IN THE SUPREME COURT OF FLORIDA

JUSTIN HEYNE,)
)
Appellant,)
)
vs.) CASE NO. SC09-2323
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
444Seabreeze Blvd. Suite 210
Daytona Beach, Florida 32118
(386) 254-3758

ATTORNEY FOR APPELLANT

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PRELIMINARY STATEMENT

The original record on appeal is comprised of twenty-five consecutively numbered volumes. The pages of the first nine volumes are numbered consecutively from 1 to 1388. Volume ten begins renumbering the pages sequentially from page 1 to 3020 which concludes volume twenty-five. Pages 1 through 800 are also known as supplement volume II through V.[1] Counsel will refer to the record on appeal using the appropriate Roman numeral to designate the volume number followed the appropriate Arabic number referring to the appropriate page. There is a one volume supplement and counsel shall designate the supplement with the letter "S" followed by the appropriate Arabic number referring to the appropriate page.

[1] The Court Reporter had improperly compiled the initial record.

POINT I

IN REPLY AND IN SUPPORT THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL ON EACH COUNT OF FIRST DEGREE MURDER WHERE THE FINDING OF PREMEDITATION IS NOT SUPPORTED BY THE EVIDENCE.

The appellant relies upon the initial brief in reply to the appellee.

POINT II

IN REPLY AND IN SUPPORT THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL WHERE THE EVIDENCE DID NOT SUPPORT THE AGGRAVATING FACTOR.

The state in their answer brief argues that the "intention of the killer to inflict pain on the victim is not a necessary element of the {HAC) aggravator." See answer brief page 46. Justice Pariente's concurring opinion joined by Justice Anstead and Justice Shaw in ***Francis v. State***, 808 So.2d 110, 142 (Fla. 2001) correctly details that the intention to inflict pain on a victim is a necessary element of the HAC aggravator and this concurring opinion should be reaffirmed by this Court:

> I disagree, however, with the majority's blanket statement that

> "[t]he intention of the killer to inflict pain on the victim is not a necessary element of the [HAC] aggravator." Majority op. at 135. As to the HAC aggravator, we definitively stated in ***State v. Dixon***, 283 So.2d 1, 9 (Fla.1973), a landmark decision explaining why we were upholding Florida's death penalty scheme against constitutional attack: (Quote omitted)
>
> Our explanation and definition of HAC from ***Dixon*** was then codified in the Florida Standard Jury Instructions, which provides:
>
> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. *"Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of, the suffering of others.* The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.
>
> Fla. Std. Jury Instr. (Crim.) Homicide at 110. *Black's Law Dictionary* defines the word "designed" as "Contrived or taken to be employed for a particular purpose .... The term may be employed as indicating a bad purpose with evil intent." *Black's Law Dictionary* 447 (6th ed.1990). Therefore, both our decision in ***Dixon*** and Florida's Standard Jury Instructions recognize and require an intent element in order to establish the HAC aggravator.

Francis at 143.

The state further argues in their Answer Brief that the facts and circumstances surrounding the murder of Ivory Hamilton is similar to the facts and circumstances to the murders in ***Francis v. State***, 808 So.2d 110 (Fla. 2001) where

this Court upheld the HAC aggravating factor. See Answer Page 47. The state's reliance on ***Francis*** is clearly misplaced because the cases are factually distinguishable.

In ***Francis*** the evidence at trial was that victim Brunt was stabbed sixteen times and victim Flegel was stabbed twenty-three times. Victim Brunt's defensive wound tends to indicate that she was conscious during at least some part of her attack. This Court rejected Francis' contention that the victims may have been instantaneously killed as not being supported by the record based upon the medical examiner's testimony that the victims could have remained conscious for as little as a few seconds and for as long as a few minutes. In the instant case, the trial court found that the victim Ivory Hamilton died instantly by a gunshot wound to the head, whereas the victims in Francis died from a frenzy of stab wounds. Moreover, there is nothing Judge Eaton's sentencing order that supports the factual finding that Heyne's actions were designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others.

This Court has consistently held that instantaneous or near instantaneous deaths by gunshot, unaccompanied by additional acts to mentally or physically torture the victim, are not especially heinous, atrocious, or cruel. Accordingly, the EHAC factor is not permissible based on the present facts, and the trial court's

finding of this factor was error requiring the appellant's death sentence vacated and the appellant sentenced to life imprisonment.

POINT III

IN REPLY AND IN SUPPORT THE TRIAL COURT ERRED WHEN IT REJECTED STATUTORY MITIGATING THAT WAS ESTABLISHED BY THE GREATER WEIGHT OF THE EVIDENCE.

The appellant relies upon the initial brief in reply to the appellee.

POINT IV

IN REPLY AND IN SUPPORT THE DEATH SENTENCE IS DISPROPORTIONATE WHEN COMPARED WITH SIMILAR CASES WHERE THE AGGRAVATING CIRCUMSTANCES ARE FEW AND THE MITIGATION, ESPECIALLY THE MENTAL MITIGATION, IS SUBSTANTIAL.

The appellant relies upon the initial brief in reply to the appellee.

POINT V

IN REPLY AND IN SUPPORT FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO ***RING V. ARIZONA***.

The appellant relies upon the initial brief in reply to the appellee..

ANSWER ON CROSS-APPELLANT

POINT I ON CROSS-APPEAL

THE TRIAL JUDGE WAS CORRECT TO REJECT THE WITNESS ELIMINATION AGGRAVATING FACTOR.

Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. On review, this Court should determine whether the trial court applied the right rule of law, and, if so, whether competent substantial evidence supports it finding. ***See Willacy v. State***, 696 So.2d 693, 695 (Fla. 1997) The law is well-settled that when the victim is not a law enforcement officer, the witness elimination aggravator requires clear proof that the defendant's dominant or only motive was the elimination of a witness. ***Menendez v. State***, 368 So.2d 1278 (Fla. 1979); ***Riley v. State***, 366 So.2d 19 (Fla. 1978)

The state argues that the trial court should have found the witness elimination aggravating factor because "there is no suggestion at all that Ivory was killed for any reason other than the fact that she was a witness to the murder of her parents." The evidence concerning the shooting came primarily from the confession of Justin Heyne, and this evidence was not substantial, competent evidence to support the witness elimination aggravating factor.

During Heyne's confession he was asked how Ivory was struck. Heyne replied: He thought that she had gotten in the way and that he would never hurt her on purpose. The appellant explained the shooting of Ivory a second time as follows: The first shot occurred as Ivory was walking out of the room. Sarah ran into the room to her side of the bed. Then there was "like a boom." While appellant was shooting the gun Ivory had pulled on his shorts. After the first shot was fired Ivory jerked on the appellant's pocket and Ivory was like stumped, she did not know what to do. As the appellant fled he knew that "he had gotten into it with Ben," but he did not think Ivory or Sarah had gotten hurt. The appellant explained the sequence of the shooting. The appellant first shot Ben. After the second shot Sarah came running into the room. The appellant got 'really spooked, real panicked." The appellant shot a second time and saw Ivory and Sarah both go down.

The appellant explained the shooting again as follows: When Sarah and Ivory had walked in the room the appellant and Ben were already going at it. The appellant said "And I don't leaving - - -you know what I mean, either we shake hands or we do what we gotta do." ***The appellant was not worried about witnesses.*** The appellant shot Sarah because she was screaming and he was in panic. The appellant then claimed that he remembered firing one shot with the

"Baby 9" and three shots with the gun in the box. The appellant stated that he did not purposely shoot Ivory.

The state argues that the case of ***Correll v. State***, 523 So.2d 562 (Fla. 1988) is similar to the instant case and therefore this Court should uphold the witness elimination aggravating factor. The ***Correll*** case is distinguishable from the instant case. In ***Correll***, the defendant sexually battered and then stabbed to death his ex-wife. Correll also stabbed to death the other three victims. It is also noteworthy that prior to her murder, Correll's ex-wife expressed fear of harm from her ex-husband. The evidence supported the finding that it was Correll's plan to "leave no survivors in the house" because he cut all the phones lines before and during the killing episodes. ***Corell*** at 568. By contrast, in the instant case there was a heated argument that escalated into gunfire with all three victims being shot within seconds. Moreover, the murders in the instant case were in part a function of Heyne's mental illness. The trial court was correct to reject the witness elimination aggravating factor because the witness elimination aggravator requires clear proof that the defendant's dominant or only motive was the elimination of a witness. The clear proof that is required of Heynes's motive to support this aggravating factor was insufficient.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to vacate the judgement and sentence, and remand for sentencing for three counts of Second Degree Murder as to Point I; reverse the sentence of death and remand for a new penalty phase, or remand with directions that the appellant receive a life sentence as to Point II and Point III; vacate the sentence of death and remand with directions that the appellant receive a life sentence as to Point IV and V; and uphold the trial court's sentencing order rejecting the witness elimination aggravating factor as to Point I on the Cross-Appeal.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
444 Seabreeze Blvd. Suite 210
Daytona Beach, FL 32118
(386) 254-3758

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Pamela Jo Bondi, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Justin Heyne, DC#X23653, Florida State Prison, 7819 N.W, 228th St., Raiford, FL 32026 this 21st day of January, 2011.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER