IN THE SUPREME COURT OF FLORIDA

ANTHONY SPANN,

Appellant,

vs. APPEAL NO. 00-1498

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Petitioner will be responding to each Issue set forth in the Initial Brief and Answer Brief.

ARUGMENT

ISSUE I

THE TRIAL COURT ERRED IN RULING THAT HANDWRITING ANALYSIS SATISFIES THE FRYE STANDARD FOR ADMISSIBILITY AND IN PERMITTING THE STATE TO INTRODUCE TESTIMONY THAT CERTAIN HANDWRITING SAMPLES SHOWED EVIDENCE OF INTENTIONAL DISTORTION OF THE HANDWRITIG IN AN ATTEMPT TO DISGUISE THE HANDWRITING SO AS TO PREVENT COMPARISON.

The State first argues that this issue is not properly preserved for appellate reveiw. (State's Brief at 15-16). Contrary to the State's argument this issue was properly preserved for appellate review.

Defense counsel objected to the State's handwriting expert being allowed to testify that certain handwriting samples showed evidence of intentional distortion of the handwriting in an attempt to disguise the handwriting so as to prevent comparison, (21, T2105-2132; 24, T2374-76). Frye hearings were conducted by the trial court on this issue. (24, T2370-2378; 25, T2545-2582) The issue was preserved for appellate review.

With respect to the remainder of the State's arguments, Mr. Spann would rely on facts, law and argument contained in Mr. Spann's Initial Brief.

ISSUE II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ADEQUATELY FOLLOW THE PROCEDURES WITH RESPECT TO MR. SPANN'S WAIVER OF MITIGATION IN THE PENALTY PHASE OF THE TRIAL.

The State argues that the trial court followed the proper procedure with respect to Mr. Spann's waiver of mitigation in the penalty phase. In doing so, the State merely points to and quotes the trial transcripts and records, and then merely states that the trial court followed the proper procedure regarding Mr. Spann's waiver of mitigation. (State's Brief at 23-35). The State in its argument on this point fails to meaningfully address the matters raised in Mr. Spann's Brief regarding this Issue.

One of Mr. Spann's arguments on this Issue is that defense counsel's proffer was inadequate. The State's only argument on

this point is that "Spann fails to explain how the proffer is inadequate." (State's Brief at 35). Contrary to this statement by the State, Mr. Spann's brief clearly states that throughout the proceedings Mr. Spann's defense counsel only provided a bare-bones and very cursory proffer of what the mitigation would be. Mr. Spann's defense counsel failed to provide the trial court with any details or substance regarding the mitigating evidence. Mr. Spann's defense counsel merely proferred the broadest generalities possible, and at no time provided any specific information regarding the mitigating factors. Mr. Spann's defense counsel

failed to provide the trial court with any of the available records regarding Mr. Spann. (Mr. Spann's Brief at 51).

The proffer by defense counsel was also inadequate in light of the fact that defense counsel failed to even proffer mitigation that later came out in the P.S.I. Clearly, defense counsel's proffer was inadequate and the trial court erred by relying on an inadequate proffer.

Without an adequate proffer, it is impossible for Mr. Spann to make a knowing and intelligent waiver of mitigation. Without an adequate proffer of mitigating evidence, it is impossible for the trial court to properly waive the mitigating factors. Without an adequate proffer of mitigating evidence, it is

impossible for this Court to conduct proportionality review.

The State also failed to address Mr. Spann's point that the trial court committed reversible error by failing to conduct a Koon inquiry at the Spencer hearing. The trial court should have conducted a Koon inquiry at the time of the Spencer hearing. The trial court's failure to do so is reversible error.

ISSUE III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT MR. SPANN HAD FREELY AND VOLUNTARILY MADE A KNOWING AND INTELLIGENT WAIVER OF THE ADVISORY JURY IN THE PENALTY PHASE OF THE TRIAL AND ALSO ABUSED ITS DISCRETION BY ALLOWING MR. SPANN TO WAIVE THE ADVISORY JURY IN THE PENALTY PHASE OF THE TRIAL.

