

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

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Chief Deputy Clerk

KEN ELDON LOTT,)
)
 Appellant,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

CASE NUMBER: 86,108

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

SUPPLEMENTAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CASE NUMBER: 86,108

STATEMENT OF THE CASE AND FACTS

Appellant set forth the statement of the case and facts in his initial brief.

POINT XII

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION WHERE THE FINDING IS UNSUPPORTED BY THE EVIDENCE.

The trial court found that this murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification because in the trial court's view the things that were done to the victim required a separate plan to kill. (TR580) The trial court, lacking substantial evidence of whether this murder was the result of cool reflection and heightened premeditation, nonetheless found this circumstance based upon the pyramiding of bits and pieces of circumstantial evidence. The result was an erroneous conclusion that is aggravating circumstance is applicable.

The aggravating circumstance of murder committed in a cold and calculated manner without any pretense of moral or legal justification applies only to crimes which exhibit heightened premeditation greater than is required to establish premeditated murder, and it must be proven beyond a reasonable doubt. Gorham v. State, 454 So.2d 556 (Fla. 1984), cert. denied 105 S.Ct. 941; Rogers v. State, 511 So.2d 526 (Fla. 1987) "This aggravating

factor is not to be utilized in every premeditated murder prosecution," and is reserved primarily for "those murders which are characterized as execution or contract murders or witness elimination murders." (citation omitted)." Bates v. State, 465 So.2d 490, 493 (Fla. 1985). See also Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987).

Moreover, the evidence must prove beyond a reasonable doubt that the murder was committed with reflection and planning - a cold, calculated manner without any pretense of moral or legal justification, and there must be "...a careful plan or pre-arranged design to kill...." Rogers v. State, 511 So.2d 526 (Fla. 1987). Where HAC focuses primarily on the suffering of the victim and the nature of the crime itself, CCP focuses on the state of mind of the perpetrator. Mason v. State, 438 So.2d 374 (Fla. 1983); Michael v. State, 437 So.2d 138 (Fla. 1983). Consequently, if in the perpetrator's mind he had a pretense of a justification for the murder, even if objectively no justification at all, this aggravating circumstance is inapplicable. Blanco v. State, 452 So.2d 520 (Fla. 1984) (victim confronted and struggled with the defendant during a burglary); Banda v. State, 536 So.2d 221 (Fla. 1988); Cannady v. State, 427 So.2d 723 (Fla. 1983) (CCP improperly found where the victim jumped at the

defendant before the fatal shot).

An intentional and deliberate killing during the commission of another felony does not necessarily qualify for the premeditation aggravating circumstance. Maxwell v. State, 443 So.2d 967 (Fla. 1983). Impulsive killings during a felony do not qualify for the premeditation aggravating circumstance. See Hamblen v. State, 527 So.2d 800 (Fla. 1988) (defendant shot robbery victim in the back of the head after becoming angry with her for activating the silent alarm); White v. State, 446 So.2d 1031 (Fla. 1984) (defendant shot two people and attempted to shoot two others during a robbery). The fact that the underlying felony may have been fully planned ahead of time does not qualify the crime for the CCP factor if the plan did not include the commission of the murder. Jackson v. State, 498 So.2d 906 (Fla. 1986); Hardwick v. State, 461 So.2d 79 (Fla.1984).

Circumstantial evidence can support this aggravating factor. But, a plan to kill cannot be inferred from a lack of evidence -- a mere suspicion is insufficient. Lloyd v. State, 524 So.2d 396, 403 (Fla. 1988); see, also, Gorham v. State, 454 So.2d 556, 559 (Fla. 1984); Drake v. State, 441 So.2d 1079 (Fla. 1983); King v. State, 436 So.2d 50 (Fla. 1983); Mann v. State, 420 So.2d 578 (Fla. 1982) Moreover, this Court has rejected this

circumstance where the evidence showed multiple wounds. This Court reasoned that without more evidence, multiple wounds do not prove the heightened premeditation required. Hamilton v. State, 547 So.2d 630 (Fla. 1989) (multiple wounds to two victims); Caruthers v. State, 465 So.2d 496 (Fla. 1985) (victim shot three times); Blanco v. State, 452 So.2d 520 (Fla. 1984) (victim shot seven times). A beating death with multiple wounds does not necessarily qualify for this aggravating circumstance. King v. State, 436 So.2d 50 (Fla. 1983); Wilson v. State, 436 So.2d 912 (Fla. 1983). Additionally, strangulation and asphyxiation without a prior plan to kill does not qualify. Hardwick v. State, 461 So.2d 79 (Fla. 1984).

In Jackson v. State, 648 So.2d 85 (Fla. 1994) this Court detailed a formula for determining whether the CCP aggravating factor should be applied:

Thus, in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), Richardson, 604 So.2d at 1109; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), Rogers, 511 So.2d at 533; and that the defendant exhibited heightened premeditation (premeditated), Id.; and that the defendant had no pretense of moral or legal

justification. Banda v. State, 536 So.2d 221, 224-25 (Fla.1988), cert. denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989).

Jackson at 89.

In the instant case, the trial court relied heavily upon the manner of killing to support the finding of heightened premeditation to kill. What is known about the manner of killing is gleaned from the testimony of the medical examiner. The evidence supports the inference that the victim was attacked with a blunt object and then strangled. At this point there is no sign of struggle, because the blows to the victim's skull and the strangulation rendered the victim unconscious. Thereafter, the victim's neck was cut causing the victim to bleed to death.¹ The medical examiner could not be certain about the interval between the initial assault and the stabbing testifying that it could have been immediate or up to thirty minutes.

There is insufficient evidence that the physical attack upon the victim had any planning or preparation. Accordingly, this aggravating circumstance should be struck, the death sentences vacated and the matter remanded for resentencing.

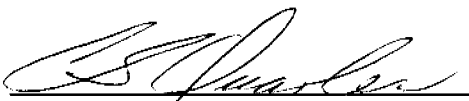
¹ The victim was also stabbed in the back after she was dead to confirm the death.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and argument, Appellant respectfully requests this Court to reverse Appellant's conviction and discharge him from Florida custody as to Points I, II and III; order a new penalty phase as to Points IV, VII, VIII, IX, XI and XII; order a new trial as to Points V, VI and X.

Respectfully submitted,


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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 Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal, and mailed to Mr. Ken Eldon Lott, #026985 (A-1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 30th day of August, 1996.


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