IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
OCT 14
CLERK, SUPREME COURT
By ____
Chief Deputy Clerk

THOMAS LEE GUDINAS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 86,070

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
CHIEF, CAPITAL APPEALS
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

PAGE NO.

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

ARGUMENTS

POINT II: 1

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN CONDUCTING SEVERAL PRETRIAL HEARINGS WHERE THE APPELLANT WAS INVOLUNTARILY EXCLUDED THUS DENYING GUDINAS' RIGHT TO DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

POINT III: 4

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE ATTEMPTED SEXUAL BATTERY OF RACHELLE SMITH SHOULD HAVE BEEN GRANTED WHERE THE STATE FAILED TO PROVE AN OVERT ACT IN FURTHERANCE OF THE ATTEMPTED SEXUAL BATTERY.

POINT X: 5

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE JURY'S RECOMMENDATION FOR DEATH WAS CONSTITUTIONALLY TAINTED BY IMPROPER PROSECUTORIAL ARGUMENT AND IMPROPER, INADEQUATE INSTRUCTIONS.

ARGUMENTS Cont'd. PAGE NO.

POINT XI: 6

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

CONCLUSION 7

CERTIFICATE OF SERVICE 8

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Nelson v. State 274 So.2d 256 (Fla. 4th DCA 1973)	1
Coney v. State 653 So.2d 1009 (Fla. 1995)	3
Smith v. State 632 So.2d 644 (Fla. 1st DCA 1994)	4
State v. Dixon 283 So.2d 1 (Fla. 1973)	6

IN THE SUPREME COURT OF FLORIDA

THOMAS LEE GUDINAS, Appellant,	)	
vs.	)	CASE NO. 86,070
STATE OF FLORIDA, Appellee.	)	

ARGUMENTS

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN CONDUCTING SEVERAL PRETRIAL HEARINGS WHERE THE APPELLANT WAS INVOLUNTARILY EXCLUDED THUS DENYING GUDINAS' RIGHT TO DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

The State questions whether the in-chambers proceeding from which Gudinas was excluded may not have been a "pre-trial conference." (Answer Brief, p. 37, n. 18) Appellant does not think there is any question that it was indeed a pre-trial conference. The parties were in court that day based on a *pro se* request by Gudinas to discharge his appointed counsel. (R 35) The trial court proceeded to conduct a Nelson[1] hearing. The reality of the

[1] Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973).

situation is that the trial judge continued with the hearing, in chambers, without Gudinas' presence. The error is especially egregious, because the subject of the hearing was Appellant's dissatisfaction with his appointed counsel. The State contends that it is "readily apparent" that nothing took place during the in-chambers discussion that touched upon any matter about which Gudinas would have had any input. (Answer Brief, p. 38) Appellant submits that the State's conclusion is an astounding leap of logic.

The State also talks about the "sensitive" nature of the matter discussed, pointing out that an in-chambers conference was the preferable way to deal with the issue. Appellant submits that he has an absolute right to be present, especially when "sensitive" matters are discussed during a proceeding where the State is attempting to take his life. The State's concern for Appellant's feelings is admirable but misplaced. Appellant's later expression (under questioning) of satisfaction with his lawyers' performance, should be greatly discounted based on his lack of familiarity with legal standards of competence. Additionally, Appellant was unaware that at least some hearings were held without his knowledge or presence. He certainly cannot assess his lawyers' performance at proceedings that he did not attend.

As for the hearings where Appellant's presence is not indicated, an evidentiary hearing may be necessary to establish whether or not Gudinas was absent or present. The same is also true of the State's contention that there is no evidence to support the claim that the trial court expressed concerns about finding another lawyer to replace the withdrawing lawyer at the in-chambers conference. (Answer Brief p.40) In the initial brief, Appellant cited an April 1996 telephone conversation between undersigned counsel and Michael Irwin, the trial

counsel for Mr. Gudinas. If any further verification of this matter is needed, an evidentiary hearing would be the proper procedure. Additionally, Appellant submits that this type of error requires no objection. See e.g. Coney v. State, 653 So.2d 1009 (Fla. 1995). Furthermore, as a practical matter, Appellant cannot object to something that he knows nothing about.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE ATTEMPTED SEXUAL BATTERY OF RACHELLE SMITH SHOULD HAVE BEEN GRANTED WHERE THE STATE FAILED TO PROVE AN OVERT ACT IN FURTHERANCE OF THE ATTEMPTED SEXUAL BATTERY.

The State's reliance on Smith v. State, 632 So.2d 644 (Fla. 1st DCA 1994), is misplaced. Smith's affirmance of two counts of attempt to commit lewd and lascivious assault was predicated on the fact that the female victims in that case were minors. If Smith had made the same statement ("Honey, let me have some pussy," or "Give me your pussy") to an adult woman, no crime could have been charged. Similarly, if Appellant screamed the same words as did Smith, in the instant case, Appellant's argument would remain the same. Gudinas did not express any attempt to have forced sexual intercourse with Rachelle Smith. Therefore, the conviction cannot stand.

POINT X

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE JURY'S RECOMMENDATION FOR DEATH WAS CONSTITUTIONALLY TAINTED BY IMPROPER PROSECUTORIAL ARGUMENT AND IMPROPER, INADEQUATE INSTRUCTIONS.

The Mitigation Jury Instruction

The State complains that defense counsel failed to submit a special requested jury instruction offering a definition of "greater weight of the evidence." Appellant points out that defense counsel objected to the modification of the standard jury instruction that to included that phrase. Appellant is amazed at the State's contention. The State would have trial counsel psychicly anticipate the trial court's modification of the standard instruction (without written request by the State as required by the rule). Defense counsel should not be expected to have written requests prepared for unexpected events. Besides, defense counsel's objection that the phrase is not defined for the jury should be construed as a specific objection to the modification of the standard instruction. This also answers the State's complaint that, although defense counsel objected, he was not specific in his objection. Indeed, he was. His problem with the modification (aside from the fact that the court modified the standard instructions approved by this Court), was the failure of the instruction to adequately channel the jury's discretion, i.e. the phrase was not defined.

POINT XI

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The State must prove aggravating circumstances beyond and to the exclusion of every reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). The State's varied interpretations of the evidence concerning what **could** have happened that night reveals that the State failed to prove their own theory beyond and to the exclusion of every reasonable doubt.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those presented in the Initial Brief, Appellant respectfully requests this Honorable Court to reverse the convictions and vacate the sentences and remand for a new trial as to Points I, II, IV, V, VI, VII, VIII and IX. As to Point III, Appellant asks for discharge on Counts I and II. As to Points X, XI and XII, this Court should vacate the death sentence and remand for the imposition of life imprisonment. As to Point X, this Court at least remand for a new penalty phase.

Respectfully submitted,

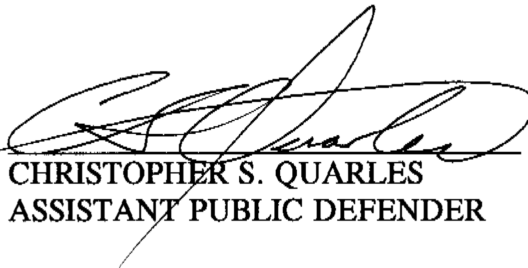
JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Thomas Lee Gudinas, #379799 (44-2191-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 11th day of October, 1996.



CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER