IN THE SUPREME COURT OF FLORIDA

CHADWICK WILLACY,)
)
Appellant,)
)
vs.)
)
STATE OF FLORIDA,)
)
Appellee.)
)

CASE NUMBER 86,994

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

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CHADWICK WILLACY,	)	
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Appellant,	)	
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	)	
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	)	
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	)	

ARGUMENTS

POINT I

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED BY NOT GRANTING THE DEFENSE MOTION TO RECUSE AND OR DISQUALIFY WHERE THE MOTION WAS LEGALLY SUFFICIENT.

The Appellant stands on the argument in the initial brief.

POINT II

IN REPLY AND IN SUPPORT THAT WILLACY WAS DENIED A FAIR RESENTENCING HEARING BY THE UNNECESSARY PRESENTATION OF EVIDENCE WHOSE PROBATIVE VALUE WAS OUTWEIGHED BY ITS PREJUDICIAL EFFECT.

The State argues in their answer that the evidence of the victim's burnt corpse was properly admitted as part of a single criminal episode. (Answer brief at 19) The State relies upon the case of Preston v. State, 607 So. 2d 404 (Fla. 1992). The Appellant contends that the Preston case is distinguishable from the instant case.

In Preston the medical examiner testified about the autopsy of the victim. According to his testimony, the initial wound was to the victim's neck. The victim immediately lost consciousness and/or died. Defense counsel objected on the grounds of relevance to any testimony about injuries inflicted after the initial wound. The trial court overruled the objection. In finding no error in the admission of the testimony concerning the wounds inflicted after the initial neck wound, this Court focused upon the fact that the medical examiner's testimony demonstrated the deliberate nature of the crime and refuted Preston's claim that he was in a PCP-induced frenzy at the time of the murder. Further, the jury was specifically instructed that it could not consider injuries inflicted after the victim lost consciousness in determining whether the murder was especially heinous, atrocious, or cruel.

In the instant case, the evidence of the victim's burnt corpse was not used to refute any contention of the appellant. Moreover, the claim that the evidence of the victim's burnt corpse was relevant to prove HAC and CCP has no merit. According to the medical examiner, the victim was "agonal" at the time the fire was started, meaning that the victim was in the process of dying from the blows to the head and strangulation. Therefore, the setting of the fire and any resulting fire damage was not relevant to the aggravating factors of HAC and CCP. The Preston case is further distinguished because in Preston the trial court specifically instructed the jury that it could not consider injuries inflicted after the victim lost consciousness in determining whether the murder was especially heinous, atrocious, or cruel. There was no such jury instruction in the instant case.

The photograph and video taken of the burnt corpse could in no way enhance the jury's understanding of the issues in the penalty phase context. Insofar as determining whether the

murder was especially heinous, atrocious or cruel, the jury may well have been greatly influenced by the offensiveness of the photographs and video. Mutilation of a body after death cannot be properly considered in establishing that statutory aggravating factor. See Halliwell v. State, 323 So.2d 557 (Fla. 1975). However, lay people may attribute weight to the HAC factor solely because of such graphic photos and video.

The unnecessary, prejudicial introduction of this photograph over timely objection denied Willacy a fair jury recommendation in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 9, and 22 of the Florida Constitution. Further, due to the inflammatory nature of this photograph, the jury recommendation has become unreliable as being based on inflamed emotion in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Accordingly, the death sentence must be reversed and the matter remanded for a new penalty phase with a new jury recommendation.

POINT III

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER.

The State claims in their answer that there was sufficient evidence to support the trial court's finding of HAC. The state's evidence is the testimony of the medical examiner that the victim could have been moving during the attack, and the testimony of the bloodstain analyst that the victim could have been moving after the body started burning. This claim has no merit.

The State relies upon the authority of Whitton v. State, 649 So. 2d 861 (Fla. 1994); Taylor v. State, 630 So.2d 1038 (Fla. 1993); Hildwin v. State, 531 So.2d 124 (Fla. 1988); and Routly v. State, 440 So.2d 1257 (Fla. 1983) for the proposition that a victim's fear and emotional strain can establish HAC. These cases listed by the State are distinguishable from the instant case. In Whitton, the medical examiner described the attack as lasting approximately thirty minutes. The defendant had defensive wounds and the trail of blood reflecting the victim's movement indicate that the blows to the head must have come late in the attack. Based on this, the medical examiner testified that the victim was aware of what was happening to him, and would have felt pain as a result of the injuries he sustained. In the instant case, the initial attack was seconds, and the medical examiner could not determine whether the victim was conscious after the initial attack.

