IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

PRESSLEY ALSTON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO.: 87,275
LOWER CASE NO.: 95-5326-CF

On appeal from the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE NO.**

STATUTES

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS ALSTON'S CONFESSION

The state's argument as to this issue ignores the facts established at the suppression hearing. Without analyzing the testimony presented below, the state asserts, "[Detective] Baxter testified that he never promised Alston anything, that he never threatened Alston . . . that Roberts never promised anything to Alston or threatened him, and that Alston confessed freely and voluntarily and offered to take them to the victim's body." (Answer Brief of Appellee at 7-8). Appellee would have this court believe no cross-examination of Detective Baxter had occurred. It was clear from the record that the interrogating detectives made specific promises to appellant, including their agreement to tell the judge about his cooperation, and it was clear that the detectives had intimated they would soon begin questioning appellant's girlfriend if he didn't talk. (T-Vol. XI - 158-59; T-Vol. XI - 160).

Moreover, the state argues that because Alston had seen detectives twelve or thirteen times ***after*** May 26, that somehow his statements on that date were totally voluntary and uninfluenced by police coercion. (Answer brief of appellee at 11). Despite the trial court's having permitted this line of questioning at the suppression hearing, these incidents clearly do not address whether a ***prior*** confession was freely and involuntarily given.

The cases upon which appellee relies as to this issue are inapplicable. Johnson v. State, 660 So.2d. 637 (Fla. 1995), addresses the question of the waiver of rights in a polygraph consent form, and the voluntariness of a post-polygraph statement by the defendant. Johnson's assumption that the polygraph waiver did not cover post-test interrogation was deemed to be unwarranted. In fact, Justice Kogan specifically distinguished Johnson from cases involving the so-called "Christian burial speech." 660 So.2d. at 643. Johnson is therefore inapplicable to Pressley Alston's case where there was police deception and psychological coercion, including a "Christian burial speech" technique.

Bruno v. State, 574 So.2d. 76 (Fla. 1991), is similarly distinguishable. In Bruno, this court determined that there was no police overreaching where the police believed an in-custody defendant's son was involved in the crime, and the police discussed the son's welfare with the defendant prior to obtaining a confession from the defendant. Black v. State, 630 So.2d. 609 (Fla. 1st DCA 1993), is also inapplicable. In Black, the First District Court gave great weight to the fact that the defendant himself had initiated the negotiations that led to his confession. Noting that "the salient consideration in an analysis of the voluntariness of a confession is whether a defendant's free will has been overcome," the court noted that the police had "merely acquiesced in [defendant's] attempt to obtain leniency for his girlfriend." 630 So.2d. at 609.

Cannady v. State, 427 So.2d. 723 (Fla. 1983), is likewise

distinguishable. In Cannady, the only claim of psychological coercion was that the detective had grabbed the defendant's hand and said, "the drugs had gotten [his] mind all twisted and that he [the detective] wanted to help." 427 So.2d. at 726. The Cannady record is a clearly distinguishable from the record in the instant case.

Here, the evidence clearly established that at least ***seven*** different factors were at work on Pressley Alston before he confessed:

(a) Pressley Alston was not advised for what reason he was being taken into custody at the time of his arrest;

(b) Pressley Alston was not advised for what reason he was under arrest once he reached the Police Memorial Building;

(c) the interrogating detectives made specific promises to Pressley Alston, including their agreement to tell the judge about his cooperation;

(d) the interrogating detectives intentionally misled Pressley Alston because they stated they would not take notes, thereby leading the defendant to believe that what he said could not be used against him;

(e) the interrogating detective employed a blatantly coercive and deceptive ploy in giving the "Christian burial speech" to Pressley Alston, stating that they only wanted to help find the body;

(f) the interrogating detective employed a ruse that "the Coon family needed closure"; and

(g) the detectives intimated they would soon begin questioning Alston's girlfriend.

Because a ***combination*** of factors worked together to overcome Alston's free will and to render Alston's confession involuntary and the product of psychological coercion, it was error for the trial court to have denied the motion to suppress.

ISSUE II:

THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION IN LIMINE CONCERNING THE VIDEOTAPE OF THE "WALK-OVER"

The state argues that because appellant was responsible for the prejudicial content of the videotape that the tape is somehow therefore admissible. Clearly, the question of responsibility for a piece of evidence does not establish whether it is ***relevant.*** The Florida Evidence Code defines relevant evidence as "evidence tending to prove or disprove a material fact." Section 90.401, Florida Statutes (1995). In Stokes v. State, 541 So.2d. 642 (Fla. 1st DCA 1989), the First District Court was faced with a similar issue: whether irrelevant, character-attacking statements purportedly made by a defendant were properly admitted at her murder trial. In Stokes, the appellant had written letters to a cell-mate in which she admitted to sexual misconduct while in jail and plans for theft from other inmates. 541 So.2d. at 645. The Fist District reversed the homicide conviction, stating that "[t]he letters do impact upon appellant's character, and do not appear to be relevant to any issues at trial." 541 So.2d. at 646.

