein fully addressing Issues **XII-XV above.**

Furthermore, this Court should address Issues **XII** and XIII on the merits, because Appellee has addressed them on the merits, albeit briefly and in a footnote. (Answer Brief of the Appellee, p. 80)[3]

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[3] With regard to Issue XII concerning Juror Zagurski, Appellant would note that the trial judge created an insoluble dilemma for himself when he discharged the only alternative juror, Mr. Baxter, after guilt phase, contrary to Florida Rule of Criminal Procedure 3.280(b), and Mrs. Zagurski's problems later cropped up. Under the circumstances, with no alternate available to replace Zagurski, the judge could hardly make an objective determination as to whether she should be excused. If the judge excused her, with no one available to fill her seat, he would have had no choice but to grant a mistrial.

CONCLUSION

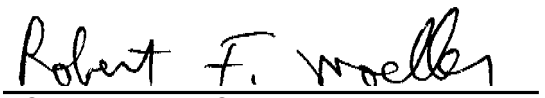
Appellant, Donald Voorhees, hereby renews his prayer for the relief requested in his initial brief.

Appellant also moves the Court for leave to fully brief Issues XII-XV.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 13th day of May, 1996.

Respectfully submitted,



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