

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 68,044

DAVID COOK,

Appellant/Cross-Appellee,

v.

THE STATE OF FLORIDA,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
CRIMINAL DIVISION

BRIEF OF APPELLANT/CROSS-APPELLEE
DAVID COOK

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STATEMENT OF THE CASE AND FACTS

The defendant, DAVID COOK, respectfully relies upon the Statement of the Case and the Statement of the Facts as recited in his initial brief of appellant.

ARGUMENT

I.

THE TRIAL COURT'S DETERMINATION THAT THE DEFENDANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY SHOULD BE UPHELD BY THIS COURT ON APPEAL BECAUSE THE STATE'S BELATED CONTRARY CLAIM HAS BEEN WAIVED, THE FINDING CONSTITUTES A LEGITIMATE EXERCISE OF DISCRETION BASED ON THE DEFENDANT'S PREVIOUSLY CLEAN RECORD, AND TO HAVE HELD OTHERWISE WOULD HAVE CONSTITUTED AN IMPROPER DOUBLE USE OF AN AGGRAVATING CIRCUMSTANCE TO JUSTIFY THE DEFENDANT'S SENTENCE OF DEATH.

The state, by its cross-appeal, asks this Court to strike the mitigating factor found by the trial court that the defendant "had no significant history of prior criminal activity." [appellee brief at p.40-41] For procedural, as well as substantive, reasons the trial court's determination should be upheld.

First, the issue presented by the state in this belated cross-appeal has been waived for the failure to preserve it below. In its argument to the jury during the sentencing phase of the defendant's trial, the prosecutor admitted the existence of at least one mitigating factor:

Then you are supposed to look through the evidence and see if you find any mitigating factors. There is one, maybe one and a half. [TR 1116]

Specifically, the state conceded the existence of the statutory mitigating circumstance of no substantial prior criminal history:

And on the other side of the line to weigh these aggravating factors, again we have no substantial prior criminal history and six good people came in here

and told us he should live. [TR 1126;
emphasis added]

The state is estopped from arguing otherwise now.

In addition, in its "response to motion to strike, and alternatively, motion to (sic) leave to file cross-appeal", the state does not dispute its failure to preserve the issue. It argues only "that the contemporaneous objection rule would not apply in this context." The state's argument, however, ignores the rule, well established if not sacrosanct, that:

In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.

Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

The government may lose its right to raise issues on appeal when the government has made contrary assertions in the court below, when it has acquiesced in contrary findings by the Court, or when it has failed to raise such questions in a timely fashion during the litigation. Steagald v. United States, 451 U.S. 204 (1981). It is firmly established that a criminal conviction cannot be affirmed on the basis of a theory not previously presented. Chiarella v. United States, 445 U.S. 222 (1980). Neither, for a similar reason, should the ultimate sentence of death be sustained.

The only authority cited by the state, State v. Whitfield,

487 So.2d 1045 (Fla. 1986), does not absolve the state of its obligation to present the issue, in the first instance, to the trial court. This Court in Whitfield held that a contemporaneous objection to the trial court was not required to preserve review of a trial court's failure to make mandatorily written clear and convincing reasons for an upward sentence departure, because in the absence of the mandated findings a sentence was rendered illegal. This Court in no way diminished the contemporaneous objection requirement in the context presented here:

Sentencing errors which do not produce an illegal sentence or an unauthorized departure from the sentencing guidelines still require a contemporaneous objection if they are to be preserved for appeal. Whitfield at 1046.

Thus, absent protest to the trial court, the issue advanced here by the state for the first time should be rejected and the trial court's determination left intact.

Second, the trial court's finding that the defendant "had no significant history of prior criminal activity" should be sustained as a matter of fact and law. Prior to the convictions suffered by the defendant in this case, he had no prior criminal record. As the dissenting justices succinctly noted in Ruffin v. State, 397 So.2d 277 (Fla. 1981), the unfairness of using a contemporaneous crime in the same criminal episode to negate the mitigating circumstance of no history of prior criminal activity is "painfully obvious":

Such a holding goes against any common-sense interpretation of the phrase "history of prior criminal activity" and amounts to tortured logic ... Id at 284.

As the dissenting opinion further reasoned, while this Court has consistently permitted subsequent or contemporaneous criminal acts to be used in aggravation, it should not allow a contemporaneous crime to be used to negate the mitigating circumstance of no history of prior criminal activity. As the Court reasoned:

The statutory language for the aggravating circumstance speaks only in terms of "previous convictions." The language related to the mitigating circumstance speaks in terms of no significant "history of prior criminal activity." The term "history" must relate to a time frame broader than crimes committed contemporaneously with the crime for which the death sentence is being imposed. To hold otherwise would result in a finding of a "history" of prior criminal activity for every person who commits another crime during the same criminal episode during in which a murder is committed.

To endorse the argument of the state here results in the same illogical conclusion.

In Patterson v. State, ___ So.2d ___ (Fla. October 15, 1987), this Court, following its recent decision in Wasko v. State, 505 So.2d 1314 (Fla. 1987), and receding from Hardwick v. State, 461 So.2d 70 (Fla. 1984), cert. denied, 471 U.S. 1120 (1985), held that the trial court's utilization of the defendant's contemporaneous conviction of armed sexual battery as the basis for the aggravating circumstance that the defendant had previously been convicted of another violent felony was error. In Wasko, supra, this Court found that the trial court's finding of:

No significant criminal history in mitigation was proper because Wasko had no previous criminal record. [Id. at

The same conclusion is compelled here where the defendant had no previous criminal record.

In addition, this is not a case where the defendant argues that the trial court "should have" found a mitigating circumstance, it is a case in which the state argues that the trial court "should not have" found a mitigating circumstance. Such a determination is peculiarly within the power of a trial court to make. A trial court's determination should not be upset absent a palpable abuse of discretion. The trial court did not abuse its discretion here. As the state was quick to point out to this Court regarding mitigating circumstances the trial court did not consider:

Finding or not finding a specific mitigating circumstance applicable is within the trial court's domain, and reversal is not warranted simply because an appellant [or cross-appellant] draws a different conclusion.

Stano v. State, 460 So.2d 890, 894 (Fla. 1984). This Court has consistently reaffirmed that it is within the trial court's discretion to determine whether sufficient evidence of a particular mitigating circumstance exists and, if so, what weight should be given to it. Nibert v. State, 508 So.2d 1, 4 (Fla. 1987). See, also, White v. State, 446 So.2d 1031 (Fla. 1984). Thus, the trial court was well within its discretion in determining that this defendant, who had never before been convicted of any crime before this case, had "no significant history of

prior criminal activity" in mitigation. It considered, as this Court should, the single episode giving rise to the defendant's conviction in this case to be one integrally related transaction and not a "history" of criminal conduct.

If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). Having therefore failed to demonstrate an abuse of discretion, the state must fail even on the merits of its claim that the trial court "should not have" found that this first offender defendant had no significant history of prior criminal activity.

Further, the state's reliance upon Ruffin v. State, 397 So.2d 277 (Fla. 1981); and Echols v. State, 484 So.2d 568 (Fla. 1985), is misplaced. To endorse the state's argument would effect an impermissible "double aggravation" for the same conduct where the trial court already found, by virtue of the defendant's contemporaneous murder conviction, that the defendant "was previously convicted of another capital felony involving the use or threat of violence to the person." [R 225] Here, the fact of Onelia Betancourt's homicide is improperly used twice, if the state's position is adopted, to justify the defendant's death sentence.

Such "double dipping" is impermissible and constitutionally intolerable. McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Provence v. State, 337 So.2d 783 (Fla. 1976); Carr v. State, 379 So. 2d 97 (Fla. 1979). Ipsa facto, it is necessarily prohibited for a trial court to utilize a single circumstance to both

justify an aggravating circumstance and justify the exclusion of a mitigating circumstance. The intolerable result is the same - a double penalty for the same conduct.

None of the authorities cited by the state address the precise issue here involving the propriety of a mitigating circumstance determined to exist by the trial court. In Ruffin v. State, supra, the defendant complained that the trial court had reversibly erred in failing to consider the mitigating circumstance of no significant history of prior criminal activity. While the majority of this Court held that in determining the existence or absence of the mitigating circumstance of no significant prior criminal activity, "prior" means prior to the sentencing of the defendants and does not mean prior to the commission of the murder for which he is being sentenced, this Court did not address the issue here - whether a contemporaneous homicide can be used to both support the aggravating circumstance of "previously convicted of another capital felony" and at the same time negate a mitigating circumstance. Under McCampbell v. State, supra, and Provence v. State, supra, the answer is no. Neither, apparently was the "doubling of the same facts for separate aggravating factors" issue raised in Echols.

Accordingly, the trial court acted well within its discretion in determining that this defendant who, prior to the transaction giving rise to his convictions in this case, had no prior conviction record, did not have a significant history of prior criminal activity. Even if the issue had not been waived by the

State, its finding was further compelled since it had already used the defendant's coincidental conviction to justify the aggravating circumstance that the defendant had "previously been convicted of another capital felony" Accordingly, the trial court correctly found the existence of a mitigating circumstance in this case and that finding should be upheld by this Court on appeal.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the appellant/cross-appellee, DAVID COOK, urges this Court to affirm the determination of the existence of the mitigating circumstance "no significant history of prior criminal activity" as found by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Richard L. Polin, Esquire, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, this 5th day of February, 1988.

By: Geoffrey C. Fleck
GEOFFREY C. FLECK, ESQUIRE