IN THE SUPREME COURT OF FLORIDA

MICHAEL GRIFFIN,	:	
Appellant,	:	
vs.	:	Case No. 93,906
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

Appellant emphasizes the following facts in response to the facts as presented by Appellee:

Appellee refers to several admissions that Appellant allegedly made to Cynthia Lambert. (Answer Brief, p. 14) The record does not establish that Appellant made these statements to Cynthia Lambert. To the contrary, Anthony Lopez, the co-defendant, made the statements, which were hearsay statements that were later related to law enforcement. [S1:92] Cynthia Lambert did not testify during the proceedings below.

ARGUMENT

ISSUE ONE

DID THE TRIAL COURT ERR IN FINDING THAT APPELLANT HAD VOLUNTARILY AND INTELLIGENTLY WAIVED HIS RIGHT TO A JURY DURING THE PENALTY PHASE?

In the answer brief, Appellee relies heavily on Hunt v. State, 613 So.2d 893 (Fla.1992), maintaining that the waiver in that case of an advisory sentence during the penalty phase occurred under circumstances similar to the present case. In Hunt this court held that Hunt had voluntarily and knowingly waived her right to a jury recommendation of the sentence. Id. at 899. This holding, however, is not dispositive of the same issue in the present case because the relevant facts in Hunt are not clear. Nearly all of the opinion in Hunt concerns whether Hunt voluntarily and intelligently entered a plea to the offenses. This court detailed the facts concerning this issue, and these facts are highlighted by Appellee. Hunt makes few references, however, to the facts relevant to the waiver issue. Finding tangentially that Hunt knowingly waived the advisory sentence, Hunt leaves unanswered the extent of the trial court's inquiries regarding the waiver of the jury. The opinion, after quoting a lengthy portion of the plea colloquy, does indicate that the trial court made further inquires into the plea and implications of the plea. Id. at 896. That this continued inquiry included considerations of the voluntary and knowing nature of the waiver is not inconceivable.

Secondly, the trial judge's colloquy in Hunt concerning the waiver is dissimilar to the one found in the present case. The trial judge informed Hunt that he would consider all of her testimony at her co-defendant's trial before determining the penalty. Id. With this statement the trial court strongly suggested to Hunt that he would consider all of her mitigating evidence during the penalty phase. The trial judge in the present case gave no such assurances. Instead, the judge informed Appellant that the purpose of the penalty phase proceeding was to allow the state to present aggravating evidence in support of the death penalty. Thus the court below made misleading statements concerning the waiver in contrast to what occurred in Hunt where the trial court arguably made an inquiry that was too limited but not misleading.

Appellee also argues that the waiver of the advisory sentence should be upheld because defense counsel stated on the record that he had discussed with Appellant the consequences of the waiver. A similar argument was rejected by the court in Arthur v. State, 374 S.E.2d 291 (S.Car.1988). In Arthur four attorneys advised Arthur to waive the jury recommendation during the penalty phase of the trial. Id. at 293. One of the trial attorneys assured the trial court that Arthur was committing the waiver with "full knowledge." Id. Nonetheless, the appellate court concluded that the record did not indicate Arthur's voluntary and knowing waiver of the jury recommendation. The court reached this conclusion because the

record did not establish "a searching interrogation of the accused by the trial court itself." Id.

The decision in Arthur recognizes that the knowing and voluntary character of a significant right should not be left to guesswork and speculation--the record must establish an appropriate waiver by means of a trial court inquiry. By arguing that the conclusional statements of Appellant's trial counsel support the waiver, Appellee would have this court find a knowing waiver based on speculation that trial counsel fully advised Appellant on the issue. But guesswork should not contribute to a trial court's imposition of a death sentence especially when proper advisement by the court is neither burdensome nor complex. Not left to guesswork is that the trial court did erroneously instruct Appellant of the nature of the wavier.

ISSUE TWO

DID THE TRIAL COURT ERR IN FAILING TO CONSIDER A MITIGATING CIRCUMSTANCE PRESENTED BY THE DEFENSE?

Appellee argues that Appellant is procedurally barred under section 924.051, Florida Statutes (Supp.1996), from raising the claim that the lower court failed to consider the mitigating circumstance of his potential for rehabilitation. Appellee maintains Appellant waived this argument by failing to challenge the sentencing order at the trial level. Appellee's contention is misplaced. By raising the issue of his potential for rehabilitation in a sentencing memorandum, Appellant did present the issue of his potential for rehabilitation before the trial court. [V11:2048] One of the primary purposes of the rule requiring objections is to ensure that concerns are brought before the trial court to avoid appellate review of a barren record. Norton v. State, 709 So.2d 87 (Fla.1997). Defense counsel's raising of the mitigating circumstance adequately establishes that the circumstance was before the trial court for consideration. See, Toole v. State, 479 So. 2d 731 (Fla.1985) (Once a requested jury instruction is submitted, an objection to the failure to instruct is not necessary for preservation of the instruction issue.) The trial court simply choose not to consider the circumstance in its sentencing order in violation of Campbell v. State, 571 So.2d 415 (Fla.1990) and its progeny.

