IN THE SUPREME COURT OF FLORIDA

HAROLD A. BLAKE,

Appellant,

vs.

Case No. SC05-1302
Lt.No. CF02-52030A1-XX

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY,
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant, HAROLD BLAKE, will respond to each of the arguments advanced by the State. Mr. Blake continues to rely upon the citations of authority and argument contained in the Initial Brief.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE RECORDED STATEMENT OF MR. BLAKE WHERE THE RECORDED STATEMENT WAS TAKEN AS THE RESULT OF AN IMPLIED PROMISE TO MR. BLAKE THAT THE STATEMENT WOULD NOT BE RECORDED AFTER MR. BLAKE REFUSED TO CONSENT TO A RECORDED STATEMENT

In the Initial Brief Mr. Blake argued that the trial court erred when it denied his motion to suppress a video recorded statement that he gave to law enforcement officers. The facts surrounding the video taping are not in dispute- when Mr. Blake was asked by law enforcement if they could record the statement, he refused. Law enforcement ignored Mr. Blake's express refusal and surreptitiously recorded his statement through the use of concealed cameras and recording equipment.

Mr. Blake contends that he had a right to rely upon

the police honoring his refusal to consent to a recorded interview and the police actions were tantamount to an implied promise that the statements would not be recorded. The subsequent recorded statement is then involuntary because it is the product of improper inducement.

The State offers five reasons under which the trial court's action should be affirmed. Mr. Blake disagrees with the State's analysis and maintains that the recorded statement should have been suppressed.

The State's first position is that Mr. Blake did not have an expectation of privacy in the police interrogation room, therefore he could not rely upon the police to honor his refusal to be recorded. This position is incorrect under the facts unique to this case. The cases cited by the State are distinguishable and do not address the factual circumstances of this case.

In Boyer v. State, 736 So.2d 64 (Fla. 4th DCA 1999), the district court held that a secretly recorded conversation between a criminal defendant and his sister-in-law would not be subject to suppression. The opinion notes that a microphone was clearly visible in the room and was discussed by the defendant and his sister-in-law. Given their knowledge of the microphone coupled with the

fact that the police had made no promises that the conversation would not be recorded and neither the defendant nor the sister-in-law had specifically refused to a recording of the conversation, the district court determined that the defendant had no expectation that his conversation would be private. In contrast, in this situation, Mr. Blake had a reasonable expectation that his specific refusal after he was asked to give a recorded statement would be honored. Law enforcement throughout the interrogation process with Mr. Blake made him several other promises, including a promise to call his girlfriend, which they kept. Mr. Blake had a reasonable right to expect that his refusal would be honored. Mr. Blake's reasonable belief was further fostered by the fact that unlike Boyer, the recording equipment was completely hidden. Mr. Blake had no opportunity to observe recording equipment as did the defendant in Boyer.

The State also cites to Larzelere v. State, 676 So.2d 394 (Fla. 1996) and Allen v. State, 636 So.2d 494 (Fla. 1994) in support of the position that the recorded statements were admissible because of a lack of privacy expectation. Again, both are distinguishable because there was no evidence that the police took action designed to

mislead the defendants into believing that their communications were secure. In both instances, the recording was done between inmates in jail or holding cells with no police intervention. In neither case did the police deliberately foster an expectation, contrary to the actions of the police in this case.

The State's second argument is that no consent was necessary and relies upon Bedoya v. State, 779 So.2d 574 (Fla. 2001) for this argument. Bedoya unsuccessfully argued that his recorded and videotaped statements should be suppressed because they were done without his knowledge or consent. However, Bedoya never claimed, as Mr. Blake does, that the police asked for his consent to tape and he refused to give it. The difference between Bedoya and this case is that the request for permission to tape was asked-and refused. While the police under Bedoya may not have to ask in order to get a tape, if they do ask, then they are bound by the refusal of the defendant. To permit the police to seek consent, have that consent be refused, and then to proceed without notifying the defendant that his refusal is not being honored is a significantly different situation than that of Bedoya. Likewise, in Bell v. State, 802 So.2d 485 (Fla. 3rd DCA 2001), the defendant was not made aware of

the tape and was not asked whether or not he would consent to taping. A defendant has the right to expect that his refusal to give permission for a recorded interview will be honored because by the fact of asking for consent, the police have fostered an expectation that the request will be honored.

The State's fourth argument is that misrepresentations from law enforcement do not automatically render a confession involuntary. The State overlooks the nature of the misrepresentation in this case. A confession is not free and voluntary if elicited due to direct or implied promises, however slight. Walker v. State, 771 So.2d 573 (Fla. 1st DCA 2000).

The fifth argument raised by the State is that in order for a confession to be involuntary, police coercion must have played a significant role in obtaining it. The State asserts that there was no coercion causally connected to Mr. Blake's statements. This assertion is incorrect. Mr. Blake agreed to go over the statement again only on the condition that it not be recorded. The blatant misrepresentation about the true nature of the second statement and the police actions which affirmatively deluded Mr. Blake into believing that he was not being

recorded is coercion. Without the implied promises from law enforcement, the second recorded statement would not exist.

The State's final argument is that the recorded statement would have come in as impeachment evidence because Mr. Blake testified. However, had the recorded statement been suppressed, that ruling could have altered the determination of whether or not Mr. Blake would have chosen to testify. With the entire statement having been ruled admissible, there was no need to consider waiving a favorable ruling. It would be improper to base a ruling on whether evidence should have been suppressed upon the defendant's decision which was predicated on the evidence already having been admitted.

Mr. Blake contends that the case which is most applicable to the issue in this case is State v. Calhoun, 479 So.2d 241 (Fla. 4th DCA 1985), which has not been overturned. While noting that a criminal defendant would not usually have an expectation of privacy in an interrogation room, the court held that that a defendant may have a justifiable expectation of privacy if that expectation is deliberately fostered by the police. In Calhoun the defendant was under arrest and a suspect in another case. The defendant was placed in a room for what

he believed was a "private" conversation with his brother. Unknown to both, this conversation was monitored by law enforcement. The defendant and his brother were separated and the defendant was advised of Miranda, which he invoked. After several minutes the defendant and his brother were reunited and their fifteen minute conversation was recorded. There was no court order permitting the intercept and neither brother consented to the recording.

Calhoun made it clear that §934, Fla. Stat.(which permits wiretapping under certain circumstances) did not apply. The court further concluded that the police had misled the defendant by fostering a belief on his part that his request for a private conversation would be honored. Likewise, in this case the police fostered in Mr. Blake a reasonable belief that his refusal to have his statement tape recorded or videotaped would be honored. Mr. Blake gave the second statement only because he relied upon the police to honor their implied promise. As a result of this reliance, the recorded statement is subject to suppression.

ISSUE II

THE TRIAL COURT ERRED IN FAILING TO ADVISE MR. BLAKE THAT HE COULD EXERCISE HIS RIGHT TO SELF-REPRESENT-

ATION AFTER THE COURT DETERMINED THAT APPOINTED COUNSEL WOULD NOT BE REPLACED.

Mr. Blake, on two occasions, sought to discharge court-appointed counsel. The trial court held a hearing on the second request and determined that appointed counsel was not ineffective and denied the request to discharge. The trial court did not issue his ruling on the record and did not advise Mr. Blake either in court or in the order that he had the right of self-representation.

The State cites to Craft v. State, 685 So.2d 1292, 1295 (Fla. 1996), and argues that the trial courts have no obligation to inform a defendant of his right to self-representation after a motion to discharge counsel is denied. Craft held that there is no obligation by the court to advise the defendant of self-representation under facts which clearly demonstrated that the defendant was aware of the right of self-representation and failed to asked for it. In Craft the defendant had sought to discharge his public defender prior to trial to no avail. During jury selection he again objected, and failing to secure discharge, in open court moved to be appointed co-counsel. His public defender, in the presence of Craft, advised

the trial court that Craft was not seeking to represent himself. Craft stood silent and did not contradict the public defender. Clearly, under these facts where the issue of self-representation came up and where it was equally clear that the defendant knew of this right and was declining to exercise it, a requirement that court have an additional obligation to advise him of a right he had already clearly declined to exercise would be fruitless. That is not however, the situation in this case.

There is no assurance in this case that Mr. Blake, unlike Mr. Craft, knew that he had a right of self-representation. Mr. Blake was never informed by the court that he could still get rid of Mr. Colon. While the trial court has no obligation to advise a defendant of his Sixth Amendment right who clearly already knows of it and has declined to exercise, Mr. Blake submits that an important distinction exists when there is no assurance that the defendant was ever informed of that right, as is presented here. Craft certainly recognized that the better course was for the trial judge to inform the defendant of his right to self-representation and fully comply with Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), approved by Hardwick v. State, 521 So.2d 1071 (Fla.), cert. denied, 488

U.S. 871, 102 L.Ed 2d 154, 109 S.Ct.185 (1988). When the trial courts fail to comply with Nelson and follow that "better course", then an issue is presented that is subject to the harmless error test enunciated by Sweat v. Lewis, 895 So.2d 462 (Fla. 5th DCA 2005). Mr. Blake affirms reliance upon the argument presented on the question of whether or not the error in this case was harmful as set forth in the Initial Brief.

ISSUE III

THE SENTENCE OF DEATH IS NOT PROPORTIONATE

Mr. Blake argues in the Initial Brief and in this response that the sentence of death in this case is not proportionate. The sentencing order and applicable aggravating factors and mitigating circumstances have been previously set forth in the prior briefs of each party and it is not necessary to replicate those findings again.

In aggravation the trial court found that Mr. Blake had a prior violent felony conviction, undisputedly arising from the conviction of first-degree murder in the death of Mr. Kelvin Young. Mr. Blake asserts that this Court must consider the fact that the jury determined that Mr. Blake

was not the shooter of Mr. Young in determining whether or not the sentence of death is proportional. The State does not dispute that it is appropriate for the Court to consider the facts of the prior violent felony, but argues that this Court has found sentences of death to be proportionate where the defendant was the instigator and primary participant in the underlying crimes, citing to Van Poyck v. State, 564 So.2d 1066 (Fla. 1990) and Stephen v. State, 787 So.2d 747 (Fla. 2001). In each case ample evidence about the prior crime was admitted in order for the respective courts to determine that the defendant was the primary instigator of the prior crime. The evidence admitted in this case about the prior crime does not establish that Mr. Blake was the instigator of the prior crime. The testimony was that the driver of the car approached Mr. Young, the driver demanded money, and the driver shot Mr. Young. No evidence established any activity to further to crime by the passenger who, according to the verdict, was Mr. Blake. Mr. Blake denied committing the crime.

In addressing the third aggravating factor, Mr. Blake asked this Court to consider that the robbery/pecuniary gain aggravating factor will apply in every case and that

the confrontation between Mr. Blake and the victim was not violent, that Mr. Blake never entered the store, and that the video tape admitted by the State supported Mr. Blake's statement that he fired after being startled.

The State responds by arguing that the fact that the victim sought to flee or thwart the robbery does not render a death sentence disproportionate and cites to several cases. This was not the Appellant's argument. Proportionality review requires a comparison between the facts of cases. The State's argument fails because those cases in which the victim fought with the defendant are genuinely more aggravated as they demonstrate a clear intent to kill that is absent in this case.

For example, the State cites to Bryant v. State, 785 So.2d 422, 437 (Fla. 2001) in support of this position. Yet in Bryant the defendant engaged in a physical fight with the victim before shooting him three times at point blank range. There were three aggravating factors present and only one mitigating circumstance of remorse. Under those facts, this Court found death was proportionate. Mr. Blake, however, did not engage in a physical fight with the victim, he did not shoot him three times in the head at point blank range. The facts of the murder in Bryant

demonstrate that it was far more deliberate act with a clear intent to cause the death of the victim than was shown in this case.

Similarly, the victim in Mendoza v. State, 700 So.2d 670, 679 (Fla. 1997), struggled with his three attackers outside his home(one of which was Mendoza)and was able to shoot one of them before he was shot three times at point-blank range. A death sentence was proportional because there were two aggravating factors and no mitigation found. Again, it was clear in Mendoza that the defendant wanted to ensure that the victim died. That factor is lacking in this case and distinguishes it sufficiently from Mendoza.

In Carter v. State, 576 So.2d 1291 (Fla. 1989), the defendant was seen standing over one victim and had already shot and killed another person in the gas station. Carter was convicted of killing both men, there were three aggravators, including the second death, and only a deprived childhood as a single mitigating factor. It was clear that Carter intended his victims to die and ensured that by firing over them. The facts of this case distinguish it from Carter in both the deliberate nature of the murders and the amount of mitigation. This case presents far more mitigation than present in Carter and

there is no evidence of a deliberate plan to kill.

The State next argues that this case is similar to Shellito v. State, 701 So.2d 837 (Fla. 1997), Melton v. State, 638 So.2d 927 (Fla. 1994), and Finney v. State, 660 So.2d 674 (Fla. 1995). While the State provides a numerical count of the aggravators and mitigators of each of these cases, the State fails to provide this Court with the factual information necessary for proportionality review. For example, the defendant in Shellito, who was 19 at the time of the murder, had eight adult felony convictions, including robbery and burglary. Obviously, Shellito's prior record was significantly more extensive than Mr. Blake's. Further, the trial court found only two mitigating factors in Shellito and did not find the defendant's age to be mitigating. Mr. Blake's case is less aggravated and more mitigated than that of Shellito.

In Melton the defendant had only two mitigators: good jail conduct and a difficult family background. Clearly, the defendant in Melton presented one of the least mitigated of cases. The trial court in this case found far more mitigation established, including Mr. Blake's age and remorse.

Finney is completely inapplicable to this case as a

basis for affirming a death sentence on proportionality grounds. Finney was convicted of a rape/murder where the victim was found gagged, bound, and had been stabbed 13 times. The aggravators of HAC, prior violent felony, and pecuniary gain were found, clearly making this one of the most aggravated murders. Little mitigation was present, largely related to the defendant's prior military record and good jail behavior, leaving it among the least mitigated.

The State quotes from this Court's opinion in Bryant v. State, 901 So.2d 810 (Fla. 2005), as authority for a basis to affirm the death sentence, but again fails to provide any additional analysis of the mitigation/aggravation other than the numbers tally provided in the opinion in string cited cases. For example, Melton v. State, Id., is again referenced, but without the previous explanation which distinguishes it from this case. Diaz v. State, 860 So.2d 960 (Fla. 2003) is also noted in a footnote, but is distinguishable from this case in light of the presence of the CCP aggravator and egregious nature of the facts of the case the defendant hunted down and killed his estranged girlfriend's father while trying to kill her.

The remaining cases cited by the State in support of

their view that a death sentence is proportionate are also distinguishable from this case, because they are either more aggravated or less mitigated. For example, the defendant in Freeman v. State, 563 So.2d 73 (Fla. 1990) beat the victim to death, had a prior conviction for first-degree murder, had no statutory mitigation and had limited non-statutory mitigation that was not compelling, (he was artistic and liked to play with children). The mitigation outlined in the Initial Brief in this case is far more compelling.

In Johnston v. State, 841 So.2d 359, 361 (Fla.2002), the defendant kidnapped, raped, and strangled a young woman, resulting in four aggravating factors- prior violent felony, murder committed in the course of a sexual battery, pecuniary gain, and HAC. Clearly, this case represented one of the most aggravated of first-degree murders. Mr. Blake's case does not, especially when compared to Johnston.

