

IN THE SUPREME COURT
STATE OF FLORIDA

MARTIN GROSSMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

FILED

SID J. WHITE

JUL 20 1987

Case NO. 87-1986 SUPREME COURT

By _____ Deputy Clerk

APPEAL FROM THE CIRCUIT COURT
IN THE SIXTH JUDICIAL CIRCUIT
FOR PINELLAS COUNTY, FLORIDA

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUMMARY OF THE ARGUMENT

The United States Supreme Court has held in Booth v. Maryland, *infra*, that it was reversible error to present evidence of the impact of the murder on family members to a sentencing jury. In the Grossman case, three members of the victim's family testified as to the impact the death of Peggy Park had on them. However, the Booth decision does not require the reversal of Grossman's sentence.

First, it was the judge, not a jury, that heard the potentially damaging victim information. Since the judge is constrained by law to consider only the statutory aggravating factors in deciding to impose the death penalty, and there is no indication in either his sentencing colloquy or order that he considered the victim information, the risk that the victim impact statement was erroneously considered is far less likely than had the information gone to a jury.

Second, assuming the Court cannot overlook the possibility that the judge might have been swayed by the victim impact statement, the sentence should still not be vacated. Florida law is clear that death is the appropriate sentence where the judge finds the existence of aggravating factors but no mitigating circumstances. This is true even where one of the aggravating circumstances is non-statutory and erroneously weighed. In this case the judge found three valid statutory aggravating circumstances and no mitigating ones, so death is clearly the appropriate sentence.

Where, as here, there is no evidence that the judge relied upon the victim impact statement information and no mitigating circumstances were found to exist, an harmless error analysis is required. Even constitutional errors can be harmless. Any error in this case is unavoidably harmless because the judge found no mitigating circumstances. Since no mitigating circumstances were found to exist, the consideration of the victim impact statement (VIS) could not have overcome any mitigating circumstances in the judge's weighing process.

Should this Court find the "error" was not harmless, the Court should reweigh the aggravating and mitigating circumstances without considering the VIS to decide if death is appropriate. Even without the victim information, the fact that no mitigating factors were found to outweigh the aggravating circumstances requires a finding that the death penalty was the appropriate sentence.

Additionally, the lack of a contemporaneous objection to the introduction of the victim impact statement waives this issue for appellate review, so Grossman is not entitled to the reversal of his sentence on this point.

ISSUE

HOW THE UNITED STATES SUPREME COURT'S DECISION
IN BOOTH V. MARYLAND, INFRA, IMPACTS ON THE
INSTANT CASE.

Martin Grossman was adjudicated guilty of murdering Peggy Park. The penalty phase of the trial was conducted and the jury recommended Grossman be sentenced to death. After the jury had made their recommendation, members of Ms. Park's family testified before the judge as to the impact of the victim's death on them. The judge subsequently sentenced Grossman to death.

After the Grossman case, the United States Supreme Court, in Booth v. Maryland, 55 U.S.L.W. 4836 (U.S. June 15, 1987), held that it was reversible error to present evidence of the impact of the murder on family members to a sentencing jury. This brief will address any impact of Booth on the case sub judice, including the applicability of harmless error analysis.

The Court in Booth found that the victim impact statement (VIS) was irrelevant to a capital sentencing decision and that its admission created a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner. Booth, however, does not require reversal of Grossman's sentence.

The first reason Booth doesn't require reversal here is the distinction that exists between Florida's capital sentencing scheme and Maryland's. In Florida, unlike Maryland, it is not the jury who ultimately imposes the death penalty, and in this case, it was not the jury who heard the potentially damaging

information. For Booth to control this case the Court would have to assume there is no difference in the risk that a jury might act arbitrarily and capriciously and the risk that a judge will act arbitrarily and capriciously. This, according to Florida law, is not an acceptable assumption since the judge is presumed to follow the law and there is no indication this judge deviated from the strictures of the law.

The trial judge is presumed to know and follow the law. Section 921.141, Fla. Stat. exhorts the judge to make his decision, following the jury's recommendation, by weighing the aggravating and mitigating circumstances. It is well established that the trial judge can only consider the statutorily established aggravating circumstances. See, Elledge v. State, 346 So.2d 998 (Fla. 1977), appeal after remand, 408 So.2d 1021, cert. denied, 459 U.S. 981, 103 S.Ct. 316, 74 L.Ed.2d 293, rehearing denied, 459 U.S. 1137, 103 S.Ct. 771, 74 L.Ed.2d 984.

Not only is the judge presumed to follow the law, there is no indication in this case that the trial judge departed from the requirements of law. The fact that he heard the VIS testimony does not require a finding that he relied upon it in his sentencing decision. To the contrary, the judge's colloquy (R.2763) and written order (R.289-290) indicate that he weighed only the appropriate factors.

