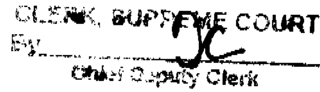
IN THE SUPREME COURT OF FLORIDA

PAUL AUGUSTUS HOWELL,)
)
Appellant,)

vs. Case No. 85,193



)
STATE OF FLORIDA,)
)
Appellee.)
)

SID J. WHITE

MAY 9 1997

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant will be responding to Issues I, III, IV, and VI. Appellant will rely upon the arguments and authorities for the remaining Issues as set forth in the Initial Brief.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN REFUSING TO APPOINT DIFFERENT COUNSEL FOR APPELLANT AND IN REFUSING TO APPOINT A SECOND ATTORNEY.

In the Initial Brief Appellant argued that it was error for the trial court to continue to allow Frank Sheffield to represent Appellant. Based upon requests by the State, Appellant and Sheffield himself, Appellant contends that Sheffield should have been removed from the case. Even more compelling was the fact that Sheffield had already been removed from Appellant's Federal case, at Sheffield's insistence.

The State argues that Appellant was not entitled to have Sheffield removed because there was no actual conflict demonstrated or no showing that the conflict adversely affected counsel's performance. (State's Brief at 35-36) This is simply not correct. The conflict went to the very nature of the attorney-client relationship. The conflict between Appellant and Sheffield was ongoing, and it had never ended. Sheffield's comments to the contrary, the record is clear that Appellant was not happy with Sheffield and there was bad blood between them concerning the alleged telephone threat (as well as other problems). Either the phone threat had occurred, as Sheffield originally told to the Federal Judge, or Sheffield's wife was a liar, something that Sheffield was not willing to concede as evidenced by his cross-examination of Larry Sproat.(R1240-1246)

Appellant made it clear, that at as far as he was concerned, this problem was not over until Sheffield admitted that the call had not occurred. (R1238-1239) There is no question that this issue created an actual ongoing conflict between Appellant and Sheffield.

This conflict also adversely affected Sheffield's performance. Because Sheffield accused Appellant's family of making the threat, there were problems between Appellant's family and him. Appellant's family was not willing to have any contact with Sheffield or work with him in the case. This culminated in them not being used by Sheffield to testify in the penalty phase.

The facts speak for themselves in this case. If this is not actual conflict, then what is? The cases cited by the State are distinguishable in that they do not have the same type of factual conflicts present in this case. Both Bouie v. State, 559 So.2d 1113, 1115 (Fla. 1990) and Schwab v. State, 636 So.2d 3, 5-6 (Fla. 1994), dealt with factual situations involving conflicts created by third persons associated with the case. In Bouie the conflict arose due to a potential conflict related to the public defender representing both the defendant and a witness against him. In Schwab the public defender sought to withdraw because some of the employees in his office were chain of custody witnesses for the State. In each case this court found no error because the conflict had not created any problems with the representation. A completely different situation is presented here. The conflict arises out of significant problems between

Appellant and Sheffield. The conflict that caused Sheffield to removed from the Federal case continued to create problems between Appellant and Sheffield throughout this case, including trial.

The case of Maddox v. State, **715** S.W.2d **10** (Mo. App.1986), is distinguishable from this case and has no binding authority. In Maddox the court found that the attorney had only a generalized suspicion that his client burglarized his house. Frank Sheffield had far more than a generalized suspicion. His statements to the Federal judge were that the death threat was made specifically relating to his handling of Appellant's case. Sheffield believed that the threat originated from Appellant, that the threat was actually made by Appellant's family, that he was genuinely frightened, and that it was taken seriously enough by the government that he was offered protection for he and his family. Sheffield himself stated he didn't want to live 30 or 40 years like that. This invalidates the State's argument that since 11 months had passed since the threat, and nothing had happened that it was no longer on Sheffield's mind.

The record clearly demonstrates actual conflict. As such, it was error to require Appellant to proceed with Sheffield as his attorney. Appellant is entitled to a new trial with a different lawyer.

The State next argues that Appellant did not make specific enough complaints against Sheffield to warrant a new attorney, and that it was simply a question of strategy. (State's brief at

39-40) The record supports the contrary position. Appellant advised the court that his family could not work with Sheffield because of his belief that they were criminals.(R1544) Appellant notified the court that he was dissatisfied with counsel's trial performance, his preparation for cross-examination, his lack of communication with Appellant, and his failure to call certain witnesses. These concerns were certainly specific enough under Lowe v. State, 630 So.2d 969 (Fla. 1994) to warrant a more thorough inquiry under the circumstances.

Appellant disagrees with the State's contention that the court gave Appellant every opportunity to explore his options about counsel. Every time Appellant voiced a concern or complaint, the court would encourage him to stay with Sheffield and did nothing to indicate to Appellant that he had any intention of removing Sheffield. It was clear it was pointless and futile for Appellant to continue to complain ad infinitum.