The case of Singleton v. State, 783 So.2d 970 (Fla. 2001) is also distinguishable from this case as being more aggravated. Singleton was convicted of stabbing his victim to death after he had lured her to his apartment for an act of prostitution. Two aggravating factors were sustained-

HAC and prior violent felony. The prior violent felony occurred when Singleton had abducted, raped, and attempted to murder a fifteen year old girl. Singleton had chopped off the young girl's arms and left her to bleed to death. The presence of the HAC aggravator coupled with the facts of the prior violent felony distinguishes Singleton as among the most aggravated of murders, whereas, this case, although tragic, is not among the most aggravated.

In Sliney v. State, 699 So.2d 662 (Fla. 1997), the defendant and a co-defendant killed the owner of a pawn shop. The victim was beaten, beaten in the head with a hammer, and stabbed in the back with a pair of scissors. This Court noted that even though HAC was not found, the murder was particularly brutal. Again, the facts of this case are significantly less brutal than those in Sliney.

Similarly in Hurst v. State, 819 So.2d 689 (Fla.2002), the murder was one of the most brutal. The victim was slashed and stabbed at least 60 times with a tool resembling a box cutter. The defendant killed the victim after an argument in the fast food restaurant where she worked and was found murdered. This Court affirmed the aggravators of HAC and in the commission of a robbery. The Court found the mitigation to be of little weight, most of

which was self-serving. Given the substantial aggravation as evidenced by the brutality of the murder, the death sentence was found to be proportional.

In Franqui v. State, 804 So.2d 1185 (Fla. 2001), three aggravators were found in the shooting death of a policeman during a bank robbery. No statutory mitigators were found- age was considered and rejected. Four very minor non-statutory mitigators were found, only one of which was accorded more than little weight (the defendant's faith and self-improvement while incarcerated was given some weight). This Court found the death sentence to be proportional when compared to other cases involving the murder of a policemen and with little or insignificant mitigation.

In Hayes v. State, 581 So.2d 121 (Fla. 1991), the defendant planned a robbery of a taxi cab and planned in advance to shoot the cab driver. Two aggravating circumstances were found: CCP and pecuniary gain. Mitigation established included the defendant's age of 18, his deprived background, and low intelligence. This Court concluded that this was a premeditated, cold-blooded murder committed during a robbery, thus a death sentence was proportionate. The facts in this case do not lend themselves to a finding that Mr. Blake carried out a

premeditated and cold-blooded killing, one in which he offered to kill the victim prior to the crime occurring as Hayes did. The murder in Hayes was far more aggravated than that present here.

Lastly, the case of Anderson v. State, 863 So.2d 169 (Fla. 2003), is clearly inapplicable as a basis for the affirmance of a death sentence on proportionality grounds. Anderson, in an attempt to rob a bank, shot two tellers, killing one. Anderson fired 10 shots, with nine striking his two victims. Four aggravating circumstances were established- CCP, pecuniary gain, under sentence of imprisonment, and prior violent felony. Clearly, the factor of CCP, coupled with the particularly brutal facts of how many shots were fired into the victims in Anderson distinguishes this case from Mr. Blake's case where one bullet was fired through a door.

The State has failed to adequately distinguish the cases relied upon by Mr. Blake in the Initial Brief in support of a life sentence. Mr. Blake will continue to rely upon the cases of Urbin v. State, 714 So.2d 411 (Fla. 1998), Livingston v. State, 565 So.2d 1288 (Fla. 1990), and in particularly Terry v. State, 668 So.2d 954 (Fla. 1996) in support of his argument that death is not a proportion-

ate sentence in this case. The cases offered by the State do not support a death sentence when the facts of those cases are compared to the facts of this case. The sentence of death is should be reversed for a life sentence.

CONCLUSION

Based upon the foregoing arguments and citations of law, the Appellant, HAROLD BLAKE, respectfully requests that this Court grant relief by reversal for a new trial or in the alternative, a life sentence.

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 Katherine Blanco, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607 this ___ day of February, 2007.

Respectfully submitted,

_____
ROBERT A. NORGARD
Attorney at Law

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this Reply Brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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