Assuming arguendo that the defense failed to preserve this issue, this court can nonetheless address the matter because the trial court error is fundamental. An appellate court may hear an

unpreserved sentencing error that constitutes fundamental error. §924.051, Fla.Stat. (Supp.1996). An error is fundamental if it is equivalent to a denial of due process. J.B. v. State, 705 So.2d 1376 (Fla.1998). A failure to give weight to all established mitigating circumstances is a violation of due process. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Therefore, Appellant's claim is not procedurally barred.

Recognizing the curtailment of liberty that results from an illegal sentence, appellate courts have held that section 924.051 does not preclude review of illegal sentences because they are fundamental. In Heggs v. State, 718 So.2d 263, 264 (Fla. 2d DCA 1998), the court held that a sentence under an arguably unlawful version of the sentencing guidelines was reviewable in the absence of objection because the potentially illegal sentence "implicates a fundamental due process liberty interest." See also, Nelson v. State, 719 So.2d 1230 (Fla. 1st DCA 1998) (An unlawful habitual offender sentence constitutes fundamental error.); Henderson v. State, 720 So.2d 1121 (Fla. 4th DCA 1998) (A sentence exceeding the statutory maximum amounts to fundamental error.); Bain v. State, 730 So.2d 296 (Fla. 2d DCA 1999) (A sentencing error that improperly extends the defendant's incarceration is fundamental). If an unlawful sentence that extends incarceration in a non-capital case triggers the fundamental error standard, a sentencing error that may result in a sentence of death in a capital case requires at least the same standard.

In addition, Appellee argues that any error, if present, is harmless. Appellee, in support of this argument, points out the sentencing order's attention to other mitigating circumstances, some of which are related to Appellant's prospects of rehabilitation. The court's consideration of these circumstances does not cure the failure to consider the potential for rehabilitation. The trial court must consider all mitigating circumstances purposed by the defense. Campbell v. State, 571 So.2d 415. Nowhere in the sentencing order does the court address Appellant's future conduct that is integral to his claim that he can be rehabilitated. Appellee cannot show beyond a reasonable doubt that the trial court's failure to consider this important mitigator did not affect the sentence.[1]

[1]Contrary to Appellee's arguments, section 924.051 does not shift the burden to Appellant to establish harm where the error in not considering evidence of mitigation is constitutional error. See, Goodwin v. State, 721 So.2d 728 (Fla. 4th DCA 1998) (Beyond-a-reasonable-doubt standard under Chapman v. California, 386 U.S. 18 (1967), applies where constitutional error argued.

ISSUE THREE

DID THE TRIAL COURT ERRONEOUSLY CONSIDER TWO AGGRAVATING CIRCUMSTANCES THAT REFER TO THE SAME ASPECT OF THE OFFENSE?

Appellee contends that Hartley v. State, 686 So.2d 1316 (Fla. 1996), rejects an identical argument made in the present case concerning whether the trial court's consideration that the murder occurred during the course of a kidnapping and that it was committed for pecuniary gain was impermissible doubling of the same aggravating factor. Contrary to Appellee's assertion, Hartley is not controlling in the present case. Most significantly, Hartley did not reject the conclusion reached in Green v. State, 641 So.2d 391 (Fla.1994), that the two aggravators can constitute impermissible doubling under the appropriate facts. This court in Hartley distinguished Green by finding that the facts of Hartley's case supported both aggravators. The sole purpose of the kidnapping in Hartley was not just to further the robbery because Hartley and his accomplices clearly planned on murdering the victim from the outset. Therefore, the purpose of the kidnapping was to both rob and murder. In the present case, the record does not firmly establish a similar dual purpose. Appellant testified he and Lopez had intended to leave the victims alive inside the freezer. [S4:447] Nothing in the record directly contradicts this testimony. The testimony is consistent with the position that the sole reason for the kidnapping was to facilitate the robbery.

In addition, Appellee argues that the kidnapping had a broader purpose than to just facilitate the robbery. Appellee maintains that the movement of the victims from the loading area to the freezer area was unnecessary. However, Appellee admits Appellant and Lopez opened the lockers and obtained money while the victims were inside the freezer. Appellee does not explain how Appellant and Lopez could have gathered the money while the victims remained unrestrained in the loading area. Because Appellant and Lopez needed to restrain the victims in order to gather hundreds of pounds of coins, they kidnapped the victims in furtherance of the robbery. Consequently, the kidnapping--in purpose or in fact--should not be considered separately from the robbery for purposes of a determination of the aggravators.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of May, 2002.

Respectfully submitted,

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