The State argues that the record shows that the trial court's colloquy thoroughly established Mr. Spann's knowing and voluntary waiver of the advisory jury. (State's Brief at 40-42) The State's argument on this point is erroneous.

Contrary to the State's position, the record does not

reflect a thorough colloquy with Mr. Spann. The trial court's primary focus in the colloquy with Mr. Spann was that the advisory jury could recommend a life sentence and that the trial court would be required to give that recommendation great weight. (30, T3174-3177)

The trial court did not advise Mr. Spann that the State and defense counsel may present evidence in the penalty phase to the jury relative to the nature of the crime and character of Mr. Spann, and that the jury could also rely on evidence in the guilt phase of the trial. The trial court did not advise Mr. Spann that based on this evidence, the jury would determine, first, whether sufficient aggravating factors exist that would justify the imposition of the death penalty and , second, whether there are mitigating factors sufficient to outweigh the aggravating factors, if any. The trial court did not advise Mr. Spann regarding what

aggravating factors might be considered by the jury and what mitigating factors might be considered by the jury. The trial court did not advise Mr. Spann of the burdens of proof regarding aggravating and mitigating factors. The trial court did not advise Mr. Spann that each side could make an argument to the jury. The trial court did not advise Mr. Spann regarding how the voting worked in the penalty phase. The trial court did not

advise Mr. Spann that the jury would be given legal instructions regarding the penalty phase that they must follow. See, Florida Standard Jury Instructions in Criminal Cases, Penalty Proceedings - Capital Cases F.S. 921.141.

The trial court also did not advise Mr. Spann of the consequences of waiving the penalty phase jury. Although the trial court advised Mr. Spann that the trial court would be required to give the jury recommendation great weight, Mr. Spann was not advised of the appellate consequences of waiving an advisory jury that might recommend life.

The trial court never asked Mr. Spann if he was freely and voluntarily waiving the advisory jury. The trial court never asked Mr. Spann if he was promised anything, or threatened or coerced in anyway to get him to waive the advisory jury.

To the extent that the trial court did conduct a colloquy of Mr. Spann, it was far from a "searching interrogation" of Mr. Spann. See, Arthur v. State, 374 S.E. 2d 291 (S.C. 1988). Without

a "searching interrogation" of Mr. Spann, the record could never affirmatively show that the waiver is "an intentional relinquishment or abandonment of a known right or privilege." See, Boykin v. Alabama, 395 U.S. 238, 243, (1969) - quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

The questions asked Mr. Spann by the trial court were all leading questions that merely required a yes or no response by Mr. Spann. (30, T3174-3177) The trial court never asked Mr. Spann any non-leading questions that affirmatively demonstrated his knowledge of the penalty phase proceedings in general, his knowledge of the function and role of the jury, or his understanding of the consequences of his waiver.

The State next argues that the trial did not abuse its discretion by failing to exercise its discretion and require an advisory jury because Mr. Spann did not want an advisory jury. (State's Brief at 42). The State's argument on this point is erroneous.

The State's argument is erroneous because the trial court clearly has the discretion to require an advisory jury even if the defendant wishes to waive the advisory jury, See, State v. Carr, 336 So. 2d 358 (Fla. 1976). Even though a defendant does not want an advisory jury, it is up to the trial court in its dicretion to determine whether or not to require an advisory jury. Where the trial court fails to recognize this duty, and merely acquiesces to

the wishes of a defendant, the trial court has failed to exercise its sound discretion and in doing so abused its discretion.

In the instant case a thorough reading of the record shows the trial court was merely acquiescing in Mr. Spann's desire not to have an advisory jury. The trial court failed to recognize its duty to utilize its sound discretion in determining whether or not to require an advisory jury despite Mr. Spann's desire not to have an advisory jury. The trial court failed to exercise its sound discretion and in doing so abused its discretion.

