IN THE SUPREME COURT OF FLORIDA

GHENGIS KOCAKER,

Appellant,

vs.

CASE NO. SC10-229
Lower Ct.:CRC04-19874CFANO

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant, Ghengis Kocaker, will respond to Issues I and II of the Answer Brief. Mr. Kocaker will rely upon the arguments and citations of authority contained in the Initial Brief for Issues III and IV.

ARGUMENT

ISSUE I

THE CIRCUMSTANTIAL EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION OF FIRST DEGREE MURDER.

In this first issue Mr. Kocaker argued that the circumstantial evidence presented at trial did meet the standard enunciated in State v. Law, 559 So.2d 187 (Fla. 1989). Law requires that the State not only offer sufficient evidence of each element of the offense, but that the evidence be inconsistent with the defendant's reasonable hypothesis of innocence. The State argues that this is not a circumstantial evidence case, but that there is direct evidence of guilt. Mr. Kocaker disagrees.

The trial court considered this to be a circumstantial evidence case. At the motion for judgment of acquittal defense counsel argued to the trial court that the "testimony of the witnesses outside of the lay witnesses that testified about statements made by the Defendant are

snippets of circumstantial evidence." (Vo.30,T837) The State did not dispute defense counsel's characterization of the case as circumstantial- the State's response was "Judge, we're relying on the facts in evidence so far and ask you to deny that motion." (Vol.30, T838) The trial court then ruled, stating "All right. And obviously there's a plethora of circumstantial evidence here, which is enough to get to a jury, in light most favorable to the State. So I'm going to deny the motion." (V.30,T838) The parties below considered this to be a circumstantial evidence case, thus it would be appropriate for this Court to apply the same rule of law in the direct appeal.

Mr. Kocaker also disagrees with the State's contention that his statements to inmate Paul Sands were admissions sufficient to constitute direct evidence. Inmate Sands testified that he had a conversation with Mr. Kocaker in the holding cell when both were coming back to Pinellas county. Mr. Kocaker first stated he was coming back for a VOP, as was inmate Sands.(Vol.29,T728) Sands told Mr. Kocaker he was coming back for a long time, to which Mr. Kocaker said "Well, I burned somebody". Sands admitted he wondered what Mr. Kocaker was talking about- did he "whoop" somebody, knock somebody out, shoot somebody, or

whatever.(Vol.29,T728). Sands asked Mr. Kocaker what he meant by “burned” and Mr. Kocaker just responded it was justified. Mr. Kocaker did not explain at all what he meant by “burned”. (Vol.29,T720) Sands testified he thought Mr. Kocaker was joking, pulling his leg, or just saying something “beyond more than what it was.”(Vol. 29,T729) In this context, given inmate Sands’ testimony that he felt that “burned” could mean many different things and did not really believe Mr. Kocaker, the statement does not constitute an admission sufficient to be considered direct evidence.

Thus, the circumstantial evidence standard should be applied in this case. Mr. Kocaker’s theory of defense, that Fury and/or one of his female prostitutes was responsible for the death of the victim.

ISSUE II

THE SENTENCE OF DEATH IS NOT PROPORTIONATE WHERE THIS CASE IS NOT AMOUNT THE LEAST MITIGATED OF FIRST DEGREE MURDERS.

In the Initial Brief Mr. Kocaker acknowledged that three aggravating factors were submitted to the jury for consideration and found to have been established by the trial court. The State has argued to this Court that in carrying out proportionality analysis, aggravating factors

that were not presented to the jury or found to exist by the trial court may be considered by this Court, specifically pecuniary gain/in the course of a robbery. [State's Answer Brief, p.37-38]. This argument is not supported by the single case cited by the State.

The State relies only upon Sliney v. State, 699 So.2d 662, 672 (Fla. 1997) to support this argument. Sliney does not stand for the proposition that this Court can find and consider an aggravating factor not considered by the jury or found by the trial court. In Sliney this Court noted that although the murder had been brutal, the jury had not considered HAC nor had the trial court found and weighed that aggravating factor. This Court did not find established nor consider the aggravating factor of HAC in conducting proportionality analysis, but merely noted in dicta that the murder was brutal. The State's argument that Sliney finds it appropriate for this Court to add additional aggravators for the first time on appeal when conducting a proportionality analysis is an incorrect reading of Sliney and therefore, wrong.