Because there is no evidence that Judge Farnell relied on the victim impact statement, the penalty should not be disturbed on appeal. This Court has in the past refused to assume the judge had relied on non-statutory aggravating factors when she enumerated

the aggravating circumstances and the evidence supporting those factors, see, Rose v. State, 472 So.2d 1155 (Fla. 1985), and should do so in this case.

The second reason Booth does not require reversal is the absence of mitigating factors. Assuming, for the sake of argument, that there is a risk that the judge relied on the VIS, Florida law still requires the affirmation of the death penalty. The consideration of the VIS would be the functional equivalent of considering a non-statutory aggravating factor. Where the judge has found some aggravating circumstances but no mitigating factors, the death penalty is not automatically reversed, even where some non-statutory may have been considered.

It appears that the United States Supreme Court does not fault a death sentence predicated in part upon non-statutory aggravating factors where there are no mitigating circumstances . . . (emphasis in original) Elledge, supra at 1002-1003 and the cases cited therein.

Therefore, reversal is not warranted in this case.

While Booth does not address the propriety of an harmless error analysis, it clearly does not prevent such analysis. Even if the mere hearing of the VIS testimony by the judge is thought to be unconstitutionally risky, it is well established that even constitutional errors can be harmless. See, Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) and progeny.

Florida has long held that harmless error analysis is proper in death penalty cases where the judge finds some aggravating but no mitigating factors. The harmless error analysis

is proper even where the judge has relied on some non-statutory factors as long as no mitigating circumstances were found to exist.

One question that has arisen is whether defendants must be resentenced when trial courts erroneously consider improper aggravating factors . . . If the trial court properly found that there are no mitigating circumstances, the Florida Supreme Court applies a harmless error analysis. Elledge, supra, at 1002-1003. See, e.g., White v. State, 403 So.2d 331 (Fla. 1981); Sireci v. State, 399 So.2d 964, 971 (Fla. 1981). In such a case, "a reversal of the death sentence would not necessarily be required", Ferguson v. State, 417 So.2d 639, 646 (Fla. 1982), because the error might be harmless.

Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134, 1147 (1983).

Any error in this case is unavoidably harmless for two reasons: there is no indication that the judge relied on the VIS at all; and, the judge found that three aggravating factors existed and that there were no mitigating circumstances. Had the VIS information even minutely affected the judge's decision, there is no danger that the consideration of the information overcame the mitigating circumstances in the weighing process, since there were no mitigating circumstances. There can be no reasonable possibility that the mere hearing of the VIS affected the verdict in this case. See, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)

Should this Court decide that there was error, this Court may, on the record before it, constitutionally reweigh the aggravating and mitigating circumstances and make a determination in this case that death is the proper sentence. Although this

Court has expressed an unwillingness to engage in an independent evaluation and reweighing of the aggravating and mitigating circumstances, see, Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981), this Court has in effect done so, and upheld a death sentence upon that basis. Goode v. State, 365 So. 2d 381 (Fla. 1978). The United States Supreme Court later sanctioned the independent reweighing of the aggravating and mitigating circumstances by the Florida Supreme Court in Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1985). Even when the VIS information is excised from consideration, there were no mitigating circumstances in this case so death is clearly the required sentence.

An additional difference exists between this case and Booth that makes reversal of the sentence unwarranted. Defense counsel in the instant case did not object to the testimony of the victim's family, whereas in Booth, defense counsel objected and the prosecution agreed to limit the evidence to the reading of the statement instead of presenting live testimony. The absence of an objection waives this issue for appellate review. See, Steinhorst v. State, 412 So.2d 332 (Fla. 1982) and Rule 90.104, Fla. Evid. Code. Grossman is therefore not entitled to reversal of his sentence on this point.

In summation, because the judge is presumed to follow the law which precludes consideration of non-statutory aggravating factors in imposing the death penalty; and there is no indication that the judge impermissibly relied on the VIS, Booth does not warrant reversal in this case. The fact that no miti-

gating factors were found to exist also requires the affirmation of the death penalty in this case. Since any possible error is rendered harmless because the consideration of the VIS could not have outweighed the mitigating circumstances where no mitigating circumstances were found, reversal is further not warranted. Additionally, this issue was waived for appellate review so petitioner is not entitled to reversal of this question.

CONCLUSION

Based on the foregoing argument and authority, respondent respectfully urges that Booth v. Maryland, supra, does not require reversal of Grossman's sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Elizabeth G. Mansfield, DILLINGER & SWISHER, P.A., 5511 Central Avenue, St. Petersburg, FL 33710 on this 17th day of July, 1987.

Lauren Hafner Sewell
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