Clearly, Stokes is the rule of law applicable to the instant case: none of the extraneous and superfluous comments or actions on the "walk-over" videotape proved any fact in issue, and in fact, the entire video (audio and video) constituted a massive attack on appellant's character. The trial court erred in permitting this totally irrelevant, highly prejudicial piece of evidence to be admitted against appellant. Because this tape so grossly attacked

appellant's character, appellant was deprived of his right to a fair trial. This court should reverse appellant's convictions and reverse this cause for a new trial.

ISSUE III:

THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST TO INFORM THE JURY THAT APPELLANT WAS BEING ADMINISTERED PSYCHOTROPIC MEDICATION

The trial court's error in failing to instruct the jury as to the fact that appellant was taking psychotropic medication during the trial cannot be said to be harmless. Because the jury was required to make determinations about appellant's mental state at the time of the crime, about appellant's mental state at the time of his arrest, and about appellant's mental state at the time of the penalty phase proceeding, it was certainly not harmless error to fail to so instruct the jury.

The jury's verdicts may well have been different if jurors had known Alston's non-disruptive seemingly "appropriate" courtroom behavior was the result of medication. As the trial court pointed out, it had not seen "any bizarre or inappropriate behavior." (T-Vol. XV-914). It cannot be said that Alston's demeanor during this three-day trial would not have influenced the jury's decision making. Because the trial court erred in failing to so instruct the jury, the convictions must be set aside, and this cause remanded for a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN PERMITTING THE MEDICAL EXAMINER TO TESTIFY AS TO THE IDENTIFICATION OF THE VICTIM BASED UPON METHODS OF FORENSIC ODONTOLOGY AND UPON HEARSAY RECORDS OF THE VICTIM'S DENTAL HISTORY

The state asserts "[t]he determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge . . . ," citing Terry v. State, 668 So.2d. 954 (Fla. 1996). In this case, the trial court specifically and unequivocally stated that the assistant medical examiner would not be permitted to give an opinion in the field of forensic odontology. The voir dire of Dr. Floro and the trial judge's ruling are set forth in the record:

> Q: Dr. Floro, you are not a forensic odontologist, are you?
>
> A: I am not a forensic odontologist.
>
> Q: A forensic odontologist begins with being a dentist; is that correct?
>
> A: That's correct, sir.
>
> Q: And you are not a dentist?
>
> A: I am not a dentist.
>
> Q: And in this case you did not make an independent identification of dental records in this case, did you?
>
> A: Not an independent, but in conjunction with.
>
> Q: All right, and do you -- strike that.
>
> MR. WHITE: I have no further questions, Your Honor.
>
> I would accept him as a forensic pathologist, but I would ask the Court not to

qualify him as a forensic odontologist.

> THE COURT: The witness would be permitted to give an opinion or opinions in the area of forensic pathology but ***not in the area of forensic odontology.***

(T-Vol. XVI 1121-22). (Emphasis supplied).

The trial court was correct in its ruling that Dr. Floro would not be permitted to testify as a forensic odontologist, but subsequently erred in inexplicably permitting him to so do. Because Dr. Floro's testimony was the primary proof of identity of the victim, the error cannot be said to be harmless. Had the trial court abided by its correct ruling that prohibited Dr. Floro from rendering an opinion as a "forensic odontologist," the state would have had only tangential evidence upon which to base an identification (a few clothing scraps). Because Dr. Floro's improper opinion testimony enabled the state to get past a judgment of acquittal, the error is not harmless.

ISSUE V:

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE ARMED ROBBERY COUNT BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION

Appellant relies on the argument set forth in his initial brief as to this issue.

ISSUE VI:

THE TRIAL COURT ERRED IN FAILING TO GIVE THE INDEPENDENT ACT INSTRUCTION DURING THE GUILT PHASE OF THE TRIAL

Appellant relies on the argument set forth in his initial brief as to this issue.

ISSUE VII:

THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST TO DELAY THE PENALTY PHASE PROCEEDINGS UNTIL THE CO-DEFENDANT COULD BE TRIED AND SENTENCED

Appellant relies on the argument set forth in his initial brief as to this issue.