Neither were the complaints merely a matter of strategy. The fact that Sheffield had alienated Appellant's family, who were critical penalty phase witnesses, was not a strategic complaint. That Appellant was not receiving discovery was not a strategic complaint.

The State next argues that Appellant did not make clear his request for self-represention. Contrary to the State's position, Appellant did make it clear to the court that he would rather represent himself than have Sheffield. (State's Brief at 43) However, the court told Appellant he would have to think about

whether or not this was really what he wanted to do and they would discuss it later. It was never discussed later as promised and no Faretta inquiry was held. As this Court has stated in Capehart v. State, 583 So.2d 1009, 1014 (Fla. 1991), it is a better practice for the court to advise of the right of self-representation. Because of the limited facts contained in the opinion regarding this *issue,* it is impossible to say exactly what Capehart had complained about or how extensive and how often he complained. In this case the complaints were extensive and ongoing.

Likewise, in Watt v. State, 593 So.2d 198, 203 (Fla. 1992), the defendant's complaint was only that he had not been seen in jail enough. The complaints voiced by Appellant were certainly far more persuasive than that.

Here, there was no reason not to conduct a Faretta inquiry. Appellant had said he would rather represent himself than have Sheffield, Sheffield himself urged the judge to conduct a hearing. Given these facts coupled with this Court's opinion that it is the better practice to do so, a Faretta inquiry should have occurred. Because it did not, reversal is required.

ISSUE III

NO ERROR HAS BEEN DEMONSTRATED IN REGARD TO THE SENTENCER'S FINDINGS IN MITIGATION (as phrased by the State)

The State's main complaint with this issue is that trial counsel did not adequately advise the trial court of the non-statutory mitigation. While this certainly poses questions about the effectiveness of the lawyer, evidence was presented to the court by way of letters from family members. While Sheffield did not read these letters to the court himself or make reference to the specific contents, the court had them and should have read them and recognized those things contained therein which would be mitigating in nature.

The State cites to Lucas v. State, 568 So.2d 18, 24 (Fla. 1990), for the proposition that even though the court was given letters, counsel had an additional duty to explain them to the court. Appellant submits that Lucas does not go that far. It is unclear in Lucas just what the lawyer had given the trial court to review. Likewise, in Hodges v. State, 595 So.2d 929 (Fla. 1992), the form in which the mitigation was presented to the trial court is not clear. In this case the information was presented to the court in writing. This gave the court ample opportunity to determine what mitigating factors were present.

Another complaint by the State is related to Appellant's position regarding the late sentencing order. In this case the Court did a second sentencing order for the purpose of addressing the issue of Defendant's age, since age was not addressed in the

original sentencing order. This order was entered over a month after the sentencing and after the Notice of Appeal had been filed. The State in contesting Appellant's position cites no case law which has overturned this Court's clear directive for contemporaneous orders, and cites no case law or other authority which has altered the statutory basis for when a court is divested of its jurisdiction.

It is Appellant's final contention that he has demonstrated under Campbell v. State, 571 So.2d 415 (Fla. 1990), that the trial court's decision in the weighing process was not "supported by sufficient competent evidence in the record." Thus this case must be returned to the trial court for a constitutionally sound evaluation.

ISSUE VI

THE FINDING OF THE AVOID ARREST AGGRAVATING CIRCUMSTANCE WAS NOT ERROR (as phraised by the State)

Contrary to the State's assertions, it remains Appellant's position that the primary reason for this offense was not witness elimination. The State points to two brief statements attributed to the Appellant to support their position that Tammie Bailey might have "snitched" on Appellant's brother or might "snitch" on the drug trafficking operation. This however, ignores the other reasonable and established motives for the making of the bomb.

The State, at trial, argued that financial or pecuniary gain was a motive and also argued Appellant's dislike of law enforcement officers was another motive. Because other, equally compelling motives were present, and because there was ample evidence in the record to support this, it cannot be reasonably argued that witness elimination was the sole or dominant motive.

Appellant urges this Court to examine closely the facts of this case and to revisit its opinion in Sweet v. State, 624 So.2d 1138 (Fla. 1993).

CONCLUSION

Based upon the foregoing facts, law and argument, Appellant requests this Honorable Court to grant the following relief:

As to Issue I, a new trial;

As to Issues II and IV through VIII, a new sentencing hearing with a jury;

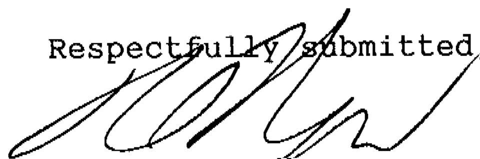
As to Issue III a new sentencing hearing by the trial court;

As to Issue IX, a remand to the trial court for the imposition of a sentence of life imprisonment without the possibility of parole for 25 years.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Richard Martell, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32399-1050; and Paul Howell, DOC #123792, P.O. Box 221, Union Correctional Institution, Raiford, Florida, 32083, on this 8th day of May, 1997.

Respectfully submitted,



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