IN THE SUPREME COURT OF FLORIDA

MICHAEL SCOTT KEEN,

Appellant,

vs. Case No. 88,802

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

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PRELIMINARY STATEMENT

Appellant, MICHAEL SCOTT KEEN, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or “ST[vol.]” followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State relies on the statements of the case and facts previously presented by the parties.

SUMMARY OF ARGUMENT

Issue I - Keen did not preserve this issue below where he failed to secure a ruling on his motion for a special verdict form at sentencing.

ARGUMENT

ISSUE I

WHETHER THIS COURT SHOULD RECEDE FROM A LONG LINE OF CASES AND IMPOSE A NEW RULE ON TRIAL COURTS TO REQUIRE SPECIAL VERDICT FORMS FOR SENTENCING IN A CAPITAL TRIAL (Restated).

Prior to trial, Keen's counsel filed a "Comprehensive Motion Regarding Penalty Phase" (R II 214-56), within which he "move[d] the Court to direct the jury to return findings of fact as to aggravating and mitigating circumstances in concert with the jury's recommendation of the penalty to be imposed in this cause." (R II 219). When the motion came up for hearing, the trial court deferred ruling until a penalty phase became necessary. (T I 5). On the first day of the penalty phase proceeding, Keen's counsel reminded the trial court "that there was [sic] some pretrial motions concerning the death penalty that were filed that were deferred." He further informed the court that he and co-counsel had reviewed them and that he believed that "everything at this point is moot, except for a . . . motion [in] limine regarding prosecutorial argument." (T XV 1833). Thus, no other arguments were made regarding the need for findings of fact by the jury in relation to its sentencing recommendation. More importantly, no ruling was rendered regarding Keen's motion for a special verdict form.

It is well-settled that an appellant must obtain rulings on his or her motions in order to raise the issues on appeal. Armstrong v. State, 642 So. 2d 730, 740 (Fla. 1994) (finding claim procedurally barred where trial court took motion under advisement, but never made ruling); Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983) (holding that defendant failed to preserve evidentiary issue for review by failing to obtain ruling on motion for mistrial); State v. Kelley, 588 So. 2d 595, 600 (Fla. 1st DCA 1991) (noting clarity of rule that failure to obtain ruling on motion effectively waives motion). Here, Keen made a motion, but failed to obtain a ruling thereon. Nor did he otherwise object to the form or manner in which the jury indicated its sentencing recommendation. Thus, he failed to preserve this issue for appeal.

To the extent, however, that Keen claims the lack of factual findings by the jury constitutes fundamental error, his claim has no merit. This Court has previously addressed this identical issue and rejected it:

> In his first claim, Patten contends that Florida's death penalty procedure is unconstitutional because it does not require the sentencing jury to report in detail what decisions it reached with respect to each of the aggravating and mitigating circumstances. Patten claims that a special verdict form must be utilized so that a jury may indicate which aggravating and mitigating circumstances it found applicable and how it weighed them. We find no constitutional or statutory requirement that mandates the use of a special verdict form in death penalty cases.

> Accordingly, we find this claim to be without merit.

Patten v. State, 598 So.2d 60, 62 (Fla. 1992). See also Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990) ("First, Jones contends that section 921.141(2), Florida Statutes (1987), and the federal constitution require jurors to use a special verdict form and to unanimously agree upon the existence of the specific aggravating factors applicable in each case. We have previously decided this question adversely to Jones's position. James v. State, 453 So.2d 786, 792 (Fla.), cert. denied, 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984); Alvord v. State, 322 So.2d 533, 536 (Fla.1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976)."); Hildwin v. State, 531 So.2d 124, 129 (Fla. 1988) (rejecting argument that death penalty was unconstitutionally imposed because jury did not consider elements that statutorily define crimes for which death penalty may be imposed).

More importantly, the United State Supreme Court has also rejected Keen's argument. In Hildwin v. Florida, 490 U.S. 638 (1989), the Supreme Court considered the issue of whether "the Florida capital sentencing scheme violates the Sixth Amendment because it permits the imposition of death without a specific finding by the jury that sufficient aggravating circumstances exist to qualify the defendant for capital punishment." After noting that this Court rejected Hildwin's claim, the Supreme Court granted

certiorari and affirmed, finding that "the existence of an aggravating factor here is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty.' Accordingly, the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Id. at 640-41 (quoting in McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986)). See also Spaziano v. Florida, 468 U.S. 447, 457-65 (1984) (rejecting claim that jury must be given final authority in making life-or-death decision); Walton v. Arizona, 497 U.S. 639, 647-49 (1990) ("[W]e cannot conclude that a State is required to denominate aggravating circumstances 'elements' of the offense or permit only a jury to determine the existence of such circumstances."); Poland v. Arizona, 476 U.S. 147, 156 (1986) ("Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." (internal citation omitted)); Clemons v. Mississippi, 494 U.S. 738, 745 (1990) ("Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.").

To support his position that this Court should recede from its own prior decisions **and ignore Hildwin, Walton, and Poland**, Keen

relies on two recent decisions from the United States Supreme Court. In Jones v. United States, 119 S.Ct. 1215 (1999), the defendant was charged with carjacking. The federal statute that proscribes that offense allows for three different, and increasingly more severe, sentences depending on the extent of injury, if any, to the victim. Ultimately, the Supreme Court held that the statute established three separate offenses and that the additional element of injury (or death) to the victim had to be charged by indictment, proven beyond a reasonable doubt, and indicated by the jury on a special verdict form.

Similarly, in Richardson v. United States, 119 S.Ct. 707 (1999), the defendant was charged with engaging in a "continuing criminal enterprise," which was defined as a continuing series of violations of federal drug statutes. Ultimately, the Supreme Court held that the jury had to unanimously agree not only that the defendant committed a continuing series of violations, but also that the defendant committed each of the individual violations that made up the continuing series. They could not merely agree unanimously that the defendant committed a continuing series of violations and then determine individually what particular violations made up the continuing series.

Neither of these decisions, however, in any way undermines the reasoning in Hildwin, Walton, and Poland. In Jones, the injury to the victim determined the degree of offense. In Richardson, the

commission of specific drug violations determined whether the defendant committed a "continuing criminal enterprise." Thus, the factual findings determined the guilt of the defendant.

Moreover, in Jones, the Supreme Court explained the distinction between capital sentencing and the carjacking statute at issue in Jones: "[T]he finding of aggravating facts falling within the traditional scope of capital sentencing [is] a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available." 119 S.Ct. at 1228.

In this case, and all capital cases, none of the aggravating factors are "elements" of the crime. In order to prove premeditated first-degree murder, the State need not prove, for example, that the defendant committed the murder in a heinous, atrocious, or cruel manner, that he committed it in a cold, calculated, and premeditated manner, or that he committed it for pecuniary gain. Rather, these considerations become viable only after a defendant has been found guilty of capital murder. Thus, there is no fundamental connection between the finding of aggravating factors and the guilt of the accused.

Nor would a special verdict form in the penalty phase perform a legitimate or meaningful purpose. A penalty phase jury need only recommend a sentence by a bare majority. Brown v. State, 565 So.2d 304, 308 (Fla. 1990) (reaffirming that jury's advisory recommendation as to sentence need not be unanimous and that simple

majority would suffice to recommend the death penalty); Thompson v. State, 648 So.2d 692, 698 (Fla. 1994) (same). As a result, the six or more people comprising the majority may decide on the recommendation for different reasons. One juror may find that only one aggravating factor exists and recommend death, while another juror may find that more than one exists. Similarly, one juror may find that only one aggravating factor exists and recommend death, while another juror may find that more than one exists, yet recommend life based on the weight of the mitigation or the perceived lesser weight of the aggravation. Ultimately, a majority's recommendation could be based on an innumerable combination of factors that would resist even the best efforts to particularize. Conceivably, every juror would have to write a detailed sentencing order in order to articulate the factors and weight that determined that person's recommendation. Unlike at the guilt phase, where the verdict is unanimous and the special factors, like possession of a weapon or injury to the victim, are relatively finite, considerations in sentencing where the recommendation is by a majority are conceivably infinite. A list of the aggravating factors found by each of the twelve jurors would do little to explain the ultimate vote of each without a list of the mitigation found by each, the weight accorded, and the ultimate balancing of all. Ultimately, however, as the Supreme Court found in Spaziano, "there is no constitutional imperative that a jury

have the responsibility of deciding whether the death penalty should be imposed." 468 U.S. at 465. Therefore, "[i]f a judge may be vested with sole responsibility for imposing the penalty, then there is nothing constitutionally wrong with the judge's exercising that responsibility after receiving the advice of the jury. The advice does not become a judgment simply because it comes from the jury." Id.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was sent by United States mail, postage prepaid, to Richard Greene, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, FL 33401, this date: October 3, 2000.

_____
SARA D. BAGGETT
Assistant Attorney General