ISSUE VIII:

THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST TO DELETE THE PORTION OF THE JURY INSTRUCTION "RULES FOR DELIBERATION" REGARDING THE "JUDGE'S JOB" AND ERRED IN FAILING TO GIVE THE DEFENSE REQUESTED JURY INSTRUCTION

Appellant relies on the argument set forth in his initial brief as to this issue.

ISSUE IX:

THE TRIAL COURT ERRED IN PERMITTING VICTIM IMPACT EVIDENCE TO BE PRESENTED TO THE JURY

Appellant relies on the argument set forth in his initial brief as to this issue.

ISSUE X:

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY AS TO VICTIM IMPACT EVIDENCE

Appellant relies on the argument set forth in his initial brief as to this issue.

ISSUE XI:

THE TRIAL COURT ERRED IN PERMITTING THE FULL-COLOR GRADUATION PHOTOGRAPH OF JAMES COON TO BE EXHIBITED TO THE JURY DURING CLOSING ARGUMENT

Appellant relies on the argument set forth in his initial brief as to this issue.

ISSUE XII:

THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING A LAWFUL ARREST

Appellant agrees that in order to establish the aggravating factor of "avoiding arrest," that the state must show this was the sole or dominant motive for the murder. See, e.g. Rogers v. State, 511 So.2d. 526 (Fla. 1987). However, appellant disagrees that the facts of this case establish this aggravator. Appellant asserts that the facts (*and* the state's own theory) in this case establish that the dominant motive for this homicide was robbery. In fact, the trial court found that pecuniary gain was an aggravating factor in this case. (R-511-20).

ISSUE XIII:

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL

Appellant relies on this court's recent pronouncements in Hartley v. State, ____ So.2d. ____ 21 F.L.W. S 391 (Fla. 1996); and Ferrell v. State, ____ So.2d. ____ 21 F.L.W. S 388 (Fla. 1996) in support of his contention that this homicide was not heinous, atrocious and cruel. The state would have this court believe that the facts of this case establish "extraordinary" physical or mental torture required in addition to the execution-style killing. This is not the case, for the facts here are very similar to the facts of Ferrell and Hartley; the victim was abducted at gunpoint and driven to another location where he was shot execution-style.

The cases the state relies on to substantiate its argument that the mind set of the victim must be factored in when assessing the existence of this aggravating factor are factually distinguishable from the instant case. In Wyatt v. State, 641 So.2d. 1336 (Fla. 1994), cert. denied, ___ U.S. ____, 115 S.Ct. 1983 (1995), the victims were pistol whipped and raped prior to being shot. Each of the three victims were witnesses to the shootings of the others, and were acutely aware of their impending deaths. Similarly, in Harvey v. State, 529 So.2d. 1083 (Fla. 1988), cert. denied 489 U.S. 1040 (1989), the victims were an elderly couple who had been accosted in their home, and who tried to escape. One witnessed the shooting of the other. In Phillips v. State, 476 So.2d. 194 (Fla. 1985), the victim had been stalked

by the defendant. He was shot twice in the chest and tried to flee before being killed by repeated shots to the back.

The facts of these cases establish a higher level of physical and mental torture than exists in Alston's case. Harvey, Wyatt, and Phillips are therefore inapplicable to the instant case and should not be relied on by this court.

Finally, the determination that this aggravator exists cannot be said to be harmless. Appellant has argued that three of the aggravators should be stricken; if successful, only two aggravators would remain (felony murder/pecuniary gain and prior conviction). In that event, the substantial mitigation presented by Alston would likely have outweighed the aggravating factors, and the jury would have recommended life. Because the record herein fails to sustain a finding of "heinous, atrocious and cruel," appellant's sentence of death must be reversed and this cause remanded for the imposition of a life sentence.

ISSUE XIV:

THE TRIAL COURT ERRED IN GIVING INSUFFICIENT WEIGHT TO THE DEFENDANT'S MITIGATING FACTORS

In rejecting Alston's evidence of non-statutory mitigation so readily, the trial court committed a palpable abuse of discretion. The trial court acknowledged that appellant had established certain mitigation, relating primarily to his childhood and to mental deficiencies, but elected to minimize this evidence. The trial court determined that the mitigation did not -- individually or collectively -- outweigh the aggravating factors.

