IN THE SUPREME COURT OF FLORIDA

TIMOTHY HUDSON,

Appellant/Cross-Appellee,

vs.

CASE NO. 85,693

STATE OF FLORIDA,

Appellee/Cross-Appellant.

_____/

CROSS REPLY BRIEF OF THE APPELLEE/CROSS-APPELLANT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar I.D. No. 0134101
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607
(813)873-4739

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE NO,:

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The state relies on the statement contained in its initial brief, but adds this supplement:

Prior to the penalty phase -- at a hearing on February 14, 1995 -- the defense argued that the court should preclude consideration of the community control aggravator on ex post facto grounds (vol. VI, R 616-621), noting that "Unquestionably, I think Mr. Hudson was on community control in 1986." (R 619; see also Vol. II, R 267-270).

In the post-jury recommendation sentencing memorandum the state argued that at the time of the murder of Mollie Ewings the defendant was serving a sentence of community control and:

> "That sentence had been imposed upon him June 13, 1986 by the Honorable Judge Griffin as the result of a violation of probation on case number 82-7794. He was instructed on the terms and conditions of his community control on June 16, 1986, just a day before he committed the murder."

(Vol III, R 379).

In the defense response to the state's sentencing memorandum, Hudson argued that Judge Mitcham had properly ruled that the application of this aggravating factor to the defendant would be an ex post facto violation (R 374).

SUMMARY OF THE ARGUMENT

ISSUE I. The lower court erred in failing to instruct the jury and in failing to find the HAC aggravating factor. Hudson does not address the state's contention that the lower court specifically ruled that the law of the case doctrine precluded the use of the state's reliance on HAC; since that doctrine is inapplicable (no appellate court has determined that HAC is improper) and apparently concedes the lower court was in error. As to the merits of the HAC claim, the state relies on Issue II, infra.

ISSUE II. Mr. Hudson is in error in attempting to expand this Court's definition of HAC to embrace both physical and psychological pain inflicted upon the victim. The case law is clear that either can qualify for the aggravator. In the instant case, HAC is clearly shown in the multiple stabbings of the victim in her home during a struggle -- screaming while she was attacked -- with evidence the victim was in a severe amount of pain and a defensive wound was present.

ISSUE III. The lower court erred in failing to find the community control aggravator. Trotter v. State, 22 Florida Law Weekly S12 (Fla. 1996).

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED IN FAILING TO INSTRUCT THE JURY AND TO FIND THE HAC AGGRAVATING FACTOR.

Hudson contends that the state has misread the record, that two defense theories were advanced below -- a law of the case theory and factual insufficiency -- and that the trial court did not explain its reasoning in denying the state's request. Hudson 'suggests that since the trial court had been apprised of the "clean slate" rule of Preston v. State, 607 So. 2d 404 (Fla. 1992), it must be assumed that the court ruled on the alternate ground that the evidence did not support the giving of the HAC instruction.

The problem with that argument is that the lower court specifically ruled that the law of the case doctrine precluded use of HAC (Vol. VII, R 492) and the lower court was wrong under Preston and Hall v. State, 614 So. 2d 473 (Fla. 1993). The law of the case doctrine is simply inapplicable since no appellate court has determined HAC to be inapplicable. We presume that Mr. Hudson's declination to address this point constitutes a tacit, albeit eloquent, concession that the lower court was in error.

As to the merits of the HAC claim, rather than engage in undue repetition the state will rely on the argument in cross-appeal issue II at page 90 - 93 of its initial brief and issue II, infra.

ISSUE II

WHETHER THE LOWER COURT ERRED IN FAILING TO FIND THAT THE INSTANT HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

Hudson contends that in order to qualify for an HAC finding there must be a combination of both physical pain and psychological pain inflicted by the murderer (Brief, p. 24). He cites Richardson v. State, 604 So. 2d 1107 (Fla. 1992), but the Court's language in that case was:

> Thus, the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim.

(text at 1109)

The Richardson court concluded that the factor was not demonstrated in that shotgun blast to the heart because there was no pitiless or conscienceless infliction of torture. Neither Richardson nor any other case cited by Hudson requires that the murderer inflict both physical and psychological pain. In Cannaday v. State, 620 So. 2d 165 (Fla. 1993) -- another shooting case -- the Court determined that the HAC factor was inapplicable:

> Each of these victims was shot in a manner to kill the victim and without any prior knowledge by the victim that Cannaday had any intention of doing so.

(text at ????).

Citing Robinson v. State, 574 So. 2d 108 (Fla. 1991), the Cannaday Court opined that ordinarily an instantaneous or near-instantaneous death by gunfire does not satisfy the HAC aggravating

circumstance and, as explained in Williams v. State, 574 So. 2d 136 (Fla. 1991), this aggravator is permissible only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. And in Hartley v. State, 686 So. 2d 1316, 1323 (Fla. 1996), this Court declared that execution-style killings "are not generally HAC unless the state has presented other evidence to show some physical **or** mental torture of the victim." (emphasis supplied).

The instant case is similar to Rolling v. State, ___ So. 2d ___, 22 Florida Law Weekly S141, 147 (Fla. 1996), where the Court upheld an HAC finding as to victim Sonya Larson who was stabbed several times:

> Rolling argues that the trial court erred in finding the heinous, atrocious, or cruel aggravating circumstance as to the murder of Sonya Larson because there was no evidence that Ms. Larson, who was attacked in her sleep, anticipated her death or otherwise endured 'extreme pain or prolonged suffering." *Elam v. State,* 636 So. 2d 1312 (Fla. 1994).
>
> The trial court's sentencing order states in pertinent part:
>
> > Sonya Larson was killed in her own bed by multiple stab wounds. . . . The attack was characterized by the medical examiner as a "blitz" attack after which the victim would have remained alive for a period from thirty to sixty seconds. Despite the relative shortness of the event, the fact that many of the wounds were characterized as defensive wounds indicates that the victim was awake and aware of what was occurring. During all this time, the victim's mouth was taped

shut so that she could not cry out.

