

IN THE SUPREME COURT OF FLORIDA

FILED
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J. C. FEAD, SR.,
Appellant,

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v.

CASE NO. 68,341

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT, IN
AND FOR MADISON COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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Appellant, :
v. : CASE NO, 68,341
STATE OF FLORIDA, :
Appellee. :
_____ :

REPLY BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant files this brief in reply to the answer brief of appellee, which will be referred to as "AB", followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Appellant relies upon his statement of the history of his case as presented in his initial brief at pages 2-18.

III SUMMARY OF ARGUMENT

Appellant will point out in this brief that the state has invited this Court to abandon its standard of review of death sentences which are imposed over a jury recommendation of life. This standard has existed for the last 10 years and has worked fairly well. This Court should resist the state's attempt to have this Court make life recommendations by a jury meaningless.

Turning to the merits of the instant case, the state has failed to show why appellant's death sentence should be sustained. The state fails to realize that there were strong reasons why the jury recommended life. The state has failed to address at all appellant's argument that he does not deserve the death sentence when his case is reviewed in light of other similar cases. For the reasons expressed in this brief, as well as in the initial brief, appellant will ask that this Court vacate his death sentence.

IV ARGUMENT

ISSUE PRESENTED

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT APPELLANT'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, BECAUSE ABSOLUTELY NO CONSIDERATION WAS GIVEN TO THE JURY'S LIFE RECOMMENDATION AND TO THE UNREBUTTED TESTIMONY CONCERNING STATUTORY MITIGATING CIRCUMSTANCES, BECAUSE LITTLE WEIGHT WAS GIVEN TO THE UNREBUTTED NON-STATUTORY MITIGATING EVIDENCE, BECAUSE THE COURT IMPROPERLY FOUND EVIDENCE OF A CRIME FOR WHICH APPELLANT WAS NOT CONVICTED, AND BECAUSE APPELLANT DOES NOT DESERVE A DEATH SENTENCE FOR THIS HOMICIDE.

The state, in its answer brief, completely fails to demonstrate - in fact, does not even make any real attempt to demonstrate - that the jury's recommendation of life imprisonment was "unreasonable". Contrary to the well-established standard of Tedder v. State, 322 So.2d 908 (Fla. 1975) (to which it pays lip service, AB at 9-11), the state seems to be suggesting that since nobody knows for certain in this case (or, for that matter, in any other case) exactly what findings the jury made, this Court may not consider whether there was any reasonable basis for the jury to recommend life, but must look only to the four corners of the trial court's sentencing order. What the state is doing is asking this Court to review this death sentence, imposed pursuant to the trial court's override of the jury's life recommendation, exactly the same as if the

jury had recommended death. That, needless to say, is not the law. This Court has on many occasions reversed a death sentence for imposition of a life sentence without parole for 25 years, in accordance with the jury's life recommendation, where there existed a reasonable basis for the jury's recommendation. See the list of cases in the initial brief at pages 20-21; see also Brookings v. State, 11 FLW 445 (Fla. Aug. 28, 1986). Even if the trial judge finds numerous aggravating circumstances and absolutely nothing in mitigation, this Court has the obligation to reduce the sentence to life, as recommended by the jury, if the judge has unreasonably rejected the jury's opinion as to the proper penalty. Amazon v. State, 487 So.2d 8 (Fla. 1986). Likewise, if the judge merely disagrees with the jury's life recommendation, this Court must reject the life override. Rivers v. State, 458 So.2d 762 (Fla. 1984).

In Thompson v. State, 456 So.2d 444, 447 (Fla. 1984), this Court stated that:

In the years since [Tedder was decided] we have not waived from the Tedder test and have consistently applied it to the facts and circumstances of cases on review where the trial judge has overridden a jury recommendation of life imprisonment and imposed the death penalty.

