IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,611

PABLO SAN MARTIN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

APPELLEE'S ANSWER TO SUPPLEMENTAL BRIEF

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SUPPLEMENTAL POINT ON APPEAL

(Restated)

THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S RIGHT TO BE PRESUMED INNOCENT.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The State set forth a comprehensive statement of the case and facts in its original answer brief, which does not need to be repeated here. However, the language upon which Defendant bases his supplemental issue was excerpted from the trial court's sentencing order. To place the objected-to language in its proper context, the portion of the sentencing order in which the language appears is set forth in its entirety:

> NON-STATUTORY MITIGATING CIRCUMSTANCES
>
> The defendant argues the existence of several non-statutory mitigating circumstances.
>
> * * *
>
> **The co-defendant Pablo Abreu was sentenced to life imprisonment.**
>
> In paragraph 3 at page 8 of the defendant's sentencing memorandum the defense argues that the fact that the defendant Pablo Abreu was sentenced to life imprisonment and did not receive the death penalty should be considered a non-statutory mitigating factor.
>
> Throughout the trial of this case and then through the penalty phase and sentencing hearings defense counsel have repeatedly reminded the court that the defendant does not stand

convicted of the murder of Officer Stephen Bauer. The attorneys for the defendant have stressed that their client is presumed innocent of the charges in that indictment and that the existence of those pending charges should not influence this court in any way. The State has also avoided even the mention of that case in its own effort to avoid possible damage to this record. This court is very conscious of the meritorious arguments of the defense that the pending indictment against this defendant must not affect this sentencing process. This court knows very little about that case beyond the fact that the defendant is presumed innocent of the accusations therein. However, in discussing the suggestion of disparate sentencing, it is impossible to ignore the fact that Abreu pled guilty not only to this indictment but also to the indictment charging the murder of Officer Bauer.

In analyzing the life sentence imposed on Abreu it is important to first acknowledge that Abreu did not have any previous convictions for crimes of violence. More significant however was his peripheral participation in the murder of Officer Bauer. According to the State, during the attempted robbery of the Kislak Bank, Mr. Abreu was a get-away driver stationed several blocks away. The defense has never challenged that factual assertion made by the State during the sentencing hearings. Abreu's relatively small participation in that case must be viewed against the alleged participation of this defendant who, according to the State, was standing next to Officer Bauer when the officer was shot and, as the officer lay dying, stooped to pick up the money that was the object of the robbery.

This court has discussed the pending indictment only for the purpose of honestly addressing the issue of disparate sentencing. Absolutely no consideration is being given to that case in deciding the appropriate sentence herein.

(R. 1108, 1110-12). It should be further noted that in his pre-sentence memorandum, Defendant specifically raised the issue of Defendant's and Abreu's involvement in the murder of officer Bauer during the robbery of the Kislak National Bank:

3. A co-participant in the homicide robbery received consequences less severe than death.

* * *

Pablo Abreu, like his cousin [Defendant], did all of the following:

* * *

i. After the Lopez killing, like his cousin, Pablo was a willing participant in the Kislak Bank robbery (where officer Bauer was killed).

(R. 1084-85).

SUMMARY OF THE ARGUMENT

The trial court did not improperly infringe on Defendant's right to be presumed innocent by mentioning his involvement in another murder case for which Defendant had not yet been convicted. The issue was raised in Defendant's presentence memorandum and the trial court properly responded to the contention. Further, in view of the overwhelming proper evidence in support of the three aggravating factors, the dearth of mitigation, and Defendant's subsequent conviction of the charges in question, any error was harmless beyond a reasonable doubt.

SUPPLEMENTAL ARGUMENT

THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S RIGHT TO BE PRESUMED INNOCENT.

Defendant argues that simply because the trial court mentioned codefendant Abreu's guilty plea in the Bauer murder case, it violated Defendant's right to be presumed innocent. He further asserts that as a result, his sentence must be reversed. Defendant fails to explain how the trial court's order impinged on his presumption of innocence, nor why he should be entitled to a new sentencing proceeding as a result.

The only authority Defendant cites in support of his contentions is *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), and *Taylor v. Kentucky*, 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978). However, those cases only hold that in criminal proceedings, the elements of charged offenses must be proved beyond a reasonable doubt to sustain a conviction. Here, the murder charges facing Defendant in the Bauer case were not in any way used to convict him on the instant murder, attempted murder, or attempted robbery charges.[1] Nor were the charges used in support of the aggravating factors[2] which were the basis for Defendant's sentence of death. On the contrary, the court was very careful to state that it was aware of the fact that the charges against Defendant for his participation in the Bauer murder could not be considered in

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[1] At no point was the Bauer case ever mentioned in front of the jury.

