

IN THE SUPREME COURT OF FLORIDA

ANTHONY J. FARINA,)
)
 Appellant,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

CASE NO.: 93,050
L.T. CASE NO.: 92-32105 CFAES

An appeal from the Circuit Court of the
Seventh Judicial Circuit, in and for
Volusia County, Florida

SUPPLEMENTAL BRIEF OF APPELLANT

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CERTIFICATE OF TYPE AND SIZE:

I certify that this Brief was prepared using CG Times, size 14.

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POINT ONE: THE APPELLANT'S DEATH PENALTY SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW SENTENCING PROCEEDING TO PERMIT THE JUDGE AND JURY TO CONSIDER THAT THE CO-DEFENDANT, JEFFERY FARINA, WILL RECEIVE A SENTENCE OF LIFE IN PRISON AS A RESULT OF THIS COURT'S RECENT OPINION IN BRENNAN v. STATE, CASE NO.: 90,279.

On May 7, 1998, the Appellant and his brother, JEFFERY FARINA, were each re-sentenced to death for the murder of Michelle Van Ness. Both Defendants' appeals are now pending before this court.¹

On July 8, 1999, this court issued its opinion in Keith Brennan v. State, Case No.: 90,279 (24 FLW S365) holding that the imposition of the death penalty upon a defendant for a crime committed when he was 16 years of age constitutes cruel or unusual punishment in violation of Article I, Section 17 of the Florida Constitution. In the Brennan case, the court vacated the death sentence and reduced the defendant's sentence to life imprisonment without possibility of parole.

In rendering its opinion in Brennan, this court noted that since 1972 only three defendants other than Brennan who were 16 at the time of the crime have been sentenced to death. Id., at 13. One of these cases is the Appellant's Co-Defendant, JEFFERY FARINA, whose appeal is now pending. Id. The death sentences in the other two cases were vacated and reduced to life imprisonment.²

¹Jeffery Farina's case number is 93,907.

²Morgan v. State, 639 So.2d 6 (Fla. 1994) and Brown v. State, 367 So.2d 616 (Fla. 1979).

The Brennan decision renders it certain that JEFFERY FARINA's death sentence will be vacated and his sentence reduced to life imprisonment.³ The Appellant submits that this development warrants a reversal of his death sentence and a remand for a new hearing. Scott v. Dugger, 604 So.2d 465 (Fla. 1992).

This court has clearly established that a judge and jury may consider a co-defendant's life sentence in determining whether a defendant should receive a life or death sentence:

What happens to a co-defendant is relevant and may be considered by a judge and jury in determining the appropriate sentence. Bassett v. State, 449 So.2d 803, 808 (Fla. 1984).

In Scott, supra, this court held that a co-defendant's sentence of life imprisonment, imposed after the defendant's death sentence was affirmed, constituted "newly discovered evidence" for which post-conviction relief could be afforded, where the record showed that the defendant and co-defendant had similar criminal histories, were about the same age, had comparable low IQ's, and were equally culpable parties in the murder.

The record in the Appellant's case similarly shows that he and his brother each had no significant prior criminal history, were about the same age (16 and 18), and had comparable intelligence levels and abusive

³Since the date of the instant crime was May 8, 1992, Section 775.082(1) (Florida Statutes 1992) would require a sentence of life imprisonment without eligibility for parole for 25 years. However, Jeffery Farina offered to waive his right to parole during the re-sentencing proceedings held as a result of the prior remand of his case. (TR:2320)

childhoods.⁴ As to culpability, JEFFERY FARINA is more culpable since he was the sole triggerman who shot and killed Van Ness. The Appellant did not shoot or injure Van Ness. There is no evidence the Appellant dominated his brother in the commission of this murder. However, even if both Defendants were equally culpable participants in this crime, Scott still requires reversal and remand for a new sentencing hearing. Id., at 469.

As a result of the foregoing, this court should reverse the Appellant's death sentence and remand for a new sentencing proceeding.

POINT TWO: THE APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE COMPARED TO OTHER CASES WHERE THE TRIGGERMAN RECEIVED A LIFE SENTENCE.

The Appellant's death sentence is disproportionate to death sentences imposed in other cases where the triggerman received a life sentence. Slater v. State, 316 So.2d 539 (Fla. 1975); Curtis v. State, 685 So.2d 1234 (Fla. 1996); Hazen v. State, 700 So.2d 1207, 1214 (Fla. 1997).

In Slater v. State, supra, the defendant and co-defendant robbed a motel clerk. The co-defendant held a gun, which discharged, killing the clerk. The defendant grabbed the money box and ran with the co-defendant from the office. The co-defendant "triggerman" pled guilty to first degree murder and received a life sentence. The defendant was convicted at trial and the jury recommended a life sentence. However, the trial court imposed the death penalty. On appeal, the

⁴TR13:2045-2109;2109-2144;DR3:354-361.

death sentence was reduced to life imprisonment. The court noted that Slater "was an accomplice and did not have the murder weapon in his hand." Id., at 542. The court held that the death penalty imposed upon the defendant was not equal justice under the law and would be an unconstitutional application under Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Id.

In Curtis v. State, supra, the defendant and the co-defendant, both armed with firearms, robbed a convenience store. The co-defendant shot both clerks on duty, killing one. The defendant also shot the deceased victim in the foot after he had been shot by the co-defendant. Upon apprehension, both defendants admitted their guilt, and the co-defendant admitted shooting the deceased victim. The co-defendant pled guilty to first degree murder and was given a life sentence. Curtis was convicted at trial and the jury recommended the death sentence, which the trial court followed. On appeal, the death sentence was reversed as disproportionate. The court noted the presence of only two aggravating circumstances (commission for pecuniary gain and prior conviction for violent felony) against substantial mitigation (the defendant was 17 years of age, he did not kill the victim, he had been helpful to schoolmates and inmates, he had adjusted well to prison life, and his co-defendant received a life sentence).

In Hazen v. State, supra, the defendant and two co-defendants, Kormandy and Buffkin, broke into the home of Gary and Cecelia McAdams. Buffkin pointed a gun at the couple and ordered them down on the floor. All three of the intruders took turns raping Mrs. McAdams in the bedroom. One of the intruders, either

Kormandy or Buffkin, shot and killed Mr. McAdams in the kitchen. Buffkin pled guilty to first degree murder and received a life sentence in exchange for testifying against Kormandy and Hazen in separate trials. The court found that Buffkin was a prime instigator of the crime and was standing near Kormandy when the fatal shot was fired. The court noted that "In Slater, we held that the less culpable, non-triggerman defendant cannot receive a death sentence when the more culpable triggerman defendant received a life sentence." Id., at 1214. The court extended the reasoning even further in Hazen, holding that where one non-triggerman is more culpable than another and receives a life sentence, that precludes a death sentence for the less culpable non-triggerman.

CONCLUSION

The reduction of the Co-Defendant, JEFFERY FARINA's, death sentence to life imprisonment is newly discovered evidence that warrants reversal of the Appellant's death sentence and remand for a new sentencing proceeding in which the judge and jury may consider such new evidence. This would also permit the trial judge to consider the disproportionality of a death penalty in the Appellant's case as compared to other cases.

Alternatively, inasmuch as the Appellant's death sentence is disproportionate compared to death sentences imposed in other cases, based on the arguments herein and those set forth in the previous briefs filed herein by the Appellant, this court should reverse his death sentence and remand for the imposition of a sentence of life imprisonment without eligibility for parole for 25 years.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by mail, to Ken Nunnally, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, this _____ day of July, 1999.

Jeffrey L. Dees

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