IN THE SUPREME COURT OF FLORIDA

RODERRICK FERRELL,)
)
Appellant,)
)
vs.) CASE NUMBER SC93-127
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

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

REPLY /ANSWER BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES CITED:

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ARGUMENTS

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ABUSED ITS DISCRETION BY LIMITING FINAL SUMMATION TO A MERE FORTY-FIVE MINUTES RESULTING IN A DEPRAVATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND TO EFFECTIVE ASSISTANCE OF COUNSEL.

Despite the state's contention to the contrary, this issue is clearly preserved. Because the trial court noted an objection on the record without further clarification, this Court relinquished jurisdiction to reconstruct the record as to this particular issue. During the two hearings in the trial court, the state never claimed that **they** objected to

the time limitations[1]. Rather, the trial court specifically found on the record that there was little doubt that defense counsel objected to the limitation. (SR VI 541-42, 552) The trial court undoubtedly based this finding of fact on appellant's testimony recalling in some detail the objection, the grounds argued, and the basis for the court's ruling. (SR VII 564-71) Additionally, lead defense counsel testified that, although she could not specifically recall, **she thought that she probably objected**. (SR VI 548-49) Most importantly in the trial court's mind was his statement on the record that the argument would be limited to 45 minutes over "noted objection." (SR VI 541-42, 552) Based on the record and the trial court's clear finding of fact, there is no doubt that Appellant objected to the trial court's limitation of closing argument.

As for prejudice, it appears that the line of cases in this area do not require a showing of prejudice. None of the opinions cited in appellant's initial brief required a showing of prejudice. It appears that an unreasonable limitation of the time for closing argument presumes prejudice. See, e.g., Hickey v. State, 484 So.2d 1271 (Fla. 5th DCA 1986)[thirty minute time limit unreasonable in four day second-degree murder trial even though State's case was strong and trial court believed the defense had very little about which to argue].

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[1] As such, the state cannot now argue, for the first time on appeal, that they were the ones who objected. See, e.g., State v. Mae, 23 Fla. L.Weekly D364 (Fla. 2d DCA January 23, 1998).

Prejudice can be presumed, especially in a case such as this one. Defense counsel had the unenviable task of arguing for a sentence of life imprisonment instead of a sentence of death where her client had committed a brutal double homicide. Despite the obvious facts in aggravation, defense counsel had much evidence to work with in mitigation. Aside from Ferrell's tender age of sixteen, three mental health professionals testified at great length concerning their various diagnoses of Rod's mental illness. All three experts concurred that Ferrell met both statutory mitigating factors. All three experts agreed that Ferrell suffered from a schizotypal personality disorder. Such a diagnosis is unusual and needs explanation and amplification, especially **why** this evidence **mitigates** the crimes. The prosecutor countered that the expert's conclusions were not worthy of belief, contending that their opinions were based on faulty data. (XXIX 3343-48) Defense counsel needed more time to refute the prosecutor's argument.

Additionally, defense counsel was able to spend very little time arguing against the various aggravating factors. Counsel spent only two paragraphs explaining the "doubling" instruction. (XXIX 3376-77) She spent only three sentences arguing that the crime was not committed to avoid arrest which, incidentally, the trial court concluded did not apply. (XXIX 3377) Defense counsel uses a mere three sentences to argue against the "heightened premeditation" aggravator. (XXIX 3378) Most

importantly, defense counsel was forced simply to gloss over the numerous mitigating factors that apply to the case and that the trial court found were legitimate. Many of them defense counsel simply reads without explanation. The trial court had previously denied appellant's request to specially instruct the jury regarding the nonstatutory mitigating factors present in this case. Defense counsel cited this critical ruling in their conclusion that the allotted time would be inadequate. (SR VI 547-48, 551-52)

The issue of whether a capital murderer should spend the rest of his life in prison without parole or should die at the hands of the state is a complex and subtle area. The decision is not as cut and dried as the state contends. The concept of aggravating and mitigating evidence is a complicated one. Forty three witnesses testified. One hundred thirty seven exhibits were introduced into evidence at Ferrell's six day penalty phase. The forty-five minutes was the **first and only** opportunity for defense counsel to address the jury about any of the evidence and the law in an attempt to persuade them not to kill her client. Human life was at stake. Forty-five minutes was simply not enough.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT APPELLANT'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM AS WAS HIS PENALTY PROCEEDING WHERE THE TRIAL COURT CROSSED THE LINE OF NEUTRALITY AND IMPARTIALITY THUS DENYING FERRELL ESSENTIAL DUE PROCESS BY DEPRIVING HIM OF THE APPEARANCE OF AN UNBIASED MAGISTRATE AND AN IMPARTIAL TRIER OF FACT.

