

IN THE SUPREME COURT OF FLORIDA

PAUL ANTHONY BROWN,

Appellant,

vs.

CASE NO. 89,537

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS	1
ARGUMENT	2
POINT II	
IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.	
CONCLUSION	4
CERTIFICATE OF SERVICE	5

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

In footnote 11, page 36 of the State's answer brief, Appellee disputes Appellant's assertion that the murder was not planned as part of a robbery resulting in the theft of Mr. Hensley's truck. The State's argument suggests that Brown and co-defendant McGuire had formulated a robbery/murder plan in advance of their meeting with Mr. Hensley. This suggestion is rebutted by Mr. McGuire's trial testimony. Mr. McGuire stated that Brown indicated that he was going to steal someone's car using a handgun by scaring that individual away from the vehicle and then taking it. (T857) McGuire testified that on the evening of November 4, 1992, as he and Brown proceeded to Hensley's room, Brown said something to the effect of "how would you like to do it?" McGuire stated that he ignored Brown because he was "not understanding what he meant". (T863) This testimony by Mr. McGuire shows that there had not been any plan to murder someone as part of a scheme to take their vehicle. This idea was not discussed until just prior to Mr. Hensley's death. The heightened premeditation required for this aggravator does not exist.

In response to the State's allegations in footnote 12 at page 38 of its answer brief, Appellant directs this Court's attention to certain portions of the trial transcript. These pertinent portions contain evidence supporting Brown's claim that there was serious abuse of alcohol and

illicit drugs on the day of Mr. Hensley's murder. At trial, Brown stated that prior to traveling to the Main Street area of Daytona Beach, he and Scott McGuire picked up a gallon of whiskey and some beer. They began to drink this alcohol immediately and continued to consume it as they traveled by bus to the area where they encountered Mr. Hensley. (T1116) Mr. Brown further testified that he "was pretty much intoxicated" when they met Mr. Hensley. (emphasis added) (T1117) It needs to be noted that Brown's and McGuire's trial testimony and physical evidence confirm the use of marijuana and further beer consumption at Hensley's apartment. (T864, 1119) Additionally, FBI Agent Robert Chiles testified that Mr. Brown related to him that he, McGuire, and Mr. Hensley "smoked some crack in the apartment". This statement referred to the activities occurring after arrival at Mr. Hensley's apartment on the night of the murder. (T761) The activities of November 4, 1992, followed approximately two weeks of excessive use of alcohol and cocaine.

Appellant submits that the referenced testimony supports Appellant's claim that Mr. Hensley's murder occurred at the hands of an assailant extremely impaired by the use of drugs and alcohol. As stated in Appellant's initial brief, this Court has previously recognized that a defendant who engages in excessive use of drugs or alcohol may not be able to form the degree of premeditation required for this aggravating factor.

CONCLUSION

Based on the argument contained in this brief and the contents of the initial brief, Appellant respectfully requests this Court vacate the death sentence and remand for the imposition of life imprisonment without possibility of parole for a minimum mandatory period of twenty-five (25) years. In the alternative, this Court should vacate his death sentence and remand for a penalty phase before a newly empaneled jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118, this 9th day of March, 1998.

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