IN THE SUPREME COURT OF FLORIDA

TERRY LEE WOODS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 90,833

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

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

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POINT I

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED IN DENYING WOODS' MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE STATE FAILED TO PROVE PREMEDITATION BEYOND A REASONABLE DOUBT.

The state contends that Woods' argument that the trial court erred in denying the Motion for Judgement of Acquittal where the state failed to prove premeditation is not properly preserved. The state argues that the issue was not preserved because defense counsel failed to **fully** set forth the grounds of the motion. (emphasis added) Appellant disagrees.

The state cites the case of Terry v. State, 668 So.2d 954 (Fla. 1996) and Rodriguez v. State, 609 So.2d 493 (Fla. 1992) as authority that this issue was not preserved for appeal. These cases are not persuasive because these cases do not involve a

Motion for Judgement of Acquittal. In Terry, the Appellant moved at pre-trial to prohibit the state from calling Demon Floyd as a witness since "[a]ny testimony given by this witness would be unreliable not only because he has given a number of inconsistent accounts, but because there is strong evidence that he may be mentally impaired." At trial, when the state called Floyd as a witness, appellant moved to exclude his testimony based on his motion for suggestion of conflict. On appeal, appellant alleges that the trial court erred because it is improper to call a witness for the primary purpose of placing impeachment testimony before the jury. This Court held that "Because Terry's argument on appeal is different from those arguments asserted pre-trial and at trial, he has waived this claim." Terry at 957.

In Rodriguez v. State, appellant argued that it was error to permit the victim's sister-in-law to offer identification testimony due to the "inherently inflammatory" nature of such testimony, was not preserved by specific objection. The only objection to the identification testimony was based on relevancy. This Court held that: "It is well settled that the specific legal ground upon which a claim is based must be raised at trial and a claim different than that raised below will not be heard on appeal." Rodriguez at 497.

A Motion for Acquittal is different than other motions. In ruling on a general Motion for Acquittal, the trial judge must determine if competent evidence from which the jury could infer guilt to the exclusion of all other inferences is present. State v. Law, 559 So.2d 187 (Fla.1989). If so, that view of the evidence must be taken in the light most favorable to the State.

Woods contends that the state failed to provide competent evidence of the specific element of premeditation to commit the crime. Whether there was competent evidence from which premeditation may be inferred includes such things as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. Jackson v. State, 575 So.2d 181 (Fla.1991).

In the instant case, Terry Woods knew Clarence Langford. They previously had a disagreement concerning the sale of an automobile. The parties thereafter settled their differences. The eyewitness testimony of Langford's wife was no aid in trying to unravel the actions of the appellant. In fact, she never saw a gun or heard words that would explain appellant's actions. The state's theory is that the appellant committed the murder to

prevent the victim from disputing the appellant's title to the vehicle. The trial court dismissed this theory holding that "An equally plausible hypothesis is that the victim was killed as a result of an angry dispute arising out of the sale of the vehicle." (R980)

The Motion for Judgement of Acquittal is a defendant's mechanism to alert the trial court that the evidence presented by the state is not sufficient to sustain a conviction. On appeal, it is appropriate to review the trial record and argue those elements of a crime that have not been proven beyond a reasonable doubt.

POINT II

IN REPLY AND IN SUPPORT THAT APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, AND INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE 1, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state argues that the death penalty is proportional because of the lack of statutory mental mitigation, the victims were elderly, the murder was committed execution style, and that the appellant lured the to a dirt road before they were shot. In reply, the appellant contends that this Court should compare the facts in Brookings v. State, 495 So.2d 135 (Fla. 1986) and the facts in the instant case.

In Brookings, a man named Ballard allegedly stabbed several persons, and one of those victims died. Earl Sadler witnessed this murder. Shortly thereafter, Ballard's mother, Mrs. Cecil Murray, claimed to have received threats against her family and property which she attributed to Sadler. In March 1980, Murray hired Brookings for $5,000 to kill Sadler in order to prevent Sadler from testifying against her son. On April 11, 1980 Brookings and his girlfriend, Judith Lowery, went to Sadler's home driving a car owned by Murray. Lowery testified at trial that she backed the car into Sadler's driveway and induced Sadler

to come outside to help her on the pretext that her car would not start. While Sadler was in front of the car (evidently inspecting the engine) Brookings shot Sadler dead. Lowery drove over the victim's body as they left the murder scene.

The jury found Brooking guilty of first-degree murder and recommended life imprisonment. The trial court sentenced appellant to death after finding three non-statutory mitigating, and five statutory aggravating circumstances.[1] This Court reversed the sentence of death because Brookings had a jury recommendation of life. This Court found that the jury likely gave Brookings a life sentence because of the disparate treatment of the co-defendants.

The factual circumstances of Brookings and Woods are similar. However, in Woods the jury recommended the death

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[1].1) Committed while appellant was on parole from a sentence of imprisonment in the Ohio State Penitentiary. Sec. 921.141(5)(a), Fla.Stat. 2) Previous convictions of three violent felonies in Ohio; two separate armed robberies and shooting with intent to kill a police officer. Sec. 921.141(5)(b). 3) Committed for pecuniary gain; hired to commit murder for $5,000. Sec. 921.141(5)(f). 4) Committed to disrupt or hinder the lawful exercise of governmental functions or enforcement of laws; hired to commit murder to prevent the victim from testifying as a state witness in a criminal case. Sec. 921.141(5)(g). 5) **Committed in cold, calculated and premeditated manner without any pretense of moral or legal justification.** Sec. 921.141(5)(I). Brookings at 145.

sentence by a vote of 8-4, and in Brookings the jury recommended life. Had two jurors changed their vote, Woods would have had a jury recommendation of life.

Despite the greatest care and efforts of the Courts, the comparison of these two cases provides a great example of the potential for unjust results in the Florida death penalty scheme. There is substantially more aggravation and less mitigation in Brookings than in the instant case. However, Brookings had the good fortune of a life recommendation; Woods not. Appellant asserts that included in proportionality review are cases where a bare majority of the jury voted for death (Woods), and this Court reversed a trial court jury override where there was substantially more aggravating circumstances and less mitigation (Brookings). Performing a proportionality review of these two cases justice demands that the death penalty in the instant case can not stand.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and argument, as well as those set forth in the initial brief, Terry Lee Woods requests that this Honorable Court vacate his convictions and sentences and remand for a new trial where life is the maximum possible 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. Terry Lee Woods, C715473-622-6-S, Florida State Prison, P.O. Box 181, Starke, FL 32091-747, this 30th day of June, 1998.; and to Kay Blanco, Office of the Attorney General, Tampa, FL.

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