

THE SUPREME COURT OF FLORIDA

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MARK ANDREW BURCH,

APPELLANT,

vs.

THE STATE OF FLORIDA,

APPELLEE.

CASE NO. 65-168

APPELLANT'S REPLY BRIEF

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and GULKIN, P.A.
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TABLE OF AUTHORITIES

Holmes v. State,
429 So. 2d 297 (Fla. 1983)

Jackson v. State,
451 So. 2d 458 (Fla. 1984)

Quince v. State,
414 So. 2d 185 (Fla. 1982)

STATEMENT OF THE CASE

The State has incorrectly stated that the final split of the hung jury of the first trial was ten votes for first degree murder and two votes against. The first vote was ten votes for first degree murder and two against. The final vote was ten votes for second degree murder and two for first degree murder.

STATEMENT OF THE FACTS

Betty Robson and her husband had contact with the Appellant within minutes after the shooting. Roy Folsom and Laura Carr drove the Appellant from the scene of the shooting to a trailer park located in the Everglades where the Robson's lived. At the second trial, Betty Robson testified in regards to the Appellant's sobriety that, "He was acting strange. I wouldn't say he was two thirds drunk." The undersigned impeached her with her sworn statement taken the day after the shooting. Her testimony the day after the shooting was, "I said I thought he was two thirds drunk or something." (Vol. 6, p. 1057-1057)

The State correctly states Dr. Roche was not called for the purpose of showing whether or not the Appellant could form a specific intent. However, this statement does not correctly characterize why Dr. Roche's testimony was essential. Dr. Roche was being called in his capacity as a toxicologist. His testimony was to be a predicate for the subsequent testimony of Dr. Keith Bernstein.

POINT I

THE TOXICOLOGIST SHOULD HAVE BEEN
ALLOWED TO TESTIFY ABOUT THE
EFFECTS OF THE DRUG "PCP" ON
THE HUMAN BODY WHEREIN THE DEFENSE
WAS VOLUNTARY INTOXICATION BY
INGESTION OF PCP.

The State asserts, "The trial court below excluded the (toxicologist's) testimony for the reason that there was no evidence, except the defendant and his witnesses' assertion that the drug he ingested was PCP." This is an incorrect statement of the facts. The trial court denied the toxicologist, Dr. Roche's, testimony on the grounds there was no evidence that the Appellant had ingested the drug PCP. (Vol. 6, p. 1089, 1091) The trial court did not add the caveat that there was no evidence of PCP ingestion except the testimony of the Appellant and his witnesses.

To the contrary, there was ample evidence of the Appellant's intoxication from the prosecution's own witnesses. Laura Carr testified she had known the Appellant for about two weeks prior to the shooting. The first time she met him he appeared to be intoxicated. On the other times that she observed him prior to the shooting, he appeared to be intoxicated. (Vol. 2, p. 359) Roy Folsom testified he had seen people under the influence of PCP and that was the way the Appellant acted the night of the shooting. (Vol. 2, p. 392-394) Joe Mahon testified he knew the Appellant used drugs frequently. The night of the shooting when he came to Mahon's house to retrieve the shotgun,

the Appellant was acting unusual and appeared to be high. Mahon was concerned that because of the way he was acting, the Appellant might do something crazy and asked him not to take the shotgun. (Vol. 3, p. 517-518)

Further, Betty Robson, who observed the Appellant minutes after the shooting, testified he was acting, irrational, strange, and appeared to be two-thirds drunk. (Vol. 6, p. 1053-1056) Her husband, Benjamin Robson, who observed the Appellant with his wife, testified he appeared to be high, or two-thirds drunk. (Vol. 6, p. 1066)

The State relies heavily on this Court's decision in Cirack v. State, 201 So. 2d 706 (Fla. 1967), wherein the defendant asserted the defense of insanity. The defendant sought to elicit the opinion of Dr. Estes as to the ability of the defendant to distinguish between right and wrong resulting from his consumption of too much alcohol and too little food. The trial court precluded the testimony. This Court noted that the defendant Cirack offered no evidence as to the extent of the defendant's consumption of alcohol on the day of the crime, because the defendant did not testify, nor did he call any witnesses.

Compare, in the case sub judice, the trial court was very aware that the Appellant in his prior trial had testified to a mass consumption of PCP on the day of the crime as well as the consumption of a great quantity of alcoholic beverage. The trial court was aware that the Appellant was again going to testify in a manner consistent with his prior testimony. Additionally, the

trial court was aware that other witnesses (ie. Angie Brady, Sandra Marini, and Barbara Cooper) had testified previously and were again going to testify the Appellant was a cronic abuser of the drug PCP and alcohol. In contrast to Cirack, there was an abundance of evidence concerning the Appellant's consumption of intoxicants the day of the crime.

In Cirack, this Court went on to consider whether Dr. Estes testimony should have been admissable to prove the defense of voluntary intoxication. This Court recognized that Dr. Estes, as an expert, could properly testify as to the affect of a given quantity of intoxicants on a defendant's mind. However, this Court excluded Dr. Estes testimony because the basis or predicate for his testimony and opinion was the self-serving declarations of the defendant as to the amount of intoxicants that had been consumed. This Court concluded that an expert opinion based solely on hearsay evidence characterized as self-serving declarations was not admissible.

Compare, in the case sub judice, aside from the Appellant's testimony, there was abundant testimony as to his cronic abuse of intoxicants. Barbara Cooper, had lived with the Appellant in the three month time period prior to the shooting. She observed the Appellant on a daily basis ingest PCP. (Vol. 3, p. 526-543) Sandra Marini testified in the three month time period prior to the shooting incident, she had occasion to come into contact with the Appellant four to five times per week. She knew the Appellant snorted a lot of the hallucinogenic drug PCP. Angie Brady, a barmaid at a bar frequented by the Appellant, testified that she observed the Appellant four to five nights a

week. Her observations of him revealed that he snorted a white powder she believed to be PCP, and drank large quantities of alcoholic beverages. Ray Folsom testified he had seen people under the influence of PCP and that was the way the Appellant acted the night of the shooting. (Vol. 2, p. 392-394) Joe Mahon testified that he knew the Appellant was a drug user, and the night of the shooting he was acting unusual and appeared to be high. (Vol. 3, p. 517-518) Betty Robson testified that shortly after the shooting the Appellant was acting irrational, strange, and appeared to be two thirds drunk. (Vol. 6, p. 1053-1056) Her husband, Benjamin, observed the Appellant at the same time as his wife, testified the Appellant appeared to be high, or two thirds drunk. (Vol. 6, p. 1066) In the case sub judice, the defense of voluntary intoxication was not based solely upon the Appellant's testimony.

The case sub judice is distinguished from the Cirack decision in another manner. Cirack's statements to the doctor concerning the amount of alcohol he had consumed on the day of the crime were characterized by this Court as impermissible hearsay evidence because they were self-serving declarations.

Compare, in the case sub judice, the Appellant's statements about his mass consumption of PCP on the day of the shooting incident would not be characterized as impermissible "hearsay". Under the New Evidence Code Florida Statute 90.801 defines "hearsay" to be, "An out-of-court statement, other than one made by the declarent who testifies at trial or hearing, offered in court to prove truth of the matter contained in the statement." The

Appellant's statements concerning his mass consumption of PCP and alcohol would not come within this definition, because the Appellant had previously testified at his former trial, and again testified in the case sub judice.

Further, Florida Statute 90.801 states, "A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is consistent with his testimony and is offered to rebut and express or imply a charge against him or improper influence, motive, or recent fabrication." The Appellant's testimony would come within this definition.

The Appellant first and foremost contends that his statements concerning his ingestion of PCP and alcohol on the day of the shooting would not be considered "hearsay" under the New Evidence Code. However, if this Court does determine the statements would come within the definition of "hearsay", then the Appellant would assert his statements would constitute an exception to the "hearsay rule." His statements concerning the ingestion of PCP, an illegal drug, would constitute "statements against penal interest." The possession, use, and ingestion of illegal drugs is a crime. Statements concerning their possession, use or ingestion would constitute "statements against penal interest." In contrast, the consumption of alcoholic beverages is not a crime. Therefore, Cirack's statements would not constitute a "statement against penal interest." The Appellant's statements concerning the ingestion of PCP would constitute "statements against penal interest," as opposed to the self-serving declarations precluded in Cirack.

It is interesting to note the State asked this Court to totally discount the Appellant's statements that he ingested a mass quantity of PCP on the day of, and just prior to, the shooting. The State argues that this is not competent evidence. Query: Would the State's position be the same if the Appellant were also charged with the offense of conspiracy to possess illegal drugs, to wit: PCP? Is it the State's position that statements concerning drug possession and drug use are admissible evidence only when they aid the prosecution in blackening the defendant's character? If the Appellant were charged with possession of PCP and asserted a defense of "lack of knowledge", the State would be strenuously arguing for the admissibility of these damning statements concerning his use of drugs.

The law is clear the testimony of lay witnesses, who are known or admitted addicts, or even mere users of controlled substances, is admissible to identify suspect material as a particular controlled substance where the substance itself is not available for chemical analysis, or evaluation. There was sufficient lay testimony that the substance the Appellant consumed the day of, and immediately prior to, the shooting was the illegal drug PCP. Having properly laid a predicate, the law is clear a chemist with toxicological training or experience in the field of toxicology is qualified to testify as an expert to the effects of ingested substances upon the human body. Dr. Roche, toxicologist, should have been allowed to testify as an expert to the effects of PCP upon the human body. The trial court's

exclusion of his expert testimony cannot be deemed to be harmless error wherein the Appellant's sole defense was voluntary intoxication. The Appellant's conviction should be reversed, and his case should be remanded for a new trial with instructions that Dr. Roche's testimony is admissible.

POINT II

THE COURT ERRED IN REFUSING TO
APPOINT DR. LERNER TO ASSIST THE
APPELLANT IN THE PREPARATION OF,
AND PRESENTATION OF HIS DEFENSE
OF VOLUNTARY INTOXICATION.

The State and Appellant agree an indigent defendant is entitled to the assistance of an expert when it is necessary to their defense. The question this Court must resolve is: Whether the Appellant was entitled to appointment of this particular or specific expert to assist him in the preparation of, and presentation of his defense of voluntary intoxication?

The thrust of the State's argument is the Appellant found adequate local expertise therefore the failure to appoint Dr. Lerner was harmless error.

The State alludes to the appointment of Dr. Stillman. Dr. Stillman was appointed to render a confidential opinion as to whether the Appellant was competent to aid and assist his counsel at trial. Dr. Stillman's report in no way addressed the issue of voluntary intoxication at the time of the offense. The State's statement, "Simply because the defendant was not satisfied with the opinion of Dr. Stillman does not entitle him

to appointment of particular expert, who will give the testimony he desired", is misleading. It was not a question of being dissatisfied with Dr. Stillman's opinion, because Dr. Stillman rendered no opinion concerning the issue of incapacitation by use of drugs. (Vol. 1, p. 61, lines 15-25, and p. 62, lines 1-3)

The State asserts that the appointments of Drs. Bernstein and Roche remedied any error caused by the denial of Dr. Lerner's appointment. Drs. Roche and Bernstein are qualified experts. However, comparing their knowledge and expertise of the drug PCP with the knowledge and expertise of Dr. Lerner is analogous to comparing a general practitioner to a specialist. In many instances the general practitioner may have the knowledge and skill to render adequate service. However, the case sub judice was not a case for a general practitioner. This Court has routinely stated that "death penalty" cases are special, unique cases. In viewing the evidence in a light most favorable to the prosecution, there was no question as to the identity of Alan Calloway's killer, nor to the fact the killing was not in self defense. The only question was the degree of culpability of the Appellant based upon the Appellant's state of mind.

Dr. Lerner is the foremost expert in the abuse of PCP and its effects on the human mind. The Appellant needed Dr. Lerner's knowledge and expertise to assist him in the preparation of and the presentation of his defense of voluntary intoxication by ingestion of PCP. The refusal to appoint Dr. Lerner crippled the Appellant's only viable defense.

The prosecution aside from the grounds of relevancy objected to Dr. Lerner's appointment because his examination fee for the

case sub judice and another case would be three thousand (\$3,000.00) dollars, or one-thousand five-hundred (\$1,500.00) per case. (Vol. 1, p. 75-81). The failure to appoint Dr. Lerner because of his fee violated equal protection and due process of law. Consider the combined fees of Dr. Roche and Bernstein was one-thousand one-hundred fifty (\$1,150.00) dollars. For the sake of a few dollars, the Appellant was denied the services of the expert he needed and desired.

Dr. Lerner's examination would have included the testing of the Appellant to determine whether there were still traces of the drug PCP in his body tissues, particularly his liver. It must be remembered the Appellant was arrested shortly after the shooting and remained in custody. The discovery of PCP in his body tissues would have overcome the trial court's objection to expert testimony on the grounds there was no proof of use of PCP. Drs. Roche and Bernstein did not make this tissue study.

Accordingly, the Appellant's conviction should be reversed, and the cause remanded for trial with instructions that the trial court appoint Dr. Lerner as an expert.

POINT III

THE COURT ERRED IN OPPOSING THE DEATH PENALTY.

The State's assertion that the killing was especially heinous, atrocious or cruel does not comport with the law as

applied to the facts. The medical examiner testified Calloway would have become unconscious very quickly after sustaining the wound, and probably not have remained conscious more than one minute. Death would have ensued within three to five minutes.

The State does not comment on, nor address this Court's recent decision in Jackson v. State, 451 So. 2d 458 (Fla. 1984), wherein this Court reversed the finding of heinous, atrocious, and cruel because the victim was rendered unconscious within moments after being shot for the first time, and thereafter was incapable of suffering to the extent contemplated by this aggravating circumstance. The Appellant would assert that Jackson is controlling and that the quick, sudden death caused by the gunshot wound is not sufficient for a finding of heinous, atrocious, or cruel.

The trial court erred in finding that the statutory mitigating circumstance, that the Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, did not exist. The State asserts that Dr. Bernstein's testimony was equivocal because he testified the Appellant even though he was suffering from an anti-personality disorder would know the difference between right and wrong. (Vol. 7, p. 1310-1312) The references of the State are taken from the prosecution's cross examination of Dr. Bernstein. The testimony alluded to was in reference to the prosecutor's questioning of Dr. Bernstein concerning the Appellant's sanity within the meaning of the McNaughton Rule. Dr. Bernstein testified the Appellant was sane

within the legal criteria set forth in McNaughton. (Vol. 7, p. 1312)

The mitigating circumstance set forth at Florida Statute 921.141 (6)(f) reads, "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." The State has incorrectly equated this mitigating circumstance to mean the same thing as the test for legal insanity under McNaughton Rule. This Court has stated a psychological disturbance may be relevant and within the meaning of this mitigating circumstance even though it is not sufficient ground for invoking the insanity defense. Holmes v. State 429 So. 2d 297 (Fla. 1983).

This mitigating circumstance is defined as mental impairment of a "substantial" nature, but not to the extent of legal insanity. A defendant may be competent to stand trial, and yet nevertheless receive benefit of mitigating factors involving diminished capacity in determining the appropriateness of the death penalty. Quince v. State, 414 So. 2d 185 (Fla. 1982)

Viewed within this legal framework, Dr. Bernstein's testimony was not equivocal, nor conflicting. As the law provides, he testified the Appellant was not legally insane, but that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.


The Appellant asserts the trial court erred when it found four (4) aggravating circumstances and only one(1) non-enumerated mitigating circumstance. The Appellant asserts there were only

two (2) aggravating circumstances, and two(2), not just one(1), mitigating circumstance. Assuming arguendo the finding of the aggravating circumstance of cold and calculated is viable, then there are three (3) aggravating circumstances versus two (2) mitigating circumstances. Nonetheless, the cause should be remanded to the trial court for reconsideration in light this significant and substantial change in the aggravating and mitigating circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of this reply brief has been supplied to the Office of the Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, this 4 day of January, 1985.

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