> Contrary to Rolling's assertion that there was no evidence that Ms. Larson endured "prolonged suffering" or 'anticipated her death," the record reflects the medical examiner testified that Ms. Larson sustained defensive wounds on her arms during Rolling's attack and was awake between thirty and sixty seconds before losing consciousness and dying. Moreover, Rolling's statement to police on January 31 is consistent with the medical examiner's testimony and the trial court's finding. Rolling told police he stabbed Ms. Larson and put duct tape over her mouth to muffle her cries. He explained that he continued to stab her as she fought and tried to fend off his blows.
>
> Finally, as the State correctly notes, Rolling's guilty plea to this murder on February 15, 1994, is supported by a factual basis which also shows that Rolling muffled Ms. Larson's cries and that she sustained defensive wounds on her arms and left thigh.
>
> Because the evidence in the record demonstrates that Ms. Larson was awake but disabled by the duct tape over her mouth while she struggled with her attacker, sustained several defensive wounds to her arms and leg, and did not die instantaneously, we find that the trial court properly found the heinous, atrocious, or cruel aggravator proved beyond a reasonable doubt. See *Geralds* v. State, 674 So. 2d 96 (Fla.), *cert. denied,* 117 S. Ct. 230 (1996); *Merck v. State, 664 So.* 2d 939, 943 (Fla. 1995); *Garcia v. State, 644 So.* 2d 59, *63* (Fla. 1994); *Dudley v. State, 545 So.* 2d 857, 860 (Fla. 1989).

Hudson appears to argue that while there are numerous precedents acknowledging the propriety of an HAC finding where the murder results from multiple stab wounds, the instant case apparently is not multiple enough to satisfy him. [Hudson criticizes the state's reliance on Hansbrough v. State, 509 So. 2d

1081 (Fla. 1987) (thirty stab wounds); Nibert v. State, 508 So. 2d 1 (Fla. 1987)(seventeen stab wounds); Floyd v. State, 569 So. 2d 1225 (Fla. 1990)(twelve stab wounds); Johnston v. State, 497 So. 2d 863 (Fla. 1986)(stabbed three times in neck and twice in the chest), Trotter v. State, 576 So. 2d 691 (Fla. 1990) (elderly woman stabbed at least seven times); Davis v. State, 648 So. 2d 107 (Fla. 1994)(repeatedly stabbed); Pittman v. State, 646 So. 2d 167 (Fla. 1994) (three victims stabbed numerous times) .]

In the instant case, medical examiner Dr. Diggs testified that the autopsy of Molly Ewings revealed the presence of four stab wounds over the upper torso area, one on the left and one on the right side of the chest, a third over the left shoulder and one right lateral midline stab wound. All were lethal, penetrating into the lungs and producing shock (Vol. VI, R 299-300). The wounds were three inches deep (R 301-302) . Each of the injuries was inflicted while she was alive. Ewings was in a 'severe amount of pain" and consciousness would last about two minutes. A defensive wound was on the finger (R 305-306). There was testimony that the victim screamed while being attacked (Vol. V, R 214, 241) and police discovered her broken artificial fingernails at the scene of the murder (TR 211, 268, 274).[1] Cf. Derrick v. State, 641

[1]A factor to consider on this aggravator also is that the victim was attacked in the supposed safety of her own home without provocation. See Haliburton v. State, 561 So. 2d 248 (Fla. 1990); Floyd v. State, 569 So. 2d 1225 (Fla. 1990); Wyatt v. State, 641 so. 2d 1336 (Fla. 1994) .

So. 2d 378, 381 (Fla. 1994)(We reject Derrick's contention that the victim may have been unconscious during the attack. This claim is particularly unbelievable in light of Derrick's own confession indicating that the victim was screaming as he was being attacked).

ISSUE III

WHETHER THE LOWER COURT ERRED IN FAILING TO CONSIDER AND APPLY THE AGGRAVATING FACTOR OF CAPITAL FELONY COMMITTED WHILE UNDER A SENTENCE OF IMPRISONMENT OR COMMUNITY CONTROL.

Hudson argues, apparently, that Trotter v. State, 22 Florida Law Weekly S12 (Fla. 1996), is of no assistance to the state since in that case "the resentencing court found that the community control aggravator did not apply" (Brief, p. 31), whereas in the case at bar "the trial court determined that the community control aggravator did not apply" (Brief, p. 31). The state -- not seeing the distinction as stated -- presumes a typographical error and the intended distinction is that the Trotter trial judge found the presence of the aggravator. The state agrees that the trial judge did not find this factor and should have -- occasioning this cross-appeal.

Hudson also argues reliance on the dissenting opinion of Justice Anstead in Trotter. The state respectfully disagrees and prefers the majority opinion.

CONCLUSION

Based on the foregoing arguments and authorities, the court should conclude that the lower court erred and the HAC and sentence of imprisonment-community control aggravator are present and should have been found.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar I.D. No.: 0134101
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Kenneth David Driggs, 229 Chapel Drive, Tallahassee, Florida 32304, and M. Elizabeth Wells, 376 Milledge Avenue, Atlanta, Georgia 30312, this 16th day of June, 1997.

COUNSEL FOR APPELLEE