

IN THE SUPREME COURT OF FLORIDA

GALANTE ROMAR PHILLIPS,

Appellant,

v.

CASE NO. SC08-1882

STATE OF FLORIDA,

Appellee.

===== /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant Galante Romar Phillips, relies on the Initial Brief to respond to the arguments presented in the State's Answer Brief with the following additions regarding Issue I:

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED TO AVOID ARREST.

As presented in the Initial Brief, this homicide was the result of Phillips' spur-of-the-moment, spontaneous act to prevent Aligada from stopping the robbery, grabbing Phillips' gun, and preventing Phillips' flight from the immediate scene. (IB at 27-31)

The dominate reason for the homicide was not an intentional killing for the purpose of eliminating a potential witness as required for finding the avoid arrest aggravating circumstance. (IB at 27-31)

Sweet, the robbery victim, testified the shooting was spontaneous and the two shots were quickly fired. (T12:382-383, 400-403) Aligada was shot one time. (T12:497-502, 506) He was able to run back toward the company buildings. (T12:384-384, 424, 497-506) Sweet saw that Aligada had fallen to the ground about 20 yards away. (T12:384) Phillips did not chase Aligada to shoot him again to insure his death. When Aligada fled, Phillips had no way to know Aligada would die. Phillips fled the scene when Aligada turned and ran. If Phillips' motive was to eliminate Aligada as a witness, he would have pursued him to be sure he was dead. Phillips' immediately fleeing is consistent with his motive ... to get away from the scene and avoid apprehension at the scene.

Phillips' later statements that he knew Aligada do not make clear that he recognized Aligada at the moment of the shooting or whether he realized who he was after-the-fact. The mere fact that Aligada may have recognized Phillips, however, is not sufficient to satisfy the needed proof for this aggravating circumstance.

Phillips' explanation to his ex-girlfriend about the homicide support rather than contradict Phillips' stated motive that the shooting was impulsive and to prevent Aligada from stopping the robbery and Phillips' flight from the scene. In fact, the State's Answer Brief quotes the critical portion of Phillips' statement to his ex-girlfriend where Phillips said:

Galante Phillips: But he put me in a situation to where I wanted to come out on top, that I wouldn't come out if I let him prevent me from getting away. I'm on foot so I couldn't let him stop me. He put me in a situation.

(AB at 26)

This Court has recognized the distinction between cases where a victim is spontaneously killed at the scene during an attempt to thwart the defendant's completion of a crime or flight from the scene from those cases where victims are intentionally killed to keep them from being future witnesses. *Compare, Urbin v. State*, 714 So.2d 411, 415-416 (Fla. 1998); *Cook v. State*, 542 So.2d 964, 970 (Fla. 1986), *with, Farina v. State*, 801 So.2d 44, 54-55 (Fla. 2001); *Nelson v. State*, 850 So.2d 514, 525-526 (Fla. 2003). Phillips' crime was a spontaneous act to prevent his apprehension

at the scene of the robbery, not the intentional killing to eliminate a future witness.

The cases the State relies upon in its Answer Brief are distinguishable from the facts of this case. None of the State's cases approving the avoiding arrest aggravator do so on the basis of a spontaneous killing at the scene of a crime where the victim was attempting to confront or apprehend the defendant at the immediate scene. Additional facts in each of these cases place them in the category of an intentional killing to eliminate the victim as a potential witness:

1. Walls v. State, 641 So.2d 381 (Fla. 1994). Walls burglarized a mobile home of a couple, Edward Alger and Ann Peterson. Walls tied them up in separate room, Alger got loose and attacked Walls, who shot and killed Alger after a struggle. Walls went to Peterson, untied her and struggled with her briefly before shooting her. Peterson screamed, Walls placed a pillow over her head and shot her in the head. In Walls' confession, he said he "didn't want no... witnesses." This Court affirmed the avoiding arrest aggravator for the murder of Peterson, noting that Walls' statement that he killed because he did not want to leave witnesses satisfied the proof requirement of witness elimination as a motive.