In Taylor, the record revealed that the victim was stabbed at least twenty times with two different weapons. The victim also suffered twenty-one other lacerations, bruises, and wounds, and received several blows to her head and face from blunt objects. The medical examiner testified that the victim was alive while she was stabbed, beaten, and finally strangled. In the instant case, the victim was not "slowly murdered" and not been stabbed 20 times nor had been beaten cut and bruised 21 times as in Taylor.

In Hildwin, the victim took several minutes to lose consciousness and would have been aware during that time of her impending doom. Second, the victim was brutally attacked, and according to the statement Hildwin gave to police that the victim screamed and begged for help while she was strangled, and that her face turned blue before she lost consciousness. In the instant case, the appellant made no similar statement to police about the victim begging for

help, nor was their testimony as to when the victim lost consciousness.

In Routly, the medical examiner testified that, if her conclusions concerning the number of bullets and angle of the wound were correct, that "death would have been within a matter of a few minutes." However, in upholding HAC, this Court emphasized that before the instantaneous death occurred, the victims were subjected to agony over the prospect that death was soon to occur:

> The trial court in his findings of fact concluded that the victim knew he was going to die; the evidence supports this conclusion. Mr. Bockini must have known that the defendant had only one reason for binding, gagging and kidnaping him. In a desperate effort to gain freedom, the victim apparently disconnected the vehicle tail lights. Having arrived in an isolated area, the victim was forcibly removed from the trunk and shot to death without the slightest mercy. The terror that was felt by the victim during this ride, and immediately precedent to his death is beyond description by the written word and is indistinguishable from the terror and fear felt by the victims in Knight, Adams, Steinhorst, White, and Smith. We therefore hold that the heinous, atrocious or cruel factor was properly applied by the court below.
>
> Routly at 1262.

In the instant case, there was no evidence presented that the victim was aware of her impending death.

Appellant argues that because there were no defensive wounds found on the body and because the other evidence of the killing, such as the time it took the victim to die, was not conclusively established, the judge engaged in mere speculation. Appellant argues that the evidence is just as consistent with the premise that after entering her home, the victim was struck with great force with a blunt object, and rendered unconscious. Under this likely scenario, HAC would not be applicable.

POINT IV

IN REPLY AND SUPPORT THAT THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

The evidence is not sufficient to support this aggravating factor. The State speculates that "Willacy... chased the victim through much of the house, and after beating her into submission, dragged her back into the living room where he bound her arms and legs." (Appellee brief at 33) There was no direct to support this characterization of the crime.

The State concludes that on the facts of the case there is no reasonable inference but that Willacy intended to kill the victim to eliminate her as a witness. (Appellee brief at 32) The State ignores Willacy's statement that he was an unwitting accomplice to this murder and that the left-handed drug dealer was the perpetrator of the murder.

POINT V

IN REPLY AND SUPPORT THAT THE TRIAL COURT ERRED IN FINDING THE SEPARATE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN.

The trial court found that this murder was committed for pecuniary gain while also finding that the murder occurred during the course of a felony: robbery, burglary, arson. This finding is an improper "doubling" of aggravating circumstances. In support of the trial court's erroneous finding, the Appellee cites Henry v. State, 613 So.2d 429, 433 (Fla. 1992) The facts in Henry are distinguishable from the instant case.

In Henry, the victim was lured into a restroom and persuaded her to let him tie her up

and blindfold her under the guise of protecting her from the robbers. After hitting the victim in the head and stealing the money, Henry left, but then returned with a liquid accelerant which he poured on her and lit while the victim begged him not to. Only after setting the victim on fire did he return to the other victim and do the same to her.

In the instant case, the victim was "agonal" or in the final moments of life at the time the fire was set. The arson therefore was not an intrical or dominant part of the murder. For all intents and purposes the murder was complete, and the arson was a post-murder activity.

