

IN THE SUPREME COURT OF FLORIDA

TIFFANY ANN COLE,

Appellant,

v.

CASE NO. SCO8-528

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

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
BILLMC@leoncountyfl.gov
(850) 606-1000

ATTORNEY FOR APPELLANT
FLA. BAR NO. 201170

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant, Tiffany Ann Cole, relies on the Initial Brief to reply to the State's Answer Brief with the following additions on Issue III.

ARGUMENT

ISSUE III

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT IMPROPERLY SENTENCED TIFFANY COLE TO DEATH SINCE THE COURT SENTENCED CODEFENDANT BRUCE NIXON WHO WAS OF EQUAL OR GREATER CULPABILITY TO A TERM OF YEARS IMPRISONMENT.

The State argues that the death sentence in this case is not subject to this Court's disparate sentence proportionality review under Slater v. State, 316 So.2d 539 (Fla. 1975), because Cole's codefendant, Bruce Nixon, was adjudged guilty of second degree murder. As a basis for this argument, the State uses Shere v. Moore, 830 So.2d 56 (Fla. 2002) and Caballero v. State, 851 So.2d 655 (Fla. 2003). Reliance on these cases is misplaced, and the State's argument is without merit.

Shere and Caballero merely stand for the established proposition that a defendant's death sentence is not subject to being reduced under a disparate sentence analysis where a less culpable codefendant received a sentence less than death. In both Shere and Caballero, the codefendants' lesser culpability was determined through the jury verdicts finding the codefendants' guilty of second degree murder. In contrast, Bruce Nixon's second degree murder conviction in this case was not reflective of his factual culpability for the crimes. His conviction for second degree murder was merely the deal he received from the State in a

plea bargain. Unlike in Shere and Cabellero, Nixon's second degree murder conviction was not founded on a fact-finder's evaluation of his actual culpability.

The State's real assertion here is that a second degree murder plea bargain for one defendant insulates a codefendant's death sentence from this Court's review under the disparate sentence principles of Slater. Although the State has the discretion to enter into a plea bargain with whomever it wishes, the plea bargain does not change the disparate sentence review required of a codefendant's sentence under Slater. A second degree murder conviction pursuant to a plea bargain is not the same as the jury verdicts of second degree murder in Shere and Cabellero. A prosecutor's deal-making with a codefendant cannot control this Court's sentencing review.

The State also relies on Looney v. State, 803 So.2d 656 (Fla. 2001), as a comparable case where this Court performed a disparate sentence proportionality review and affirmed a death sentence. However, Looney is distinguishable because Looney's codefendant who received life was determined to be the least culpable of the three perpetrators of the crimes. Looney, 803 So.2d at 682. In this case, the facts do not establish that Cole's involvement was more culpable than Nixon's. See, Initial Brief at 52-54, for the discussion of facts. Cole's involvement in the crimes did not

distinguish Cole as more culpable than Nixon. The evidence demonstrated that Cole and Nixon gained knowledge of the criminal plan at about the same time and participated in preparations during the few days leading up to the date of the offenses. Moreover, nothing in the record negated Nixon's greater involvement in the actual physical abduction, binding and transporting of the victims to the location of their death and grave. See, Initial Brief at 52-54.

The State noted that a trial court's determination of the relative culpability of codefendants is entitled to deference if supported by the evidence. Answer Brief at 58; See, Puccio v. State, 701 So.2d 858, 860 (Fla. 1997). However, the trial court did not make any findings on the issue of the relative culpability of Cole and Nixon. The trial court's order did address the statutory mitigator that Cole's involvement the crime was relatively minor. (R3:477-478) Also, the court acknowledged that the defense made argument that a comparison of Cole's and Nixon's involvement and Nixon's sentence be considered. (R3:479-480) In response, the trial court merely concluded this argument was nothing more than a restated argument regarding the statutory mitigator of minor participation. (R3:480) The court did not discuss or make findings of Nixon's and Cole's relative culpability in the crimes.

Tiffany Cole asks this Court to reverse her death sentence.

CONCLUSION

For the reasons presented in the Initial Brief and this Reply Brief, Tiffany Cole asks this Court to reverse her judgments and sentences.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been furnished by mail to Carolyn Snurkowski, Assistant Attorney General, Criminal Appeals Division, The Capitol, PL-01, Tallahassee, Florida, 32399-1050, and to Appellant, Tiffany Cole, #J35212, Lowell C.I. Annex, 11120 N.W. Gainesville Rd., Ocala, FL 34482, on this ____ day of May, 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,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
Assistant Public Defender
Florida Bar No. 201170
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
(850) 606-1000

ATTORNEY FOR APPELLANT