IN THE SUPREME COURT OF FLORIDA

KEVIN DON FOSTER,	:	
Appellant,	:	
vs.	:	Case No. 93,372
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LEE COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
Assistant Public Defender
FLORIDA BAR NUMBER O234176

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

PRELIMINARY STATEMENT

Appellant will rely upon his initial brief in reply to Appellee's arguments as to Issues II and VI.

ARGUMENT

ISSUE I

THE COURT BELOW ERRED IN DENYING APPELLANT'S NUMEROUS MOTIONS FOR CHANGE OF VENUE, DUE TO THE PERVASIVE AND PREJUDICIAL PUBLICITY WHICH SURROUNDED THIS CASE AND INFECTED THE COMMUNITY FROM WHICH APPELLANT'S JURY WAS SELECTED.

Appellee relies heavily upon Rolling v. State, 695 So. 2d 278 (Fla. 1997) in support of its argument, however, there are significant differences between Rolling and the instant case. For example, Danny Rolling's crimes occurred some three and one half years before his penalty trial, while here Appellant's trial took place less than two years after the events. Furthermore, unlike Appellant, who filed numerous motions for change of venue prior to trial (and during trial), Rolling filed no pretrial motion for change of venue, but waited until the sixth day of jury selection to so move, in violation of Florida Rule of Criminal Procedure 3.240(c), which requires that a motion for change of venue be filed no less than 10 days before trial. Moreover, the trial court's analysis of the pretrial publicity in Rolling, with which this Court agreed, showed that it was quite balanced and factually oriented, unlike the pretrial publicity in Appellant's case, which was far from balanced, and was highly prejudicial. (See especially the Sam Cook column which appeared in print two days before the start of Appellant's trial. Vol. VII, p. 1038) Although Appellant

referred in his initial brief to just a few examples of the massive pretrial publicity this case generated, it is necessary for the Court to examine the record itself fully to grasp the scope and damaging content of the publicity that was generated.

In a footnote, Appellee mentions that jury selection in Rolling took three weeks, while jury selection for Appellant's trial took three days. (Answer Brief of the Appellee, p. 45, n. 4) However, in Rolling this Court noted that the length of the jury selection process "was largely attributable to the trial court's efforts to ensure that the jurors selected were, without a doubt, impartial and unbiased." 695 So. 2d at 287. Similarly, the relative brevity of the jury selection in Appellant's case should not necessarily be taken as an indication that it was easy to find impartial jurors; perhaps Appellant would have been better served if the trial court had engaged in a longer, more rigorous screening process.

Finally, in Rolling this Court observed that the trial court's ruling on a motion for change of venue is far from determinative on the issue; the appellate court has a "duty to make an independent evaluation of the circumstances" to ascertain whether a defendant has been presumptively prejudiced by pretrial publicity. 695 So. 2d at 285--Court quoting from Sheppard v. Maxwell, 384 U.S. 333, 362, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966).

TABLE OF CITATIONS (continued)

ISSUE III

THE COMMENTS OF THE COURT BELOW DURING THE GUILT PHASE OF APPELLANT'S TRIAL DEMONSTRATE THAT THE COURT HAD PREJUDGED THE CASE, AND DID NOT PRESIDE OVER THE TRIAL WITH AN OPEN MIND.

Appellee has grossly distorted Appellant's argument by claiming that Appellant somehow accused the trial judge of racism. Suffice it to say that Appellant has not done any such thing in any way, shape or form, and Appellee has totally misread footnote 20 on page 37 of Appellant's initial brief.

ISSUE IV

THE COURT BELOW ERRED IN SUBMITTING TO APPELLANT'S PENALTY PHASE JURY, AND FINDING TO EXIST IN HIS SENTENCING ORDER, THE AGGRAVATING CIRCUMSTANCE THAT THE INSTANT HOMICIDE WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

On page 77 of its brief, Appellee states that Appellant entered a plea to a number of the counts in a separate information that was filed against him and was adjudicated in February of 1999. This is a matter outside the record of the instant case, in a completely separate case, and Appellant moves this Court to strike the sentence near the end of page 77 in the State's brief beginning with "Whether the court's order" and ending with "'legal churning.'" In addition, the fact that, according to Appellee, Appellant entered a plea to only some of the counts in the information further demonstrates the impropriety in the trial court having considered the 27-count information at the Spencer hearing; the information contained only allegations, not proof, and Appellant ultimately was not convicted on all counts.

ISSUE V

THE SENTENCING ORDER ENTERED BY THE COURT BELOW WILL NOT SUPPORT THE SENTENCE OF DEATH IMPOSED, AS THE COURT FAILED TO GIVE PROPER CONSIDERATION TO THE EVIDENCE PRESENTED IN MITIGATION, AND HIS FINDINGS ARE UNCLEAR.

In two recent cases, Ramirez v. State, No. 89,377 (Fla. July 8, 1999) and Snipes v. State, 24 Fla. L. Weekly S191 (Fla. April 22, 1999), this Court again emphasized the significance of the defendant's youthful age as a mitigating circumstance in capital cases. Although the defendants in Ramirez and Snipes were only 17, Appellant was barely older than that (18) at the time of the instant offense. The court below offered less than compelling reasons for rejecting age as a mitigating factor in this case, and should have given it at least some weight in the sentencing weighing process. (See this Court's discussion at pages 28-30 of the slip opinion in Ramirez, where, although the trial court did find age as a mitigator, he abused his discretion by giving it "little weight.")

Appellant must also note that in his sentencing order, the trial court erroneously concluded that the sentencing jury "obviously agreed" with the court's conclusion that age was not mitigating as to Appellant because of the jury's nine to three vote for death. (Vol XII, p. 1480) In Florida, the sentencing jury does not make written findings regarding what aggravating and

mitigating circumstances are applicable, and so there is no basis for a determination that the jury did not find Appellant's age to be mitigating. The jury may very well have found age to be mitigating, but found it and the other mitigators to be outweighed by the aggravation (assuming the jury performed its duty in accordance with the jury instructions).

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Kevin Don Foster, renews his prayer for the relief requested in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 14th day of September, 2000.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

ROBERT F. MOELLER
Assistant Public Defender
Florida Bar Number 0234176
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/rfm