POINT VI

IN REPLY AND SUPPORT THAT 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 State claims that the CCP aggravator was supported by evidence of heightened premeditation due to the various and numerous activities devoted to the accomplishment of the murder. The State relies upon Fennie v. State, 648 So.2d 95 (Fla. 1994); Lockhart v. State, 655 So.2d 69 (Fla. 1995); Walls v. State, 641 So.2d 381 (Fla. 1994); and Arbelaez v. State, 626 So.2d 169 (Fla. 1993). This claim has no merit.

In Fennie, the defendant forced his victim into the trunk of a car at gunpoint. Thereafter, Fennie made several stops to obtain the accouterments necessary to drown the victim. Fennie also informed others that he planned to drown the victim but later told them he intended to shoot her instead. To carry out his plan and avoid detection, Fennie brought the victim to a location where the gunshot would not be heard. The lengthy and drawn out nature

of this crime clearly indicates Fennie carefully contemplated his actions prior to the fatal incident. In the instant case, the victim came home unexpectedly while the home was being burglarized. The victim suffered a frenzied attack and strangulation which in itself was fatal. The subsequent actions taken by the appellant was done to destroy evidence of the crime and not part of heightened premeditation to kill the victim.

In Lockhart, the Court concluded that based upon the various means of torture used and the sexual assault, Lockhart planned the murder of his victim before even entering the victim's house. In the instant case there was no evidence of torture or sexual assault, nor any evidence of any preplanning to kill the victim. In Walls, there were two victims (boyfriend and girlfriend) that were each bound in separate rooms and murdered execution style. The second victim was told by Walls that she was to be hurt because of acts by her boyfriend. In Arbelaez, the defendant's girlfriend left him for another man. The next morning he told a friend he was going to get even. He then took the girlfriend's child and threw the child off a bridge killing the child. In the instant case, there was no evidence that the appellant had a score to settle with the victim.

In conclusion, there is no evidence that the physical attack upon the victim had any planning or preparation. To be sure, the trial court confused the subsequent dousing of the house and victim with gasoline and the attempt to burn the house down as somehow changing the character of this murder to one of heightened premeditation. The state pushed this characterization very hard in this second penalty phase proceeding, after this same trial judge rejected this aggravating circumstance in the first sentencing proceeding. The state's

persistence on this issue was successful in leading the trial court to commit error. Accordingly, this aggravating circumstance should be struck, the death sentences vacated and the matter remanded for resentencing.

POINT VII

IN REPLY AND SUPPORT THAT UNDER FLORIDA LAW, THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THIS CASE.

The Appellant stands on the argument in the initial brief.

POINT VIII

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED IN PERMITTING VICTIM IMPACT EVIDENCE THAT WAS NOT RELEVANT TO THE ISSUE OF THE UNIQUENESS OF THE VICTIM AND WENT BEYOND THE NARROW APPLICATION OF THE STATUTORY SCHEME.

The Appellant stands on the argument in the initial brief.

POINT IX

IN REPLY AND SUPPORT THAT THE TRIAL COURT ERRED IN REFUSING TO STRIKE JURORS FOR CAUSE WHERE THE JURORS WOULD AUTOMATICALLY PRESUME THAT DEATH IS THE APPROPRIATE PENALTY AND OTHERWISE EXPRESSED THEIR DOUBT ABOUT THEIR ABILITY TO BE FAIR AND IMPARTIAL DUE TO THEIR SUPPORT OF THE DEATH PENALTY.

The Appellant stands on the argument in the initial brief.

POINT X

IN REPLY AND SUPPORT THAT THE APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BASED UPON THE CUMULATIVE EFFECT OF ERRORS THAT OCCURRED AT TRIAL.

The Appellant stands on the argument in the initial brief.

POINT XI

IN REPLY AND SUPPORT THAT SECTION 921.141, FLORIDA STATUTES IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Appellant stands on the argument in the initial brief.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to to provide the following relief:

POINTS I - VII; IX-X: To reverse the death sentence and to remand for a new penalty proceeding before a new jury.

POINT VIII & XI: To vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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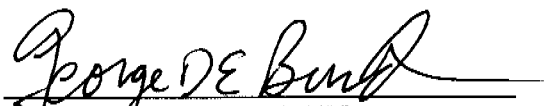
CERTIFICATE OF SERVICE

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 Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Chadwick Willacy, #707742 (43-2137-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 16th day of January, 1997.



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