IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 00-1198

WILLIAM FREDERICK HAPP,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

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CLAIM V

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE THAT THE TRIAL COURT ERRED BY FAILING TO PREPARE THE WRITTEN ORDER PRIOR TO ORAL PRONOUNCEMENT AND TO FILE SAME CONCURRENTLY WITH ORAL PRONOUNCEMENT.

Immediately upon polling the jury regarding their advisory verdict, the following ensued:

> THE COURT: Thank you. William Frederick Happ, do you have any legal cause that you may show why sentence should not now be pronounced, to Mr. Pfister or Mr. Happ?
>
> MR. HAPP: No, your Honor.
>
> MR. PFISTER: No. your Honor.
>
> THE COURT: All right. I intend to sentence at this time. Do I hear any objection, Mr. King?
>
> MR. KING: No. Sir.
>
> THE COURT: Mr. Pfister?
>
> MR. PFISTER: No, your Honor.

[ROA Vol. VII, 1383].

At that time the trial court orally pronounced sentence upon Mr. Happ. After the oral pronouncement, the following occurred:

> THE COURT: It goes without saying that the findings of fact, findings of law, and the sentencing order will be reduced to writing. The Court has before it a preliminary draft which it has worked from and that reduction of writing will be done in the next few moments.
>
> Anything else?

[ROA Vol 7, 1392].

Upon reviewing the written findings of fact, findings of law, and conclusion filed by the court [ROA 1165], it is apparent that the document is not exactly the same as that pronounced in open court, which supports the fact that the trial court did not prepare its order prior to oral pronouncement. Further, the above cited excerpt from the record supports that the written order was not filed concurrently with the oral pronouncement. The failure to prepare the written order prior to pronouncement and the failure to file same concurrently with the oral pronouncement are in violation of Grossman v. State, 525 So.2d 833 (Fla. 1988).

The "preliminary draft," as orally pronounced by the trial court, is virtually verbatim to the final findings of fact filed by the trial court. However, the remainder of the filed written findings is substantially different than that orally pronounced by the court.

The written order states as follows:

II. FINDINGS OF LAW

1) The Defendant was convicted of two (2) armed robberies and one (1) kidnapping prior to the imposition of this sentence. Those underlying crimes were committed prior to the incidents giving rise to the instant case. This is an aggravating circumstance within the purview of Sec. 921.141(5)(b), Florida Statutes.
(2) The Defendant committed the murder herein while engaged in the commission of a sexual battery, a kidnapping and a burglary. This is an aggravating circumstance within the purview of Sec. 921.141(5)(d), Florida Statutes.
(3) The victim died as a result of strangulation. The death accorded the victim was not instantaneous, but rather slow and agonizing. Such a death is especially evil, wicked, atrocious or cruel. This is an aggravating circumstance within the purview of Sec. 921.141(5)(h), Florida Statutes.
(4) The victim died after being abducted, beaten and strangled. This is an aggravating circumstance with the purview of Sec. 921.141(5)(i), Florida Statutes.

III. CONCLUSION

Based upon the foregoing findings of fact and law, and having considered the recommendation of the jury, all aspects of the Defendant's character of record, the circumstances of the crime, and all statutory and non-statutory circumstances of mitigation presented by the Defendant, it is the conclusion of the court that:
1) The State has proven the existence of those aggravating circumstances found in Secs. 921.141(5)(b), (d), (h), and (i).
2) the Defendant's family history, age, and the Defendant's educational aid to other inmates give rise to non-statutory mitigating circumstances.

> 3) The aggravating circumstances legally outweigh the mitigating circumstances herein, and do so even though the defendant's age at the time of the crime was taken into account as a mitigating factor.

[ROA 1165-1166].

However, upon reviewing the transcript, the oral pronouncement is quite different.

> As to the aggravating circumstances.
>
> Florida Statute 921.141(5)(a), the capital felony was committed by a person under a conviction of prior felony crimes -- scratch that. That's a mistake, scratch that. As to 921.141(5)(b), it's (b), the Defendant was previously convicted of another capital felony or felonies involving use or threat of violence to the person, specifically, California records, threats involving violence to the person previous.
>
> As to Florida Statutes 921.141(5)(d), the capital felony was committed while the Defendant was engaged in, in commission of, or an attempt to commit sexual battery and kidnapping.
>
> Florida Statute 921.141(5)(h), the capital felony was especially wicked, atrocious and cruel.
>
> Florida Statute 921.141(5)(i), the capital felony was a homicide committed in a cold, calculated, premeditated manner, without any pretense of moral or legal justification.
>
> Based upon these findings of fact and of law, the sentence is as follows, and considering, of course, the recommendation of the Jury verdict, and giving it its due weight.
>
> As to Count I, William Frederick Happ be sentenced to death by electrocution. The Sheriff of Lake

> County, Florida, is hereby ordered and directed to deliver the Defendant forthwith to the department of Corrections, together with a copy of the Judgment and Sentence, to await the execution of this sentence.

[ROA Vol 7, 1386-1387].

The remainder of the oral pronouncement dealt with the sentencing on the other counts.

This Court in Grossman enunciated this rule in order to reinforce the trial court's obligation to think through its sentencing decision and to ensure that written reasons are not merely an after-the-fact rationalization for a hastily reasoned initial decision imposing death. Id. at 293 (emphasis added). In the instant case the "preliminary draft" of the trial court was not an after-the-fact rationalization, but a before-the-fact rationalization, because the court had prepared the "preliminary draft" before the jury made it's recommendation.

The trial court's oral pronouncement was a compilation of the first paragraph of the sentencing order [ROA 1162-1164], intertwined with a portion of the court's findings from his "preliminary draft", and then a reversion back to the sentencing order. The oral pronouncement makes no mention of weight provided to any of the aggravators or any of the mitigators. The oral pronouncement fails to even mention that the aggravators outweigh the mitigators.

It is expected that the state in response hereto would point out that the Petitioner, when asked by the trial court whether he had any objection, indicated "no." However, the question posed to defense counsel was whether he had an objection to the court sentencing Mr. Happ at that time[1], and not the procedures the court utilized. In Gibson v. State, 661 So.2d 288 (Fla. 1995), and Landry v. State, 666 So.2d 121 (Fla. 1996)(decided on other grounds, but Justice Wells commented in his concurring opinion regarding the trial court's failure to file a contemporaneous written order with oral pronouncement) no contemporaneous objection was made by trial counsel that the court failed to file a written order, and yet this Court heard the issue on appeal. Therefore, Appellate Counsel was ineffective for failing to raise this issue before this Court.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Happ respectfully urges this Honorable Court to grant habeas relief.

[1]This issue will be revisited in Petitioner's amended 3.850 motion before the trial court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing ***SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS*** has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on ***October 27, 2000***.

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