ISSUE IV

THE TRIAL COURT IMPROPERLY FOUND AND CONSIDERED MR. SPANN'S CONVICTION FOR MISDEMEANOR BATTERY AS AN AGGRAVATING FACTOR PURSUANT TO SECTION 921.141(5)(b), FLA. STAT.

The State first argues that the trial court did not err in finding and considering Mr. Spann's conviction for misdemeanor battery as a prior violent felony aggravating factor based on the theory that the misdemeanor battery was the underlying violence in Mr. Spann's felony conviction for escape from a juvenile detention center. (State's Brief at 44) The State's argument is erroneous for two reasons.

The first reason that the State's argument on this point is erroneous is because the trial court did not rely on the felony conviction for escape from a juvenile detention center as a basis for this aggravating factor, but instead relied on a misdemeanor battery conviction. This is not a situation in which the trial court found and considered a felony conviction that was not a crime of violence per se, but based on additional evidence violence was able to properly find and consider that the conviction was for a prior violent felony. For example, see, Johnson v. State, 465 So. 2d 499 (Fla. 1985); Mann v. State, 453 So. 2d 784 (Fla. 1984) In the instant case the trial court erroneously considered a misdemeanor battery conviction as a prior violent felony conviction. See, Carpenter v. State, 26 FLW S 125 (Fla. 2001).

The second reason that the State's argument on this point is

erroneous is that based on the facts of the instant case the misdemeanor battery is not underlying violence to the felony conviction for escape from a juvenile detention center. At the time of the battery and the escape, Mr. Spann had been placed in the Orange House. The victim of the battery was Robert Sharpe, who was a group leader at the Orange House. (30, T3200) The battery was based on Mr. Spann punching Mr. Sharpe in the mouth, which resulted in a busted lip. After committing the battery, Mr. Spann fled the facility. (30, T3203). Based on these facts it is clear that the battery happened before the escape. There is no evidence that the battery happened during the escape. Thus, the misdemeanor battery is not underlying violence to the felony conviction for escape from a juvenile detention center, and therefore was improperly considered and weighed as an aggravating factor.

The State next argues that if the trial court's consideration of the misdemeanor battery conviction was error, that the error was harmless in light of Mr. Spann's convictions for two other prior violent felonies. (State's Brief at 44-46). The State's argument on this point is also erroneous.

The State's argument on this point is erroneous because the

trial court in its sentencing order did not give specific weight to each of the prior violent felonies. (3, R378-391). Thus it is impossible to determine how much weight the trial court gave to the misdemeanor battery conviction. Since it cannot be determined how

much weight the trial court gave to this misdemeanor battery conviction, this Court cannot say that the error was harmless beyond a reasonable doubt.

ISSUE V

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN CONSIDERING SEPARATE AGGRAVATING FACTORS FOR DURING THE COMMISSION OF A FELONY (KIDNAPPING), PECUNIARY GAIN, AND AVOID ARREST.

The State first argues that this claim is not preserved for appellate review because no specific objection was made below. (State's Brief at 46-47) The State's argument on this point is without merit.

The State's argument is without merit because regardless of whether or not defense counsel specifically objects, the State may not rely upon a single aspect of the offense to establish more than one aggravating factor. If the trial court finds that two or more of the aggravating factors are proven beyond a reasonable doubt by a single aspect of the offense, the trial court must consider that as supporting only one aggravating factor. See, Provence v. State, 337 So. 2d 783, 786, (Fla. 1976); Banks v. State, 700 So. 2d 363 (Fla. 1997); Rose v. State, 787 So. 2d 786, 801 (Fla. 2001).

The State next argues that a single aspect of the offense was not used to establish more than one aggravating factor. (State's Brief at 47-52, 53-54) The State's argument on this point is erroneous.

The State's argument on this point is erroneous, because the trial court did in fact rely on a single aspect of the offense to establish the felony murder (kidnapping) aggravating factor, the pecuniary gain aggravating factor, and the avoid arrest aggravating

factor. The evidence showed that Mr. Spann and the co-defendant planned to carjack a vehicle, abduct the driver, and kill the driver so that they could not be identified. (3, R380-381, 382). The trial court relied on this single aspect of the offense to find the felony murder (kidnapping) aggravating factor. (3, R380-381). The trial court also relied on this single aspect of the offense to find the avoid arrest aggravating factor. (3, R381-382). The trial court also relied on this single aspect of the offense to find the pecuniary gain aggravating factor. (3, R382). Thus, the trial court erred in considering separate aggravating factors for felony murder (kidnapping) aggravating factor, avoid arrest aggravating factor, and pecuniary gain aggravating factor.

The State finally argues that if this court concludes that

the felony murder (kidnapping), avoid arrest, and pecuniary gain aggravating factors should have been merged, that the trial court would still have imposed a death sentence. (State's Brief at 52-53). The State's argument on this point is erroneous.

The reason that the State's argument is erroneous on this point is that the trial court in its sentencing order gave significant weight to the aggravating factors in large part due to the number of aggravating factors. The trial court noted that "Even in the absence of the cold, calculated and premeditated aggravator, the Court would still feel that the remaining four aggravators seriously outweigh the existing mitigators." (emphasis

supplied). (3, R389-390). Had the aggravating factors discussed herein been properly merged into one aggravating factor there would have been only three aggravating factors instead of five aggravating factors. Since it cannot be determined how the trial court would have weighed the aggravating factors if there had only been three instead of five, this Court cannot say that the error was harmless beyond a reasonable doubt.

ISSUE VI

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO CONSIDER AND WEIGH ALL THE MITIGATING EVIDENCE CONTAINED IN THE RECORD.

The State first argues that the nineteen mitigating factors raised in Mr. Spann's Initial Brief at 71-79 are not mitigating in nature (State's Brief at 54, 58-59). This argument by the State is without merit.

In Mr. Spann's Initial Brief, nineteen mitigating factors that the trial court did not consider and weigh were identified. (Mr. Spann's Initial Brief at 71-79). Each of these nineteen

items are truly mitigating in nature. Each of these nineteen items involve an aspect of Mr. Spann's character or record. See, Section 921.141(6)(h), Fla. Stat. (1997), Luckett v. Ohio, 438 U.S. 586, 604 (1978)

More specifically, each of these nineteen items involve the types of non-statutory mitigating factors recognized by this Court. For example, Mr. Spann's prison records showed that Mr. Spann was capable of living in a prison population without serious difficulty or doing harm to another. This Court has recognized that this is a mitigating factor. See, Campbell v. State, 571 So. 2d 415 (Fla. 1990) (footnote 4 - good prison record). Another example is Mr. Spann's drug use during this incident, See, Johnson v. State, 608 So. 2d 4 (Fla. 1992). Other examples are Mr. Spann leaving home at an early age, institutionalization as a juvenile, unhealthy

relationship with mother, and need of appropriate male role model. See, Campbell (footnote 4 - deprived childhood).

The State also argues that the nineteen mitigating factors are not in the record. (State's Brief at 59). The State's argument is without merit.

Each of these nineteen mitigating factors were part of the Record in the instant case as noted in Mr. Spann's Initial Brief by appropriate references to the Record. See, Mr. Spann's

Initial Brief at 71-79. For example, the fact that Mr. Spann was capable of living in a prison population without serious difficulty or doing harm to another is found in Volume 30, page 3162 and Volume 30, page 3189. The fact that Mr. Spann came under the influence of a bad crowd is found at Volume 29, page 3161 and Volume 30, page 3188. The fact that Mr. Spann had a low level of education (only completed 9th grade) was in the P.S.I. The fact that Mr. Spann left home at an early age was in the P.S.I. The fact that Mr. Spann had an unstable residential history is in the P.S.I. The fact that Mr. Spann had an unhealthy relationship with his mother and needed an appropriate male role model was in the P.S.I.

The State further argues that the trial court did consider all the mitigation that was present in the record, including information contained in the P.S.I. (State's Brief at 59-60). The State's argument is without merit.