The state is confusing this issue with an attempt to disqualify a trial judge pursuant to the Florida Rules of Judicial Administration. Appellant contends on appeal that the record indicates that the trial court impermissibly departed from his role of impartiality, specifically by enumerating race-neutral reasons that would justify a peremptory challenge of a black juror. While the state probably did not need for the trial court to enumerate these reasons, nevertheless the trial court did so **before** the state did. In doing so, the court impermissibly departed from his role of neutral arbiter. See, e.g., Mcfadden v. State, 732 So.2d 1180 (Fla. 4th DCA 1999).

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN LIMITING APPELLANT'S VOIR DIRE EXAMINATION DURING JURY SELECTION, RESULTING IN A DENIAL OF DUE PROCESS AND THE RIGHT TO A FAIR TRIAL RENDERING FERRELL'S DEATH SENTENCE CONSTITUTIONALLY INFIRM.

The state claims that appellant has not demonstrated that the jury that heard this case was unfair or partial. That is the very point of this argument. The trial court's limitation of appellant's voir dire prevented defense counsel from exploring and uncovering the jurors' bias. Voir dire is a valuable tool to "ascertain latent or concealed pre-judgments by perspective jurors which will not yield to the law as charged by the court, or to the evidence." Jones v. State, 378 So.2d 797, 798 (Fla. 1st DCA 1980).

Additionally and contrary to the state's assertion, a juror's assertion that he or she will "follow the law" is not the be all and end all of this issue. Even where a juror subsequently states that he could follow the law, an excusal for cause is sometimes warranted. See, e.g., Huber v. State, 669 So.2d 1079 (Fla. 4th DCA 1996)[cause challenge should have been granted even though perspective juror eventually said he would be able to follow the law].

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN PERMITTING A STATE WITNESS TO TESTIFY TO HER OPINION AS TO WHAT FERRELL MEANT BY HIS WORDS, IMPROPERLY INVADING THE PROVINCE OF THE JURY AND RESULTING IN A DENIAL OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY JURY AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, AND 22, OF THE FLORIDA CONSTITUTION.

The state argues that the testimony was not improper because the witness was simply testifying as to what the phrase "unfinished business" **meant to her**. If that is indeed the case, then the testimony was completely irrelevant to any issue before the jury at the penalty phase. Irrelevant evidence is inadmissible in this state. Additionally, appellant is completely unable to fairly rebut this completely irrelevant theory espoused by the witness.

The assistant attorney general also argues that appellant failed to show any prejudice from the admission of the objectionable testimony. During final summation to the jury, the prosecutor argued that:

> He came to Florida and he saw some friends, he saw Miss Presson, he went to see his ex-girlfriend, Shannon Yohe, and **he came to conclude**

some unfinished business.

(XXIX 3355) (Emphasis supplied) Following this argument, the jury returned with unanimous recommendations that Rod Ferrell should be executed for each murder. The prejudice is obvious.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS APPELLANT'S STATEMENTS TO AUTHORITIES IN LOUISIANA FOLLOWING HIS ARREST, WHERE THE STATEMENTS WERE OBTAINED IN VIOLATION OF FERRELL'S CONSTITUTIONAL RIGHTS.

At the trial court level, Ferrell moved to suppress both statements and objected to each when they were offered into evidence. (VI 1048-77; XXVI 2676; XVI 669-70; XXVI 2716) The second statement to Florida officials later that same day was no less involuntary than the first. The coercion had not dissipated. Ferrell was still being held against his will in the same locale. Nothing had vitiated the coercion nor changed the totality of the circumstances.

Since the filing of the initial brief, this Court has rendered an important decision not cited by the state in their answer brief. In Ramirez v. State, 739 So.2d 568 (Fla. 1999) a seventeen-year-old defendant's confession was found to be involuntary under circumstances similar to the case at bar. This Court cited the "heavy burden" that the state bore in demonstrating that the defendant knowingly and intelligently waived his privilege against self-incrimination and the right to counsel, especially where the suspect is a juvenile. The totality of the circumstances to be

considered in determining whether a waiver of Miranda warnings is valid include factors that are also considered in determining whether the confession itself is voluntary. The factors considered relevant in Ramirez included: (1) the manner in which the Miranda rights were administered, including any cajoling or trickery; (2) the suspect's age, experience, background and intelligence; (3) the fact that the suspect's parents were not contacted and the juvenile was not given an opportunity to consult with his parents before questioning; (4) the fact that the questioning took place in the station house; and (5) the fact that the interrogators did not secure a written waiver of the Miranda rights at the outset. At least three of the five factors considered in Ramirez are present in Ferrell's case. Additionally, in Ferrell, the police used undue influence by arranging for Ferrell to meet alone with his girlfriend. The totality of the circumstances reveals that Ferrell's confessions were involuntary.

POINT IX

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF NAOMA QUEEN WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Undersigned counsel feels compelled to address the state's comment on what they term "a remarkably misleading bit of appellant advocacy." (AB at 56) Appellant was attempting to argue, perhaps inartfully, that Ms. Queen's actions suggested that she did not feel "unspeakable fear and terror" which is a phrase from the trial court's findings of fact. (XI 2060) From this phrase, counsel wrote, "Contrary to the trial court's finding, Queen did not recoil in abject terror." (IB at 76) Appellant did not quote this sentence as being from the trial court's findings of fact. This sentence was merely an interpolation, which counsel still maintains is an accurate one, of the trial court's conclusions. Queen's actions reveal a lack of "terror", in that she bravely and no doubt angrily fought back. That was intended to be the point of this portion of appellant's argument.

POINT X

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT APPELLANT'S CRIMES ARE NOT THE MOST AGGRAVATED, LEAST MITIGATED FIRST-DEGREE MURDERS IN THIS STATE. A PROPER WEIGHING OF THE VALID AGGRAVATING FACTORS AGAINST THE SUBSTANTIAL MITIGATION SHOULD RESULT IN A SENTENCE OF LIFE IN PRISON WITHOUT POSSIBILITY OF PAROLE.

In a footnote, the state writes, "Despite Ferrell's evident belief that Heather Wendorf should have been prosecuted for the murders, ...". (AB at 60, n. 53) Appellant points out that it is not **his** belief that Heather Wendorf should have been prosecuted. In the initial brief, appellant cited the trial court's statement on the record at sentencing:

> It is the opinion of this Court after having heard the testimony of numerous witnesses throughout the course of this trial that significant questions remain regarding the involvement of Heather Wendorf in the murder of her parents...It is the strong suggestion of this Court to Mr. King, our elected State Attorney that the grand jury be reconvened, these witnesses be presented to the grand jury in efforts that Lake Countians can understand once and for all whether or not Heather Wendorf is, in fact involved in these brutal killings.

(XXXI 3621-22) It was only at the trial court's strong urging that the prosecutor reconvened the grand jury. Despite their subsequent findings, this Court can and

should consider the evidence of Heather's involvement and complete lack of punishment in deciding the proportionality and fairness of Rod Ferrell's two death sentences.

POINT XI

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT CAPITAL PUNISHMENT OF THIS 16-YEAR-OLD CHILD OFFENDER VIOLATES INTERNATIONAL LAW AND THE CONSTITUTION OF FLORIDA AND THE UNITED STATES.

The State agrees that Brennan v. State, 24 FLW S495 (Fla. October 21, 1999) controls, but seeks to re-argue its merits. (AB at 38). The arguments the State makes were fully addressed and rejected by this Court in Brennan. The arguments are otherwise without merit.

Specifically, the State claims that, "under Article 1, Section 17 of the Florida Constitution (as amended on November 3, 1998), the 'cruel or unusual' provision of the State constitution must be interpreted in conformity with United States Supreme Court precedent." (AB at 61-62). The State's claim is rejected in footnote 4 of the Brennan decision. The amendment to article I, section 17 of the Florida Constitution cannot apply here for at least two reasons. Foremost, it constitutes an *ex post facto* application of substantive law occurring in 1998 to a crime that was committed in 1996. Such retroactive application of substantive law is expressly proscribed by federal precedent and the *ex post facto* clause to the United States Constitution. See Gwong v. Singletary, 683 So.2d 109, 112 (Fla.1996).

The amendment to article I, section 17 of the Florida Constitution is also

invalid because it was accomplished through deceptive and misleading notice to Florida's voters. The notice given Florida voters failed to inform the voters that the amendment to article I, section 17 would substantively impact on sentences other than the death penalty. The substitution of the word "and" for the word "or" was not adequately explained. The assertion that the amendment was for "preservation of the death penalty" was misleading, ambiguous and otherwise improper because the change involved far more than just the death penalty. The amendment is invalid as argued in Armstrong v. Harris, No. 95,223 (Fla. March 31, 1999).

The State argues that, based on the 1998 change to article I, section 17, and applying federal precedent, this death sentence must be affirmed based on Stanford v. Kentucky, 492 U.S. 361 (1989), where the United States Supreme Court held that Kentucky's death penalty statute was constitutional. (AB at 62). The fact that the United States Supreme Court in Stanford approved Kentucky's statute does not mean that Florida's statute is constitutional. Kentucky's statute is substantively different than Florida's. Florida's statute enables juveniles to be tried as adults in all respects, without individualized consideration of capital punishment. This fails to satisfy the Due Process concerns discussed in Thompson v. Oklahoma, 487 U.S. 815 (1988), as noted by Justice Overton in his specially concurring opinion in Allen v. State, 636 So.2d 494, 498 (Fla.1994). Stanford cannot carry the burden placed upon it by the

State.

The State has not addressed the portions of this issue that are controlled by international agreements entered into by the United States. The undersigned respectfully notifies this Court that, after the Initial Brief of Appellant was filed, the United States Supreme Court, in Dominguez v. Nevada, 98-8327, [1999 WL 118777 (U.S. Nev.)] declined to exercise certiorari jurisdiction to review the decision of the Nevada Supreme Court that held in a 3-2 decision that state execution of sixteen-year old offenders does not violate the International Agreement on Civil and Political Rights. It should be noted, however, that the United States Supreme Court first invited the Solicitor General to file a brief in the case to express the views of the United States. See Dominguez v. Nevada, ___ U.S. ___, 119 S.Ct. 2044 (June 7, 1999).

It is respectfully submitted that Brennan, supra, was correctly decided and that a death sentence for a sixteen-year old offender in Florida violates article I, section 17 of the Florida Constitution, the Eighth and Fourteenth Amendments to the United States Constitution, and the dictates of Thompson v. Oklahoma, supra, and Allen v. State, supra. Accordingly, the death sentence must be reversed and the matter remanded for imposition of a life sentence, with no possibility of parole.

THE STATE'S CROSS-APPEAL

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO FIND THE AVOIDING ARREST AGGRAVATOR WHERE SUBSTANTIAL, COMPETENT EVIDENCE SUPPORTED THE COURT'S CONCLUSION.

In rejecting this particular aggravator, the trial court wrote:

> Fla. Stat. 921.141(5)(e), the crimes for which the defendant is to be sentenced were committed for the purpose of avoiding or preventing a lawful arrest [Hereinafter "avoiding arrest or witness elimination"]. This circumstance has been found to apply to the elimination of non-law enforcement witnesses if the dominant motive for the murder is to eliminate witnesses. [citations omitted]. This circumstance is not supported in this case beyond a reasonable doubt. Thus it is given no consideration by this Court.

(XI 2060) The trial court did not abuse its discretion in rejecting this particular aggravating factor. There was substantial, competent evidence to support the Court's conclusion. When there is a legal basis to support, or reject, an aggravating factor, a reviewing court will not substitute its judgment for that of the trial court. Occhicon v. State, 570 So.2d 902 (Fla. 1990). The resolution of factual conflicts is solely the responsibility of the trial judge and an appellate court has no authority to reweigh that evidence. Gunsby v. State, 574 So.2d 1085 (Fla. 1991). In arriving at a determination

of whether an aggravating circumstance has been proved, the trial judge may apply a "common-sense inference from the circumstances". Swafford v. State, 533 So.2d 270, 277 (Fla. 1988).

At most, the state's evidence supports a theory that the victims were killed in order to obtain their vehicle. The evidence is sorely lacking to prove that the **dominant motive** for the killings was to eliminate witnesses thereby avoiding arrest. The discussion about "taking someone out" held immediately before the boys entered the home focused on the **incapacitating the victims rather than killing them**. Ferrell told police that they "decided that we would go into the house, and at least hog-tie or something her parents...Didn't exactly plan on beating them to death." (XXVI 2764-65) When asked why the pair armed themselves before entering the house, Ferrell explained that he was taking precautions, "Just in case they attacked me." (XXVI 2767-68) They saw machetes, chainsaws, and axes in the garage, but did not grab them "...because I didn't plan on killing anyone...". (XXVI 2770-71) If the murders were not planned beforehand, the elimination of witnesses certainly could not have been planned. Clearly this was not the **dominant** motive for the murders as required when the victims are not law enforcement. Wike v. State, 698 So.2d 817 (Fla. 1997) and Preston v. State, 607 So.2d 404 (Fla. 1992).

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING TESTIMONY THAT FERRELL TOLD ONE OF HIS FRIENDS HE LEFT KENTUCKY BECAUSE POLICE WERE AFTER HIM FOR "BUILDING BOMBS."

Ferrell explained to his friend Audrey Presson that he left Kentucky because "he was running from the law because they had found him building bombs." (XXII 1978) The state presented this testimony in the form of a proffer.

The state contends that the testimony was relevant to prove the "avoid arrest" aggravator. 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.

At any rate, the trial court obviously determined that the testimony was irrelevant to any issues at the penalty phase. His conclusion is supported by substantial, competent evidence. Additionally, any slight probative value was undoubtedly outweighed by the extreme prejudice. §90.403, Fla. Stat. (1995). This Court has no reason to disturb the considered and learned decision by the trial court.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments cited herein and in the Initial Brief Appellant respectfully requests this Honorable Court to vacate the death sentences and remand for the imposition of sentences of life imprisonment without possibility of parole. Alternatively, this Court should remand for a new penalty phase.

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 Roderrick Ferrell, #124473, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 13th day of March, 2000.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
CHRISTOPHER S. QUARLES
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