The state quotes Rogers v. State, 511 So.2d. 526 (Fla. 1987), for the rule on weighing mitigating factors. In Rogers, this court noted:

> . . .[t]he trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court must then determine whether the established facts area of a kind capable of mitigating the defendant's punishment . . . . If such factors exist . . . the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

511 So.2d. at 535.

The mitigation presented by appellant in this case was of sufficient weight to counterbalance the aggravating factors, especially if only two aggravating factors remain. In this case, unlike the cases relied on by the state, there was no question of

the sufficiency of proof of mitigating circumstances.[1] In fact, the mitigation in this case is akin to that offered in Campbell v. State, 571 So.2d. 415 (Fla. 1990), upon which the state relies. As this court stated in Ellis v. State, 622 So.2d. 991 (Fla. 1993), "the trial court in any penalty phase is directed to expressly find, consider and weigh ***all*** mitigating evidence . . . apparent anywhere on the record . . . ." 622 So.2d. at 635.

The trial court impermissibly merged the several mitigating factors relating to Alston's childhood into one factor, thereby diminishing without reason Alston's uncontroverted evidence of mitigation. The trial court never addressed the weight it gave to the fact that Alston had taken law enforcement authorities the body of the victim, and rejected the expert testimony regarding Alston's mental disabilities. The trial court's rejection of mitigating circumstances which had been proved by competent, substantial, uncontroverted evidence constituted a palpable abuse of discretion. This court should vacate the death sentence imposed below and remand for the imposition of a life sentence.

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[1]The cases upon which the state relies for the premise that the "trial court's finding that the facts do not establish a mitigator will be presumed correct and upheld on appeal if supported by sufficient competent evidence" are not relevant here; the trial court determined that Alston had established a majority of the non-statutory mitigation he had set out to prove. The issue is whether the trial court gave sufficient weight to those mitigators.

ISSUE XV:

THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD PROVED BEYOND A REASONABLE DOUBT THE STATUTORY AGGRAVATING FACTOR OF "COLD, CALCULATED AND PREMEDITATED MANNER"

Appellant relies on the argument set forth in his initial brief as to this issue.

ISSUE XVI:

THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO PROHIBIT THE IMPOSITION OF THE DEATH PENALTY BECAUSE OF THE MENTAL AGE OF THE DEFENDANT

The state argues that this court has never held a defendant's low mental age as a bar to the death penalty. (Answer brief of appellee at 63). However, this court ***has*** held that mental and emotional maturity are factors to be considered in determining whether age is a mitigating factor. See, e.g. Ellis v. State, 622 So.2d. 991 (Fla. 1993), and LeCroy v. State, 533 So.2d. 750 (Fla. 1988), cert. denied, 492 U.S. 925, 109 S.Ct. 3262, 106 L.Ed 2d 607 (1989).

ISSUE XVII:

THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE

The state argues that when the aggravators are weighed against the "inconsequential" non-statutory mitigation in this case, that it is "readily apparent" that this is one of the "most aggravated" murders. After carefully analyzing the facts of this case, it is apparent that only two aggravating circumstances remain: the merged pecuniary gain/during robbery and prior crime of violence. When weighed against these two aggravating circumstances, it is clear that the mitigation is not "inconsequential" and that the death penalty is disproportionate in this case.

CONCLUSION

Because the trial court erred in denying the defense motion to suppress Alston's in-custody statements and erred in permitting the videotape of the "walk-over" to be shown to the jury, this cause must be reversed and remanded for a new trial. Additionally, errors in jury instruction during both the penalty and guilt phases warrant a new trial in both phases. The trial court erred in failing to instruct the jury that Alston was taking prescription psychotropic medication, further warranting a new trial.

The trial court erred in denying the defense request for a judgment of acquittal as to the armed robbery count. The count should be remanded with instructions to discharge Alston from this court. Moreover, the trial court erred in permitting Dr. Floro to testify as to matters of forensic odontology, and to testify about un-authenticated records. the trial court erred in permitting the state to present the victim impact testimony of Sharon Coon, erred in permitting the state to display James Coon's graduation photograph to the jury during penalty phase close. Additionally, the trial court's instructions to the jury as to victim impact testimony warrant a new penalty phase trial.

The state failed to prove the aggravating factors of "HAC," "CCP," and "elimination of a witness;" and the mitigation presented by appellant far outweighs any aggravation established by the state. The trial court erred in determining that these aggravating factors had been established and that death was the appropriate penalty. In addition, because a sentence of death is

disproportionate in this case, the sentence must be vacated and set aside, and a life sentence imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Angela Corey, Office of the State Attorney, Duval County Courthouse, Jacksonville, FL 32202; and to Barbara J. Yates, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32301, by regular United States Mail this 26th day of March, 1997.

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