The State cites to no other case law in support of this argument and undersigned counsel has not found any cases which would support the radical position urged by the

State that is without precedent. It would be inappropriate for this Court to hold that an aggravator may be found and considered for the first time on appeal. To do so would be a significant departure from the jurisprudence of this Court in capital cases that is not warranted.

Even if this Court were to ignore precedent and conclude that it can find and consider additional aggravators for the first time at the appellate stage, the robbery or pecuniary gain aggravator suggested by the State is not supported by the facts in this case. The State did not allege any underlying felony or charge Mr. Kocaker with robbery or any other theft related offense in the indictment. There was no evidence at trial that established that any sum of money was actually taken from the victim. There was no evidence to establish when any taking might have occurred. No employee or owner from the cab company that any sums of money were determined to be missing. Nor was there any testimony that the decedent appeared to have been robbed of any money or personal items of value. The aggravator of "in the course of a robbery"/pecuniary gain was appropriately not considered by the jury or trial court because there was no evidence which established either of those aggravators beyond a reasonable

doubt. The lack of evidence to establish this aggravator would preclude a determination by this Court to consider it in proportionality analysis.

Even if this Court were to determine that it could find a previously unconsidered aggravator and that the evidence in this case supported that aggravator beyond a reasonable doubt, the existence of the aggravating factor of robber/pecuniary gain should not be accorded tremendous weight, nor should its existence alter the proportionality analysis.

The State next argues that a death sentence is proportionate in this case and provides a list of cases is which the decedent was a cab driver. The "cab driver killing" cases are unpersuasive as a basis upholding the death sentence in this case. While a cab driver was killed in this case and cab drivers were killed in the five cases cited by the State, any similarity ends there. The mitigation in this case differs significantly from the mitigation present in the five cases offered by the State.

In two of the cases, Kight v. State, 512 So.2d 922 (Fla. 1987) and Pace v. State, 596 So. 2d 1034 (Fla. 1992), the trial courts found no mitigation existed at all. For proportionality analysis, these cases are of no comparative

value to this case. This is not a case with no mitigation. The trial court found mitigation existed, including brain damage and some degree of mental health mitigation.

This Court has recognized the significance of both brain damage and mental health mitigation as providing a compelling basis for a life sentence. Unlike this case, there was no mental health mitigation present in Hayes v. State, 581 So.2d 121 (Fla. 1991) or Smith v. State, 641 So.2d 1319 (Fla. 1994), two more of the "cab driver killing" cases the State references.

In Sinclair v. State, 657 So.2d 1138,1142 (Fla. 1995), the trial court found one aggravator existed and that Sinclair had established three mitigators to which little/no weight was assigned- Sinclair's cooperation with police, his "dull intelligence", and lack of a father. In reversing the death sentence this Court found that the defendant's low intellect and emotional disturbances that were "inflicting this defendant were mitigators which had substantial weight". The mitigation in this case is far more extensive than that outlined in the Sinclair opinion. Sinclair would support the imposition of a life sentence in this case, particularly if this Court determines that the mental health mitigation is entitled to substantial weight

as the relatively lesser mitigation was in Sinclair.

Proportionality is not just a comparison of a particular type of homicide that occurred with other homicides of the same nature. Nor is it merely a numbers comparison. Proportionality review requires a review of the totality of the circumstances to determine if death is warranted in comparison to other cases in which a death sentence has been upheld. The State's position that one cab driver killing is the same as another without further analysis of the actual mitigation present in each case is not what the law demands.

The State argues that this Court must reject Mr. Kocaker's proportionality argument because the trial court's assignment of weight to the mitigation is unassailable and must be accepted by this Court.[State's Answer Brief, p.48] The State's claim that this Court cannot find that Mr. Kocaker is severely mentally ill and thereby reduce his sentence on proportionality grounds is not correct. [State's Answer Brief, p.48] This Court possesses the authority to reject the trial court's evaluation of the mitigation and conclusions regarding the weight assigned to mitigating factors and should do so in this case.

When considering the mitigation and the findings of the trial court, it is within this Court's power to determine the weight of the mitigation that it will consider in the proportionality analysis. Certainly this Court did just that in Sinclair when it determined that the mitigation was of substantial weight and rejected the trial court's affording the same mitigation little/no weight. While the weight afforded to a particular aggravator or mitigator is generally left to the discretion of the trial court, the final decision on weight must be supported by sufficient, competent evidence in the record. Walker v. State, 957 So.2d 560 (Fla. 2007). Thus, this Court can determine that the trial court's acceptance of the opinion of Dr. Gamache was not supported by competent, substantial evidence. The evidence at trial would support the exercise of this Court's ability to make such a determination. Dr. Gamache was the only witness at penalty phase who had not reviewed the entire DOC file and all the evidence related to Mr. Kocaker's mental health, he reviewed only documents selected by the State and provided to him.[V.23,T102] Dr. Gamache admitted he was not hired to diagnose Mr. Kocaker, only to rebut Dr. Eisenstein.[V.22,T101] Every mental health professional and doctor whose responsibility was to

diagnose Mr. Kocaker, including those from DOC, the physicians at Jacksonville hospital, Dr. Carpenter, and Dr. Eisenstein found that Mr. Kocaker suffered from paranoid schizophrenia- only Dr. Gamache who stated role was to disagree reached a different conclusion. The present record would support a determination by this Court that Dr. Gamache's opinion was not supported by competent, substantial evidence.

Further, a trial court can only reject defense evidence if it does not square with the other evidence. There must a rational basis for the rejection of the defense evidence by the trial court. Coday v. State, 946 So.2d 988 (Fla. 2006). The State suggests that the trial court's rejection of the opinions of defense experts Dr. Eisenstein, Dr. Wood, Dr. Carpenter, and the plethora of physicians who treated Mr. Kocaker for 20 years at DOC or related facilities in favor of the opinion of Dr. Gamache is appropriate in this case and that this Court must accept the trial court's conclusions. Mr. Kocaker would disagree. To accept Dr. Gamache's opinions is to reject the opinions of twenty plus years of diagnosticians who had no interest in this case. It requires the rejection of the opinion of Dr. Carpenter, a neutral witness appointed to assist the

trial court. It requires the rejection of the opinion of Dr. Poorman, a second neutral witness appointed to assist the court.

There is no rational basis for rejecting the opinions of those individuals, whose diagnosis of schizophrenia and other mental health problems aligned with the opinion of Dr. Eisenstein over Dr. Gamache. Only Dr. Gamache's opinions did not square with the opinions and observations of countless physicians and of the other evidence. For example, Dr. Gamache testified that he did not believe Mr. Kocaker was psychotic or a paranoid schizophrenic. However this testimony does not square with the Dr. Carpenter, who testified at the competency hearing that Mr. Kocaker is a paranoid schizophrenic and was prescribed Geodon as an antipsychotic; the opinion of Dr. Eisenstein that Mr. Kocaker is a paranoid schizophrenic and was being treated with Geodon as an antipsychotic, the opinion of Dr. Carpenter that Mr. Kocaker is a paranoid schizophrenic, and the opinions and diagnostic findings of the Jacksonville hospital team which placed Mr. Kocaker on two anti-psychotic medications at the time of his discharge.(Vol.20,R97;Vol. 21,T76) No one but Dr. Gamache believed that Mr. Kocaker's mental health issues were only

the result of a vitamin B-12 deficiency that may have been present in March 2006. There is no evidence that Mr. Kocaker suffered a vitamin B-12 deficiency for over twenty years of documented mental illness while incarcerated.

The competent, substantial evidence presented during the entire proceedings in this case establish this as among the most, not least, mitigated of cases. This Court should reverse the sentence of death for the imposition of a life sentence.

CONCLUSION

Based upon the arguments, citations of law, and other authorities presented in the Initial Brief and the Reply Brief, Mr. Kocaker respectfully requests that the Court reverse the judgment and sentence of death imposed in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply Brief has been furnished by U.S. Mail to the Office of the Attorney General, AAG Carol Dittmar, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607 this ____ day of March, 2011.

CERTIFCATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the font used in the preparation of 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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