IN THE SUPREME COURT OF FLORIDA

RODERICK FERRELL

Appellant,

v. **CASE NO. SC93127**

STATE OF FLORIDA

Appellee.

_____/

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

CROSS-REPLY BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
Assistant Attorney General
Florida Bar # 0998818
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR APPELLEE

CERTIFICATE OF FONT

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I. THE AVOIDING ARREST AGGRAVATOR

In his answer brief, Ferrell argues that the trial court's refusal to find the avoiding arrest aggravating circumstance was not an abuse of discretion by the sentencing court. Ferrell further argues that "when there is a legal basis to support, or reject, an aggravating factor, a reviewing court will not substitute its judgment or that of the trial court. *Occhicon* [sic] *v. State,* 570 So.2d 902 (Fla. 1990)." *Reply Brief* at 18[1]. Ferrell's argument seems to be a blend of legal theories that do not necessarily support his position.

As the State set out in its Cross-Appeal brief, there was substantial, competent evidence to support finding that Ferrell murdered two people to eliminate them as witnesses under the case law which prescribes the parameters of the "avoiding arrest" aggravator. That evidence was in the form of Ferrell's statements that he discussed killing the two victims before the burglary of their home began, and had decided to kill them "because he didn't want to be found." (TR2765). The facts of this case demonstrate a pre-existing plan to kill the two victims to avoid leaving any

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[1] *Occhicone* did not speak to the refusal of the sentencing court to **find** a particular aggravating circumstance.

witnesses to the theft of their vehicle. Because that is so, the State demonstrated that the dominant motive for Ferrell's murder of two people was to eliminate them as witnesses.[2] That is what must be shown to establish this aggravator when the victim is not a law enforcement officer, and it was an abuse of discretion for the sentencing court to refuse to find this aggravator.

To the extent that further discussion of this claim is necessary, Ferrell argues that "the resolution of factual conflicts is solely the responsibility of the trial judge and an appellate court has no authority to reweigh that evidence." That reference is taken from this Court's direct appeal decision in *Gunsby v. State*, which, in its entirety, reads as follows:

> Gunsby next argues that the trial court did not give proper consideration to the mitigating evidence which he presented. He also argues that the application of the death penalty is disproportionate in this case. The record reflects that the trial judge considered the conflicting testimony of the mental health professionals, along with the other testimony and evidence. He resolved the conflicts among the mental health experts and, to a large extent, rejected the testimony of the expert who concluded that Gunsby had a severe mental condition. The resolution of factual conflicts is solely the responsibility and duty of the trial judge, and, as the appellate court, we have no authority to reweigh that

[2] The facts of this case on this issue are not dissimilar to the facts of *Remeta v. State,* where this aggravator was upheld predicated on a statement by the defendant that he "took out witnesses, or tried to." *Remeta v. State,* 522 So.2d 825, 828-29 (Fla. 1988).

> evidence. *See Lopez v. State,* 536 So.2d 226 (Fla. 1988); *Stano v. State*, 460 So.2d 890 (Fla. 1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985); *Martin v. State*, 420 So.2d 583 (Fla. 1982), *cert. denied*, 460 U.S. 1056, 103 S.Ct. 1508, 75 L.Ed.2d 937 (1983). The trial judge found that Gunsby's diminished mental capacity was a nonstatutory mitigating factor, but he also found that "the aggravating circumstances far outweigh the mitigating circumstance and the only appropriate sentence is death."

Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991). That proposition of law does not, however, mean that the sentencing court's refusal to find an aggravator is immune from this Court's review, just as the finding of an aggravator or finding (or **refusal** to find) particular mitigation is subject to review on appeal. On the facts of this case, the avoiding arrest aggravator is based on direct evidence which was in the form of express statements by Ferrell. It is not necessary to speculate or infer[3] the conclusion that the victims in this case were killed primarily to eliminate them as witnesses. That is the standard for the application of the avoiding arrest aggravator, and the State met it -- the trial court abused its discretion in refusing to find this aggravating circumstance.

II. THE EXCLUSION OF TESTIMONY

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[3] *See, Hoskins v. State,* 702 So.2d 202 210 (Fla. 1997), where this Court found that many of the facts relied on in support of the cold, calculated, and premeditated aggravator were based on speculation. Such is not the case here -- the evidence of Ferrell's intent to eliminate witnesses came from his own mouth.

Ferrell told one of his friends that he left Kentucky because "he was running from the law because they had found him building bombs". However, Ferrell dismisses the State's position that that testimony was relevant to the avoiding arrest aggravator by stating:

> Such a contention strains the bounds of credulity. The state's theory that Ferrell committed two murders in Florida to escape a relatively minor charge in Kentucky requires an extraordinary suspension of disbelief. The relevance is tangential at best.

Answer Brief, at 20. With all respect to Ferrell's counsel, no "extraordinary suspension of disbelief" (whatever that may be) is required to recognize the relevance of this testimony to the murders Ferrell committed. This evidence gives further substance to Ferrell's clearly expressed intention to leave no witnesses to the theft of the Wendorf's vehicle.[4] This evidence was relevant to the issues before the jury, any prejudice was outweighed by its probative value, and it was an abuse of discretion to deny its admission.[5]

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[4] As discussed in the State's initial cross-appeal brief, Ferrell was traveling in a vehicle that kept breaking down, and another vehicle was needed to continue on to Louisiana. (TR1979).

[5] Ferrell argues that this was a "relatively minor charge". *Answer Brief,* at 20. If that is so, there can be no "extreme prejudice" in admitting the testimony. *Id.* Ferrell cannot have it both ways. This Court should reject his inconsistent positions.

CONCLUSION

For the reasons set out above, Ferrell's convictions and sentences of death should be affirmed in all respects.

Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Christopher S. Quarles, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, on this _____ day of _____, 2000.

Of Counsel