2. Nelson v. State, 850 So.2d 514 (Fla. 2003). Nelson sexually battered a 78 year-old woman in her home. He abducted

her, placed her in the trunk of her car and drove around for six hours until stopping in an isolated area where killed her. Nelson, in his confession, said he abducted and killed the victim because she saw his face and she would have called the police if he left. This Court noted that the defendant's statement established witness elimination as a motive. The opinion also affirmed the principle that the victim's ability to identify the defendant, without additional evidence, is insufficient proof. In addition, this Court stated that once the defendant "secured an uncontested getaway" there was no reason to kill except to eliminate the victim as a witness.

3. Reynolds v. State, 934 So.2d 1128 (Fla. 2006). Reynolds was convicted of killing three people. A man with whom Reynolds had a disagreement was bludgeoned while standing outside a trailer home. Inside the trailer, a woman and her daughter were stabbed and beaten to death. Additionally, a witness testified that Reynolds said, " ... with my record, I can't leave any witnesses ... but I do regret doing the little girl." This Court approved the avoiding arrest aggravator.

4. Sliney v. State, 699 So.2d 662 (Fla. 1997). Sliney and a co-defendant robbed a pawnshop owner with whom Sliney had dealt with on previous occasions. During the robbery, the co-defendant told Sliney that the victim would have to be killed because

“somebody will find out or something.” Sliney then killed the victim.

5. Trease v. State, 768 So.2d 1050 (Fla. 2000). Trease and a co-defendant entered the victim’s house, surprised him, and battered him in attempt to gain information about a safe. Trease placed a gun to the uncooperative victim’s head had fired a nonlethal bullet into the victim’s head. Trease then used a knife and the cut the victim’s throat. Trease told his co-defendant the victim had to be killed because he could identify them if he lived.

6. Farina v. State, 801 So.2d 44 (Fla. 2001). Farina and co-defendants devised a plan to rob a Taco Bell where Farina used to work. The restaurant was targeted because of Farina’s familiarity with the location and staff. He went to the restaurant before the robbery and verified that some of the employees could identify him. Armed with a gun, knife and rope, the group committed the robbery. Employees were confined. The co-defendants discussed the need to eliminate witnesses and began to consecutively shoot the victims execution-style. One victim was stabbed after the gun misfired. Three victims managed to survive.

7. Consalvo v. State, 697 So.2d 805 (Fla. 1997). The defendant broke into the house of the victim who was pressing charges against him for a prior theft. She was asleep, but awoke and started yelling and trying to call the police. The defendant

grabbed her and tried to stop her from calling. He stuck her with a knife and she started screaming. The defendant then stuck her two more times. This Court approved the avoid arrest aggravator based on the facts that the victim knew the defendant and she was pressing theft charges against him.

8. Hoskins v. State, 965 So.2d 1 (Fla. 2007). The defendant raped the victim in her home. He bound and gagged her and transported her in the trunk of a car to another location where he killed her. Acknowledging that the fact the victim could identify the defendant, alone, was insufficient to prove the avoiding arrest factor, this Court found the additional facts of binding and transporting the victim prior to the killing provided the needed proof.

The evidence in this case failed to prove Phillips killed the victim in order to eliminate a potential witness. This aggravating factor was improperly presented for the jury's consideration and improperly included as a sentencing factor.

CONCLUSION

For the reasons presented in the Initial Brief and this Reply Brief, Galante Romar Phillips asks this Court to reverse his judgments and sentences and to remand his case for a new trial. Alternatively, Phillips asks that his death sentence be reduced to life in prison.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Steve White, Assistant Attorney General, Criminal Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and to Appellant, Galante Phillips, #J03479, F.S.P., 7819 N.W. 228th St., Raiford, FL 32026, on this ____ day of August, 2009.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,
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