[2] The pecuniary gain/during a robbery and CCP aggravating factors were based solely on the facts of the present offense. The prior violent felony aggravator was based solely on Defendant's convictions in the Van Nest and Bird Road cases, which were affirmed in *San Martin v. State*, 629 So. 2d 1077 (Fla. 3d DCA 1994). (R. 1096-1099).

imposing sentence, and reiterated the point several times. (R. 1111-12, see penalty phase. 2-3, *supra*). *See Grossman v. State*, 525 So. 2d 833, 846 (Fla. 1988)(noting "that judges are routinely exposed to inadmissible material but are disciplined by the demands of the office to block out" such information). Defendant, however, avers that the court's statement that it had given no consideration to the Bauer case in sentencing Defendant must be disregarded. He contends that the only way this statement could have been accepted would have been if the case had not been mentioned at all. (Supp. B. 2). Defendant ignores, however, that the court, in addressing the Bauer case, was merely responding to Defendant's pre-sentencing memorandum. which had injected the issue of the Abreu's and Defendant's participation in the Bauer murder into this case. (R. 1085, see p. 3, *supra*). As such Defendant may not now fault the trial court for conscientiously addressing all of the arguments which Defendant presented in favor of a life sentence, as required by law. *See Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990)(trial court must explicitly address each mitigating circumstance proffered by the defense). *See also*, *Williamson v. State*, 511 So. 2d 289, 292 (Fla. 1987)(comment on co-defendant's plea not improper suggestion of "guilt by association" where made in rebuttal to defense argument about circumstances of plea); *Brown v. State*, 473 So. 2d 1260, 1265 (Fla. 1985)(allegedly improper finding by trial court that defendant had "led a parasitic existence" not require reversal where there was no evidence that comment affected the weighing of the aggravating and mitigating circumstances), denial of post-conviction relief reversed on other grounds, 596 So. 2d 1026 (Fla. 1992).

Further, even accepting, arguendo, that the trial court improperly considered Defendant's role in the Bauer case in sentencing him, any error would be harmless beyond a reasonable doubt. As discussed at length in the original answer brief, the permissible evidence amply supported the imposition of the death penalty in this case. (See Answer Brief, at 69-86). The jury, which had heard no reference to the Bauer case, recommended death. The trial court followed that recommendation, finding the following aggravating factors: (1) two prior convictions for felonies involving violence; (2) murder committed during the course of an attempted robbery, merged with the motive of pecuniary gain; and (3) murder committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. It found no statutory mitigating circumstances, and minimal nonstatutory mitigation: that Defendant is loved by his family. The trial court summarized its conclusions regarding the aggravating and mitigating circumstances as follows:

> In weighing the aggravating factors against the mitigating factors the court understands that the process is not simply an arithmetic one. It is not enough to weigh the number of aggravators against the number of mitigators but rather the process is more qualitative than quantitative. The court must and does look to the nature and quality of the aggravators and mitigators which it has found to exist.
>
> This court finds that the aggravating circumstances in this case are appalling, the defendant's previous convictions for violent crimes, the fact that the murder herein was committed during the commission of an attempted robbery and for pecuniary gain and the cold, calculated and premeditated manner in which the murder was committed, greatly outweigh the relatively insignificant non-statutory circumstances established by this record. Even in the absence of the cold, calculated and premeditated aggravator the court would still feel that the remaining two aggravators seriously outweighed the existing mitigators.

(R. 1115-16). There is thus no reasonable probability that, assuming the trial court improperly

considered the Bauer crime, the outcome of the proceedings would have been different had it not allegedly done so. *See Gilliam v. State*, 582 So. 2d 610 (Fla. 1991)(erroneously admitted evidence of uncharged crime harmless where not presented to jury, and not used to aggravate sentence); *Grossman*, at 845-46 (presentation of then-impermissible "victim impact" evidence harmless where it was not presented to the jury, the jury recommended death, and the evidence in support of the death sentence was overwhelming). Furthermore, were Defendant's sentence reversed on the basis urged in his supplemental brief, Defendant has since been convicted for the murder of Officer Bauer, *see San Martin v. State*, case no. 84,702 (appeal pending), and as such his participation therein could be considered by the trial court in any resentencing proceeding. *See Oats v. State*, 446 So. 2d 90, 95 (Fla. 1984)(consideration of overturned conviction during penalty phase harmless error where defendant was subsequently reconvicted of same offense, which sentencer could consider if Court ordered resentencing). For all of the foregoing reasons, Defendant's supplemental claim must be rejected.[3]

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[3] Defendant does not here appear to be challenging the appropriateness of Defendant's sentence vis-a-vis Abreu's life sentence. However, the sentence was not disparate. Abreu pled guilty and testified for the State in exchange for a life sentence. Such decisions are matters of prosecutorial discretion and do not render Defendant's sentence improperly disparate. *Brown*, at 1268-69.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the original answer brief, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **LEE WEISSENBORN**, 235 Northeast 26th Street, Oldhouse, Miami, Florida 33137, this 31st day of January, 1996.

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