In the Sentencing Order the trial court only considered five

nonstatutory mitigating factors. (3, R388-389). The trial court did not consider and weigh any of the nineteen mitigating factors raised in Mr. Spann's Initial Brief at 71-79.

ISSUE VII

THE TRIAL COURT ABUSED ITS DISCRETION WITH RESPECT TO THE WEIGHT ASSIGNED TO THE MITIGATING FACTORS.

The State first argues that the trial court did not abuse its discretion in assigning weight to the proffered mitigation

because the trial court analyzed the proffered mitigation and assigned weight for each ranging from very little to moderate. (State's Brief at 63). The State in making this argument, however, does not address the fact that the trial court was relying on an inadequate proffer. The trial court's abuse of discretion is predicated on its reliance of an inadequate proffer of the non-statutory mitigating factors. It was an abuse of discretion for the trial court to assign weight to mitigating factors based on inadequate information. The trial court's assignment of weight was arbitrary and unreasonable.

The State next argues that Mr. Spann's claim that the trial court improperly relied on limited information in the P.S.I. to weigh the mitigating factor that his father was shot to death was not preserved by defense counsel and that the trial court did not abuse its discretion in assigning weight to this mitigation. (State's Brief at 63). The State's argument on this point is erroneous.

The reason that the State's argument is erroneous is that the trial court must consider and weigh mitigating evidence contained

anywhere in the record. See, Farr v. State, 621 So. 2d 1368 (Fla. 1993). The P.S.I. stated that Mr. Spann's father was shot to death, but did not elaborate on this point any further in

terms of the circumstances of his father's death and its impact on Mr. Spann. In assigning weight to this mitigating factor the trial court was clearly relying on limited information. The trial court abused its discretion by relying on limited information. The fact that trial counsel failed to bring forth additional information regarding this mitigating factor is not a procedural bar, since it is the trial court's duty to consider and weigh mitigating evidence contained anywhere in the record. The fact that trial counsel failed to even proffer this mitigating factor and the fact that it came out in the P.S.I., however, does highlight the inadequacies of defense counsel's proffer of the mitigating factors in the instant case.

ISSUE VIII

THIS COURT CANNOT DETERMINE PROPORTIONALITY BASED ON THE RECORD IN THE INSTANT CASE.

Although Mr. Spann did not address proportionality in the Initial Brief, the State argues that the death sentence is proportional. (State's Brief at 64-67) The State's argument on this point is erroneous. Based on the record in the instant case it is impossible to make a determination regarding the proportionality or disproportionality of the death sentence.

The main reason that the State's argument regarding proportionality is erroneous is because the trial court committed reversible error by failing to adequately follow the procedures with respect to Mr. Spann's waiver of mitigation in the penalty phase of the trial. Since there was not a proper waiver of mitigation by Mr. Spann, this Court cannot conduct a proper proportionality review.

The State's argument is also erroneous, because the State relies on the trial court's erroneous findings regarding the aggravating factors and mitigating factors. (State's Brief at 64-65) As noted in Issue IV of Mr. Spann's Brief the trial court erred with respect to the prior violent felony aggravating factor. As noted in Issue V of Mr. Spann's Brief the trial court erred in considering separate aggravating factors for felony murder (kidnapping), pecuniary gain and avoid arrest aggravating factors.

As noted in Issue VI of Mr. Spann's Brief the trial court erred by failing to consider and weigh all the mitigating evidence contained in the record. As noted in Issue VII of Mr. Spann's Brief the trial court abused its discretion with respect to the weight assigned to the mitigating factors. Because of these errors by the trial court, this Court cannot conduct a proper proportionality review.

CONCLUSION

Based on the facts, the law, and the argument contained in the Initial Brief and herein, Mr. Spann requests the following:

Issue I: Reverse the convictions and remand for a new trial.

Issue II - VIII: Reverse the sentence and remand for a new sentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, Assistant Attorney General Melony Dale, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, FL 33401, this _____ day of May, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is presented in 12 point Courier New, a font that is not proportionately spaced.

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