IN THE SUPREME COURT OF FLORIDA

JOSHUA LEE ALTERSBERGER
Appellant,
vs. **CASE NO**.: SC09-1426
Lower Tribunal No.: CF07-00041 A - XX
STATE OF FLORIDA,
Appellee.
_____ /

ON APPEAL FROM THE CIRCUIT COURT OF HIGHLANDS COUNTY
TENTH JUDICIAL OF FLORIDA

APPELLANT'S REPLY BRIEF

by

JOHN THOR WHITE
ASSISTANT REGIONAL COUNSEL, SECOND DISTRICT
15500 Lightwave Drive, Ste. 107
Clearwater, FL 33760

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CCP AGGRAVATOR

Appellant's initial brief argues that the trial judge erred in finding that the cold, calculated, and premeditated (CCP) aggravating factor was proven and that once that factor has been stricken the death penalty should be reversed as being disproportionate. Appellee's answer brief responds with arguments based upon several cited cases which can be distinguished from the facts in this appeal. Those cases will now be discussed.

In *Griffin v. State,* 639 So. 2d 966 (Fla. 1994) Griffin and two co-defendants burglarized a motel and after the burglary they were driving from the scene and dividing the proceeds when they were confronted by a police officer. Griffin, the shooter, had stated twenty-six hours before the burglary that if they were pulled over by the police he was going to shoot because he was not going back to jail; a statement he repeated just prior to the fatal encounter with the officer. The Court on appeal noted that this evidence demonstrated a substantial period of reflection by Griffin, i.e. he planned to shoot the police officers if he were stopped after the burglary. In the case at bar defendant Altersberger's encounter with trooper Sottile did not follow a burglary planned a day in advance, rather it followed an episode of drinking and looking for girls and Altersberger's passenger Kinder testified that the

defendant's first impulse was to flee the trooper, and that he pulled over only after Kinder told him not to flee. Appellant contends that these facts do not support a finding of the "heightened premeditation" element of CCP which distinguishes it from the premeditation element of first-degree murder. See *Cape v. State,* 583 So. 2d 1009, 1015 (Fla. 1991)(heightened premeditation exists where the evidence indicates that the "defendant's actions were accomplished … by a careful plan or prearranged design to kill.")

In Appellant's initial brief the case of *Hardy v. State,* 716 So. 2d 761, 765 (Fla. 1998) was cited and warrants revisiting: The defendant was armed when he was stopped by an officer investigating a bank alarm. While the officer was patting down another young man Hardy took aim and shot him two times in the head "as he had planned" while the officer was off guard. The CCP aggravator was stricken by the Court and the cause remanded for imposition of a life sentence.

Looney. v. State, 803 So. 2d 656 (Fla. 2001) is also factually distinguishable and unpersuasive. Looney and two co-defendants armed themselves and forced their way into a residence. The two occupants were bound and gagged and placed face down on a bed. Both were shot by the three intruders after Looney concluded that they could leave no witnesses. The whole episode lasted about two hours. Comparable facts would indeed reflect heightened premeditation, but such facts are not found in this appeal.

In *Alston v. State,* 723 So. 2d 148 (Fla. 1998) the defendant and his co-defendants planned to commit a robbery and located a victim whom they kidnapped and robbed. The victim was driven for about 25-30 minutes to another location where he was taken into the woods and shot once by the co-defendant and then two more times by Alston. In sustaining the CCP factor the Court observed that Alston, after substantial reflection, "acted on the plan [he] had conceived during the extended period in which [the] event occurred." The Court further noted that Alston had the opportunity to leave the crime scene and not commit the murder, but chose not to leave. Altersberger did not seek out his victim. He was effectively cornered by an armed trooper in close proximity to his own vehicle and police radio. Altersberger was trapped and did not realistically have the option of leaving the scene without further adverse consequences to himself.

Ibar v. State, 938 So. 2d 451 (Fla. 2006) involved a home invasion with three armed intruders. One victim was beaten for nearly twenty-two minutes. The defendant then shot that victim and two others in the head. On appeal the Court sustained the CCP aggravator, observing that the "cold" element of CCP was met because the murders were execution-style killings, plus Ibar and his accomplices had ample time to reflect on their actions and to abort any intent to kill. As to the "calculated" element, Ibar was armed in advance and killed execution-style after calmly deciding to kill. Altersberger did not kill the trooper execution-style; rather

he fired a tragically fatal shot when confronted by a trooper standing next to his car door. There is nothing in this record on appeal as to his motive in shooting the trooper. There are simply no legal bases for the findings of "cold" and "calculated."

In *Lynch v. State*, 841 So. 2d 362 (Fla. 2003) the defendant admitted shooting the victim five times over a period of 5-7 minutes, execution-style. In *Jones v. State,* the officer was the victim of a sniper attack which the Court found manifested a "cold and calculated" state of mind by its very nature. Moreover, the record reflected that the defendant said seven days before the attack that "he was tired of police hassling him, he had guns … and intended to kill a pig." (at page 576)

PRETRIAL MOTIONS

Appellee contends that appellant's rather cursory reference to various pretrial motions (which can generally be described as motions to declare death penalty-related laws and procedures unconstitutional) are procedurally barred from consideration by the Court as having been abandoned or waived. Counsel for Appellant has reviewed the authorities cited by Appellee on topic and observes that they do appear to stand for the propositions asserted by Appellee. However, both of Appellant's *Ring v. Arizona* related motions (briefed at p. 13 of the initial brief) contain an explanation of the theory/argument advanced by defense counsel in the

trial court. Restated, the initial brief does identify the particular legal basis asserted by defense counsel before conceding that the trial judge was bound by decisional law to deny the motions. Moreover, the motions were either accompanied by a memorandum of law or incorporated substantial legal arguments within the four corners of every motion, not just the *Ring* motions. The cases cited by Appellee essentially held in each instance that the issues were not sufficiently presented for appellate review. For example, in *Doorbal v. McNeil,* 983 So. 2d 464 (Fla. 2008) the appellant did not identify what evidence had been improperly excluded from the Rule 3.851 hearing nor did he specify any claim that the trial judge wrongfully precluded. And in *Shere v. State,* 742 So. 2d 215, 217 *fn* 6 (Fla. 1999) the court held that the appellant's failure to allege or argue what grounds the trial court erred in when denying Rule 3.850 claims did not sufficiently preserve the issues for review. It would seem then that the foregoing holdings are based upon due process grounds, i.e. failure to give adequate notice of one's legal position or claim. In the case at bar, however, the trial court and the prosecutor knew exactly the subject matter and the legal basis for every motion filed by the defendant and therefore neither the state nor the trial court nor this Court is or was prejudiced by vague pleadings and ambush tactics. Accordingly, Appellant contends that the denial of the various pretrial motions identified in his initial brief have been properly preserved and have neither been waived nor abandoned on appeal.

I HEREBY CERTIFY that a copy hereof has been furnished by regular US mail to the Attorney General at Concourse Center 4, 3507 Frontage Road, Suite 200, Tampa, FL 33607-7013this ____ day of July, 2011.

JOHN THOR WHITE
Assistant Regional Counsel
15500 Lightwave Drive
Suite 107
Clearwater, FL 33760
FBN 166015 *ph*: (727) 530-4400

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I HEREBY CERTIFY compliance with the font size requirements set forth in Fla. R. App. P. 9.100.

JOHN THOR WHITE

Assistant Regional Counsel