IN THE SUPREME COURT OF FLORIDA

EDWARD T. JAMES,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 86,834

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

OTHER AUTHORITIES CITED:

IN THE SUPREME COURT OF FLORIDA

EDWARD T. JAMES,)
)
Appellant,)
)
vs.) CASE NO. 86,834
)
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)
Appellee.)
)

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL DUE TO THE IMPROPER COMMENTS BY THE ASSISTANT STATE ATTORNEY DURING THE PENALTY PHASE OF HIS TRIAL.

Appellee's initial argument with regard to this point is that it is procedurally barred since defense counsel waited until the close of the prosecutor's argument before making his motion for mistrial and also because defense counsel failed to request a cautionary instruction. Appellee's argument is misplaced. Appellant is aware of the law regarding preservation of improper comments for appellate review. In Nixon v. State, 572 So.2d 1336 (Fla. 1990), this Court held that a motion for mistrial made at the end of the state's closing argument was

insufficient to preserve for appeal the propriety of an alleged improper comment made at the beginning of the state's closing argument, where there was no contemporaneous objection. However, this Court did note that had the comment been immediately objected to, the motion for mistrial made at the end of the closing argument would have been proper. In the instant case, the offending comments by the prosecutor were made at the end of his closing arguments. Indeed, following the inappropriate comments, the prosecutor's argument consisted of three short paragraphs. Under these facts, Appellant's motion for mistrial must be construed as being timely.

As to his second argument with regard to procedural bar is concerned, Appellee apparently has overlooked this Court's most recent pronouncement in Spencer v. State, 645 So.2d 377 (Fla. 1994), wherein this Court specifically held that a defendant need not request a curative instruction in order to preserve an improper comment issue for appeal. Rather, the issue is preserved if the defendant makes a timely objection and moves for a mistrial. Thus, defense counsel's failure to move for a curative instruction in the instant case cannot be considered a procedural bar to this Court's consideration of the issue on appeal.

Turning to the merits of the issue, it is clear that defense counsel's argument that the jury's recommendation should be for life in part because Appellant was under the influence of drugs at the time is a well recognized mitigating factor. Smalley v. State, 546 So.2d 720 (Fla. 1989); Norris v. State, 429 So.2d 688 (Fla. 1983); Masterson v. State, 516 So.2d 256 (Fla. 1987). While it was certainly proper for the prosecutor to argue to the jury that this mitigating factor should not be given much weight by the jury, the manner in which the prosecutor did so in the instant case was clearly improper. The comment of the prosecutor could clearly be

interpreted by the jury as inviting them to consider the fact that Appellant had committed other non-violent felonies, i.e., drug possession, which is an improper aggravating circumstance, a fact well-recognized by the prosecutor below. With regard to the second offending comment, it is equally clear that a finding of legal sanity does not eliminate the consideration of the statutory mitigating factors concerning mental condition. Campbell v. State, 571 So.2d 415 (Fla. 1990). However, the state's argument to the jury was to the effect that because the defendant's own witnesses found him to be legally sane, the jury should merely disregard this evidence. Again, the impropriety of the state's comment is clear. Merely because the sentencing judge did not make reference to the legal sanity standard, does not mean that the error is harmless. The fact that the jury, an integral part of the capital sentencing scheme, was allowed to make this erroneous assumption, undermines the reliability of the jury recommendation. See, generally, Omelus v. State, 584 So.2d 563 (Fla. 1991) (instruction to the jury and argument by the state with regard to an improper aggravating circumstance is reversible error notwithstanding the fact that the trial court did not find the aggravating circumstance to be present).

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE JURY INSTRUCTION ON HEINOUS, ATROCIOUS OR CRUEL, WHICH IS UNCONSTITUTIONALLY VAGUE.

Appellee once again argues that this issue is procedurally barred since Appellant never proposed an alternative instruction. Appellant is certainly aware of this Court's opinions regarding the necessity of requesting an alternative instruction. However, he urges this Court to reconsider this requirement. As noted below, defense counsel informed the court that he did not think a constitutional instruction could in fact be fashioned with regard to this aggravating circumstance. (T936-37) Appellant reiterates this argument to this Court that because of the nature of this aggravating circumstance and because of this Court's differing interpretations regarding the application of this aggravating circumstance, it is virtually impossible to come up with a constitutionally sound jury instruction regarding this aggravating circumstance. Notwithstanding this argument, Appellant asserts that it is not his duty, nor should it be, to fashion jury instructions to assist the state in executing him. Rather, it must be the state's burden at all times if in fact they are seeking to take the life of one of its citizens, to come up with a constitutionally sound method of doing so. Therefore, this Court should recede from its previous holdings and no longer require an accused person to fashion constitutional instructions to enable the state to secure a conviction.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT APPELLANT'S DEATH SENTENCE FOR TONI NEUNER'S DEATH WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED AN IMPROPER AGGRAVATING CIRCUMSTANCE, THUS RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

Appellee's argument with regard to this issue is mainly that because this was a strangulation case, the trial court's finding of HAC is appropriate. However, as noted by this Court in Herzog v. State, 439 So.2d 1372 (Fla. 1983), not every strangulation murder is heinous, atrocious and cruel. Indeed, the instant case presents a perfect example of a situation in which a strangulation murder is not heinous, atrocious and cruel. The evidence supports the conclusion that Toni Neuner was first accosted while she was asleep. Because there was no evidence of any outcry on the part of Toni, it is reasonable to assume that she was rendered unconscious almost immediately. Indeed, the medical examiner could not rule out the possibility that Toni was unconscious at the time the injuries were inflicted. (T315) Appellee further argues that "whether James intended to inflict a high degree of pain, or unnecessarily torture Toni is of no consequence, because the focus is on Toni's state of mind not James'." (Brief of Appellee, Page 46). Unfortunately, this is simply not the standard. This Court clearly stated in Santos v. State, 591 So.2d 160 (Fla. 1991) and in Cheshire v. State, 568 So.2d 908 (Fla. 1990), that the HAC factor is appropriate only in torturous murders which exhibit a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the

suffering of another. Thus, it is of great importance to focus on what Appellant's intent was. The record is simply devoid of any evidence showing Appellant intended to inflict a high degree of pain or suffering on the victim. Certainly, Appellant had no enjoyment from this incident. Simply put, as tragic as the death of Toni Neuner is, a fact not contested at all by Appellant, it simply does not meet the standard for application of the aggravating circumstance of heinous, atrocious and cruel.

CONCLUSION

Based on the foregoing reasons and authorities stated, as well as those in the Initial Brief, Appellant respectfully requests this Honorable Court to vacate the death sentences and remand the cause for a new penalty phase or, in the alternative, for imposition of life sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: Assistant Attorney General Mark S. Dunn, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050, and to; Mr. Edward T. James, #969121 (42-2086-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 22nd day of October, 1996.

Michael S Becker

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER