IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CALVIN JEROME JOHNSON, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO.: 88,986
LOWER CASE NO.: 95-915-CF-B

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

REPLY BRIEF OF APPELLANT

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ISSUE I:

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SEVERANCE OF HIS TRIAL FROM THAT OF THE CO-DEFENDANT

Appellant agrees with the principle set forth in McCray v. State, 416 So.2d 804 (Fla. 1982), that the trial court "in its discretion [may] grant [a] severance when the jury could be confused or improperly influenced by evidence which applies to only one of several defendants." 416 So.2d at 806. However, it is clear that the question of whether severance should be granted must be granted must be answered on a case by case basis. In Calvin Johnson's case, there **was** both confusing and improper evidence submitted to the jury which warranted the granting of a severance. **See** e.g., Williams v. State, 567 So.2d 9 (Fla. 4 DCA 1990).

As this court recently noted in Smith v. State, 699 So.2d 629 (Fla. 1997) :

> This rule is designed to ensure a fair determination of each defendant's guilt or innocence by enabling the presentation of evidence in such a manner that the jury can distinguish the evidence properly admitted against each defendant, follow the given instructions, and apply the law to determine the individual's guilt or innocence. McCray v. State, 416 So.2d 804 (Fla. 1982). The rule provides the trial court with discretion to grant a severance when a jury would be influenced by evidence which is admissible only against one defendant in determining the guilt of another defendant.

Smith v. State, 699 So.2d at 643.

The rule [for severance1 is "designed to assure a fair determination of each defendant's guilt or innocence." This court went on to note in McCray:

> This fair determination may be achieved when all the relevant evidence regarding the criminal offense if presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct and statements, and can then apply the law intelligently and without confusion to determine the individual's guilt or innocence.

416 So.2d at 806. Clearly, the evidence in this case warranted a severance of defendant's trial from that of co-defendant. Because the trial court erred in denying defendant's motion to sever, this court should reverse the convictions herein and order a retrial of this cause.

ISSUE II:

THE TRIAL COURT ERRED IN PERMITTING THE TESTIMONY RELATING TO CO-DEFENDANT'S POSSESSION OF A HANDCUFF KEY

The state asserts that because the trial court instructed the jury to hear the evidence as to the secreted handcuff key only for purposes of the co-defendant, Anthony Johnson, that it did not cause error in Calvin Johnson's trial. Appellant asserts, albeit inartfully, that the evidence of possession of a handcuff key was,' under any theory, inadmissible as to appellant and that therefore appellant's trial should have been severed from that of his brother.

Appellant contends that the trial judge's instruction to the jury that the handcuff key evidence was admissible only as to the co-defendant was insufficient to cure the problem. The testimony as to the handcuff key was so prejudicial to appellant's case as to warrant reversal of appellant's convictions. The prejudice to appellant was compounded by the conflict in the remaining testimony in the state's case.

This court should apply the severance principles set forth in McCray, supra, and Smith, supra, and determine that appellant was denied his right to a fair trial.

ISSUE III:

THE TRIAL COURT ERRED IN IMPOSING THREE-YEAR MANDATORY SENTENCES WHEN THERE WAS NO SPECIFIC JURY FINDING THAT APPELLANT HAD ACTUALLY PERSONALLY CARRIED A FIREARM IN VIOLATION OF 775.007, FLORIDA STATUTES

This court has recently announced its definitive holding on the question of the imposition of a minimum mandatory sentence for the use of a firearm during the course of a felony. In State v. Harsrove, 694 So.2d 729 (Fla. 1997), this court held:

> There must be a specific finding by the jury. Even where the use of a firearm is uncontested, the overriding concern of Overfelt still applies: the jury is the fact finder, and use of a firearm is a finding of fact. If the State wishes to guard against the recurrence of a situation such as in the instant case, it is in a position to do so: it has the right to propose an interrogatory on the verdict form asking whether or not the jury finds the defendant guilty of a crime involving use of a firearm.

694 So.2d at 730-31.

The Harsrove court did go on to note that:

> . . . the mandatory minimum can be based on jury verdicts which specifically refer to the use of a firearm, or to the Information where the Information contained a charge of a crime committed with the use of a firearm.

694 So.2d at 731.[1] This court relied on State v. Jones, 536 So.2d 1161 (Fla. 5th DCA 1988), Lutrell v. State, 513 So.2d 1298 (Fla. 2nd DCA 1987), Massard v. State, 501 So.2d 1289 (Fla. 4th DCA 1986), and Webster v. State, 500 So.2d 285 (Fla. 1st DCA 1986), in reaching this conclusion.

It is therefore clear that unless there is a specific jury finding or "interrogatory" that the defendant used a firearm during the course of the commission of a felony, the only way that the minimum mandatory can be applied is where the defendant is charged with an offense wherein the information or indictment alleges the use of a firearm.

While count two of the indictment alleged that the attempted murder was committed by Anthony Wayne Johnson, Calvin Jerome Johnson, and Chiffon Bryant, and that each of them "carried or had in their possession a firearm, to-wit: a pistol," the offense of attempted murder was proved by a principal theory against appellant Calvin Johnson. Thus, the minimum mandatory provision of section 775.087(2), Florida Statutes, cannot be applied to Calvin Johnson for the offense alleged in count two of the indictment because the information does not specifically allege that Calvin Johnson possessed a firearm during the course of the commission of the offense. The information alleged that the firearm was in "their possession," but does not reveal whether each accused defendant actually carried a firearm, or whether one defendant did. (R-

[1] This court noted that State v. Overfelt, 457 So.2d 1385 (Fla. 1984), applied to cases where the evidence of use of a firearm is unrebutted.

Vol.I-25). Similarly, counts three and five **allege** the three co-defendants had a firearm in "their possession" during the commission of the felony. (R-Vol.I-26). Because there is no specification as to which of the three co-defendants carried the firearm it cannot be said that the jury made a specific finding that appellant personally carried a firearm. The three-year minimum mandatory sentence imposed in courts two, three and five must be vacated and this cause remanded for the imposition of a proper sentence.

The state asserts that because appellant did not raise this issue in a pretrial motion or object below, that this argument is waived, and cites Mesa v. State, 632 So.2d 1094 (Fla. 3d DCA 1994). Mesa actually stands for a slightly different proposition: if it is clear from the information or indictment that the defendant personally carried a firearm, then a pretrial motion attacking the insufficiency of the indictment must be filed, or the issue is barred. In this case, because it is not clear from the charging document which of the three co-defendants possessed the firearm, the pre-trial motion is not required and the issue of the imposition of the three-year minimum sentence is reviewable.

This court should vacate and set aside the three-year minimum mandatory sentences imposed as to counts two, three and five.

ISSUE IV:

THE TRIAL COURT ERRED IN ITS ASSIGNMENT OF WEIGHT TO THE AGGRAVATING CIRCUMSTANCE OF "PREVIOUSLY CONVICTED OF FELONY INVOLVING USE OR THREAT OF VIOLENCE"

Appellant agrees with the state's analysis of Willacv v. State, 696 So.2d 693 (Fla. 1997), but vehemently disagrees with the state's assertion that "this Court's 'duty on appeal is to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent, substantial evidence'." (Answer Brief of Appellee at 48). The standard of review addressed in Orme is the standard that applies to ***a*** review of a ***motion for directed verdict*** -- not the standard of review which applies to the question whether there is competent, substantial evidence to sustain the finding of an aggravating factor in a death penalty case. This court is required to determine whether competent, substantial evidence exists to sustain the trial court's finding of this aggravator; once that analysis is conducted, it must determine if the mitigating factors outweigh any aggravators.

Appellant asserts first that no substantial evidence exists to sustain the finding of this aggravator, and second, that because of the nature of the prior offenses, appellant's mitigation substantially outweighed any aggravator.

ISSUE V:

THE EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S FINDING THAT THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF THE CRIME OF BURGLARY DURING THE COMMISSION OF THIS CRIME

Despite the state's assertion that it is not the function of this court to re-weigh evidence to determine whether the state proved each aggravating circumstance beyond a reasonable doubt . . . , this court is charged with determining "whether competent substantial evidence supports [the findings of such an aggravatorl ." Willacy v. State, 696 So.2d 693, 695 (Fla. 1997).

The state cites Orme v. State, 677 So.2d 258 (Fla. 1996), cert. denied, U.S. , 117 S.Ct. 742, 136 L.Ed. 2d 680 (1997), for the proposition that "this court's duty on appeal is to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent substantial evidence." (Answer Brief of Appellee at 53). What appellee has forgotten to inform the court is that this standard of review applies to a review of a motion ***for directed verdict --*** not to question whether there is competent substantial evidence to sustain the finding of an aggravating factor in a death penalty case.

Similarly, the state relies on Swafford v. State, 533 So.2d 270 (Fla. 1988), cert. denied 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed. 2d 944 (1989), for the proposition that the trial judge may apply a "common sense inference from the circumstances" to determine whether an aggravating circumstance has been proved. Swafford actually held that a common sense inference can come into

play where the victim's mental state is being evaluated for the purposes of determining whether the aggravating factor heinous, atrocious, or cruel exists. See Swafford, supra at 276. The state's attempt to impose artificial restraint on this court's obligatory review of the imposition of the death penalty fails.

