IN THE SUPREME COURT OF FLORIDA

LEO LEWIS KACZMAR,

Appellant,

CASE NO. SC13-2247

STATE OF FLORIDA,

Appellee.
_____/

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant files this Reply Brief in response to the arguments presented by the state as to Issues I, IV, and V. Appellant will rely on the arguments presented in his Initial Brief as to the remaining issues.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED WHEN IT GAVE GREAT WEIGHT TO THE JURY'S RECOMMENDATION WHERE KACZMAR REFUSED TO PRESENT ANY EVIDENCE IN MITIGATION AND THE TRIAL JUDGE PROVIDED NO ALTERNATIVE MEANS FOR THE JURY TO BE ADVISED OF THE AVAILABLE MITIGATING EVIDENCE.

Appellant argued the trial court violated the Eighth Amendment and this Court's holding in Muhammad v. State, 782 So. 2d 343 (Fla. 2001), when it gave great weight to the recommendation of Kaczmar's penalty phase jury despite Kaczmar's refusal to present any mitigating evidence to the jury.

On page 16, the state argues Muhammad is inapplicable because Kaczmar presented mitigating evidence here, a stipulation as to his age, and the Muhammad rule applies only when a defendant waives all mitigation, citing McCray v. State, 71 So. 3d 848 (Fla. 2011), and Boyd v. State, 910 So. 2d 167 (Fla. 2005).[1]

Informing the jury of Kaczmar's age via a stipulation should not remove the present case from the ambit of Muhammad. First,

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[1]The state also argues this issue was forfeited twice because defense counsel did not object to the sentencing order below and appellate counsel "objected to the State's motion to remand for clarification of the order." Answer Brief at 14. This argument is meritless. An objection below is not required for this Court to review sentencing orders imposing death, and appellate counsel did not object to the state's motion. See Response to State's Motion to Relinquish ("Appellant does not object to a remand provided the appropriate legal process is followed.").

in the cases holding Muhammad inapplicable, the defendants did not waive their right to present mitigation but merely declined to present some of the evidence defense counsel had discovered as potentially mitigating. Boyd allowed his pastor to testify and testified himself but declined to present the testimony of his mother and brother. McCray chose not to present the testimony of mental health witnesses but presented the testimony of two cousins, his aunt, his father, the mother of his children, and testified himself. Neither Boyd nor McCray was seeking the death penalty and in neither case did the trial court conduct a Koon[2] inquiry.

Here, in contrast, Kaczmar informed the trial judge he was seeking the death penalty and the trial judge determined he freely and voluntarily waived his right to present mitigation after conducting the inquiry prescribed in Koon. Kaczmar did not present any witness testimony in mitigation, and when defense counsel indicated he would be presenting the stipulation regarding Kaczmar's age, no one asked Kaczmar if he agreed with that decision. Furthermore, the stipulation regarding Kaczmar's age was entirely unnecessary, as the jury was informed in the stipulation regarding Kaczmar's prior robbery conviction that Kaczmar was 17 years old in 2001 and could extrapolate from that information his age at the time of the homicide.

[2]Koon v. Duggar, 619 So. 2d 246 (Fla. 1993).

Most importantly, this Court's rationale for finding error in Muhammad applies here. In Muhammad, the Court explained:

> In determining whether the court erred in giving the jury's recommendation great weight, we must consider the role of the advisory jury. . . the jury's advisory sentence must be based on "whether sufficient aggravating circumstances exist as enumerated in subsection (5)" and "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." s. 921.141(2)(a)-(b), Fla. Stat. (1995). "The jury's responsibility in the process is to make recommendations based on the circumstances of the offense and the character and background of the defendant." Herring v. State, 446 So. 2d 1049, 1056 (Fla. 1984). The failure of Muhammad to present any evidence in mitigation hindered the jury's ability to fulfill its statutory role in sentencing in any meaningful way.

782 So. 2d at 362 (emphasis added). The Court further noted, citing and discussing Sireci v. State, 587 So. 2d 450 (Fla. 1991), that the trial court "not only has the ability but also the duty to lessen its reliance on the jury's verdict if other considerations make the jury's recommendation entitled to less weight." 782 So. 2d at 362.

Here, as in Muhammad, the refusal of Kaczmar to present any evidence in mitigation hindered the jury's ability to fulfill its statutory role in sentencing in any meaningful way. As discussed above, the stipulation as to Kaczmar's age did nothing to remove that hindrance. The trial judge had a duty to lessen its reliance on the jury's recommendation; instead, the trial judge gave the jury's recommendation great weight:

The jury was fully justified in its twelve to zero

> recommendation that the death penalty be imposed upon Defendant for Ms. Ruiz's murder. This Court is required to give great weight to the jury's recommendation [21] and fully agrees with the jury's assessment of the aggravating circumstances presented.
>
> [21]Section 921.141, Florida Statutes; Blackwood v. State, 946 So. 2d 960, 975 (Fla. 2006); Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)(stating that under Florida's death penalty statutes, the jury recommendation should be given great weight).

R3:549 (emphasis added).

The state argues at page 17 that the above statements by the trial judge indicate the trial judge determined death was appropriate independently of the jury's determination. Appellant disagrees. Given the trial judge's reference to the jury's vote of 12-0 and the judge's statement that he was required to give the jury's recommendation great weight, including a footnoted reference to statutory and caselaw authority for that requirement, this Court cannot conclude the trial judge did not do just that. A sentencing order in a capital case must be of "unmistakable clarity," Lucas v. State, 568 So. 2d 18, 23 (Fla. 1990), and any sentencing order that is not clear must be vacated and remanded to the trial court. Id.

The proper procedure on remand is a new bifurcated sentencing hearing. See Jackson v. State, 767 So. 2d 1156 (Fla. 2000); Reese v. State, 728 So. 2d 727 (Fla. 1999). As the Court explained in Jackson:

> First, upon remand, 'the court is to conduct a new hearing, giving both parties an opportunity to

> present argument [regarding the proper sentence] and submit sentencing memoranda before determining the appropriate sentence.'" Jackson, 767 So. 2d at 1160 (quoting Reese, 728 So. 2d at 727). Second, "the defendant shall be present at this sentencing hearing." 767 So. 2d at 1160. Third, the resentencing must consist of two separate hearings in accordance with Spencer []." Thus, after the first hearing, described above, "the trial court must recess the proceedings to consider the appropriate sentence." Id. Fourth, the court must prepare a revised sentencing order and "shall hold a second hearing to orally pronounce the sentence and contemporaneously file the sentencing order." Id. at 1160-61.

Accordingly, under Muhammad, this Court should reverse and remand for resentencing under the procedure set forth above.

ISSUE IV

THE TRIAL COURT ERRED IN FAILING TO FIND AND GIVE WEIGHT TO THE MITIGATING CIRCUMSTANCE THAT KACZMAR WAS EMOTIONALLY TORN BY EXTREMES OF PARENTAL ABUSE AND PARENTAL OVERINDULGENCE.

The trial court found this mitigator unproven, stating that Kaczmar failed to show how his upbringing affected his ability to know right from wrong or be law-abiding. Appellant argued in his Initial Brief that this was an improper basis for rejecting the mitigator because there is no requirement that mitigation have a nexus to the offense and, further, a nexus was shown with regard to this aspect of his upbringing.

In response, the state posits that "a trial court is welcome to reject a particular fact as mitigation." Answer Brief at 35. This is not an accurate statement of the law and ignores the established standards for evaluating mitigation established by this Court and the United States Supreme Court. See Initial Brief at 37-39.

On page 35, the state agrees that mitigating evidence need not have a nexus to the offense to be mitigating but asserts that this is not relevant to the issue. The absence of a nexus to the offense was the trial court's reason for rejecting the mitigation. The trial court thus applied the incorrect law in rejecting it. "Where a trial judge fails to apply the correct legal rule, . . . the action is erroneous as a matter of law." Canakaris v. Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980).

The state also has misapprehended the mitigator at issue. The mitigator at issue is not that Kaczmar was overindulged but that he was torn between the extremes of parental abuse and parental overindulgence. While abuse and overindulgence may each separately constitute mitigation, the mitigating circumstance at issue here is the damage caused when a child is subjected to both abuse and overindulgence, i.e., spoiling with material things. Dr. Mandoki explained that the consequence of being beaten and spoiled is an inability to internalize values, goals, and morals. This testimony was not refuted. This type of dysfunctional upbringing, particularly in that it affects a child's ability to know right from wrong, reasonably serves as a basis for a sentence less than death, and, therefore, is mitigating in nature.

ISSUE V

THE DEATH SENTENCE IS DISPROPORTIONATE.

Appellant argued in his Initial Brief that death is a disproportionate penalty because this Court has reduced a death sentence to life in cases involving similar facts, to wit, that the homicide was born of sudden rage by a defendant who had been consuming large quantities of drugs all day and was paranoid and delusional; two aggravating circumstances[3] existed, the weight of each lessened for various reasons; and significant mitigation existed, including mental mitigation. Appellant cited six cases similar to the present case in which this Court reduced the death sentence to life.

In response, the state mischaracterizes appellant's argument based soley on his drug use. Answer Brief at 10, 37. As noted above and in the Initial Brief, appellant's argument regarding the proportionality of his sentence is not premised solely on his "drug use." Because this was not appellant's argument, the state's argument against it on page 40 is irrelevant.

Also on page 40, the state cites some cases which it deems factually similar to the present case. Because the state seems to think four aggravating circumstances were found in this case and that this case involved a sexual battery, which it did not,

[3]The state incorrectly states several times in its brief that four aggravating circumstances were found in this case. See Answer Brief at 10, 37, 40.

none of the cases it cited is factually similar to the present case.

Last, the state did not distinguish any of the cases appellant cited as similar for proportionality purposes.

CONCLUSION

Appellant respectfully asks this Honorable Court to grant the relief requested in his Initial Brief on the Merits.

Respectfully submitted,

/s/ Nada M. Care
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Charmaine Millsaps, Assistant Attorney General, Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and by U.S. Mail to Leo Kaczmar, DC#J20499, U.C.I., 7819 N.W. 228th St., Raiford, FL, 32026, on this 13th day of April, 2015.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Nada M. Carey
NADA M. CAREY