The state submits that Johnson is attempting to create substantial confusion as to the facts below, and urges this court to review the facts in a light most favorable to the trial court's findings is misplaced. The state is attempting to mislead this court about the standard of review; clearly, this is the inappropriate standard of review; this court must determine whether competent, substantial evidence supports the aggravating factor.

In this case, there is no competent, substantial evidence to sustain the trial court's finding that the homicide was committed during the commission of a burglary. The state's own witnesses were unclear about what had actually transpired at the Gaines' residence just before the shooting, the state's main eye witnesses to the purported burglary identified someone else as the perpetrator -- not Calvin Johnson; the state's witnesses had prior criminal records had many reasons to fabricate, and were heavily impeached. The evidence presented by the state simply was not competent and substantial, especially upon which to base a determination that the death penalty should be imposed. This court should determine that no competent, substantial evidence exists on which to base a finding of "homicide committed during the course of

a burglary," and should vacate and set aside the death penalty and remand for the imposition of a life sentence.

ISSUE VI:

THE IMPOSITION OF THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE WHEN COMPARED WITH OTHER CAPITAL CASES

In the instant case, the trial court determined only ***two*** aggravating factors existed: prior felonies involving the use of threat or violence, and homicide committed while appellant **was** engaged in the commission of a burglary. (R-Vol.III-33). The case upon which the state relies, Moore v. State, 701 So.2d 545 (Fla. 1997), in support of its contention deals with a case where the trial court had found ***three*** aggravating factors. The state also relies on Hunter v. State, 660 So.2d 244 (Fla. 1995), for the proposition that the imposition of the death penalty is proportionate in this case. Hunter is widely distinguishable from the instant case, for instance, in Hunter, the trial judge determined that the defendant had twelve prior violent felonies which outweighed the mitigating circumstances presented by the defendant. Clearly, the number of prior violent felonies attributable to Hunter distinguished that case from Johnson's case, where the prior felonies involved an altercation with his brother, and a dispute over a crack cocaine debt.

The state relies on Ferrell v. State, 680 So.2d 390 (Fla. 1996), in support of this proposition. Ferrell had a prior violent felony of second-degree murder, which this court noted bore "many of the earmarks of [Ferrell's] first-degree murder]." 680 So.2d at 391. The state also relies on Shellito v. State, 701 So.2d 837 (Fla. 1997), for the proposition that the death penalty is

proportionate in this case. Shellito is distinguishable from this case because in Shellito, the defendant stopped an unsuspecting motorist by claiming he was out of gas, then robbed and shot the motorist. In this case, there was conflicting evidence about how the homicide happened, and it appeared that the homicide occurred as the result of an attempt to collect a drug debt. Shellito is therefore a more aggravated case, and this case should not be governed by its outcome.

Moreover, under the holding of the United States Supreme Court in Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 176, 95 L.Ed 2d 127 (1987), the death penalty is disproportionate in this case. Because the evidence in Johnson's case was so conflicting as to whether Johnson was a "major player," the death penalty should not apply.

This court should vacate and set aside the death penalty in this case and remand this case for the imposition of a life sentence.

CONCLUSION

Because the trial court erred in denying the motions to sever appellant's trial from that of the co-defendant, the guilt phase of this trial must be reversed, and this cause remanded for a new trial. Moreover, the trial court erred in permitting appellant's jury to hear evidence of the co-defendant's possession of a handcuff key. For these reasons, appellant's convictions should be reversed and this case remanded for a new trial.

The trial court erred in imposing three-year minimum mandatory sentences when there had been no jury "sub-finding" as to the question of actual possession of a firearm, and where that allegation had not been specifically charged against appellant. Moreover, the trial court erred in the weight assigned to the aggravating circumstance "Previously Convicted of Felony Involving Use or Threat of Violence," and erred in determining the existence of the aggravating circumstance "During Commission of a Felony."

Finally, the trial court erred because the imposition of the death penalty is disproportionate given the totality of the circumstances in this case. This court should vacate and set aside the three-year minimum mandatory sentences and the death penalty in this case, and remand this case to the trial court with instructions to impose a sentence of life.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Assistant Attorney General, Capital Division, Office of Attorney General, The Capitol, Tallahassee, Florida 32301;** and to **Jay Taylor, Assistant State Attorney, Office of the State Attorney, Duval County Courthouse, Sixth Floor, 330 East Bay Street, Jacksonville, FL 32202,** by regular United States Mail this 23rd day of January, 1998.

Teresa J. Sopp
Attorney for Appellant