See also Rivers v. State, supra; Barclay v. State, 470 So.2d 691 (Fla. 1985); Huddleston v. State, 475 So.2d 204 (Fla. 1984);

Amazon v. State, supra; and Brookings v. State, supra, all of which were decided within the past two years, and subsequent to Thompson. In the present case, because it has nothing else to hang its hat on, the state is essentially asking this Court to overrule the Tedder principle (although disclaiming such intent, AB at 10, footnote 1), by looking only to what the trial court set forth in its order, and ignoring what the jury reasonably could have found. Appellant implores this Court not to accept the state's thinly-veiled attempt to have this Court undo the last 10 years' application of the Tedder standard.

The state characterizes this Court's examination of the reasons for the jury's life recommendation and the judge's life override as "speculative perusals of the record". AB at 11. This appeal does not involve any needle-in-the-haystack search for "speculation" as to why the jury recommended life. The basis for this predominantly white, North Florida, rural, death-qualified jury's recommendation of life for this black man is patently obvious from the record -- the realization that nothing is to be gained by executing a man who functions admirably inside and outside of prison, except when alcohol and jealousy combine to trigger a homicide.

In the state's view, a life recommendation has become meaningless. Such a position cannot be sustained. While

a jury recommendation is not necessary in order for a sentencing scheme to pass federal constitutional muster, the United States Supreme Court has noted on several occasions that the barrier of the jury between the prosecutor and the judge further increases the fairness of the Florida system. That Court, citing Barclay v. Florida, 463 U.S. 939 (1983) and Proffitt v. Florida, 428 U.S. 242 (1976) recently stated that it:

Twice has concluded that Florida has struck a reasonable balance between sensitivity to the individual and his circumstances and insuring that the penalty is not imposed arbitrarily or discriminatorily.

Spaziano v. Florida, 468 U.S. ___, 82 L.Ed.2d 340, 355 (1984). Likewise, citing Dobbert v. Florida, 432 U.S. 282 (1977), the United States Supreme Court:

Has already recognized the significant safeguard the Tedder standard affords a capital defendant in Florida. ... We are satisfied that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role.

Spaziano v. Florida, supra, 82 L.Ed.2d at 356.

Having tried to discredit Tedder the state attempts to explain in the rest of its brief why the judge's sentence should be upheld instead of the jury's life recommendation (AB at 13-16). Even though appellant's initial brief at pages 23-24 set forth seven reasons why the jury recommended

life, appellee chose not to address any particular, with the exception of disagreeing with Dr. Mhatre's unrebutted conclusion that in light of appellant's blood-alcohol of .25, appellant acted impulsively toward his girlfriend when his jealousy was magnified by his ingestion of liquor.

It is inconsistent for the state to argue before this Court that the alcohol abuse did not establish in the jury's mind the presence of two statutory mental mitigating circumstances, where the state before the trial court conceded their presence before the jury:

What are the mitigating circumstances? It was committed while the Defendant was under the influence of extreme mental or emotional disturbance. That the capacity of the Defendant to appreciate the criminality of his conduct to conform his conduct to the requirements of the law was substantially impaired. These two, I believe, the testimony centered mainly around his condition as a result of drinking that day. So, you're going to have to assign a certain amount of weight to them.

(R 1382). It is likewise inconsistent for the state to argue to this Court that the judge was free to ignore the presence of the two statutory mental mitigating circumstances, when the prosecutor conceded their presence before the judge (R 1461). The courts have held that "it is axiomatic that a party will not be allowed to maintain inconsistent positions in the course of litigation". McKee v. State, 450 So.2d 563, 564 (Fla. 3d DCA 1984); see also McPhee v. State, 254 So.2d 406

(Fla. 1st DCA 1971); and Irby v. State, 450 So.2d 1333 (Fla. 1st DCA 1984). This is a basic legal principle, from which the state is not exempt. Steagald v. United States, 451 U.S. 204, 208-11 (1981); see also Finney v. State, 420 So.2d 639, 643-44 (Fla. 3d DCA 1982) (en banc) (Daniel Pearson, J., concurring); and Vaprin v. State, 437 So.2d 177, 178, n.2 (Fla. 3d DCA 1983). Since the prosecutor below conceded mental mitigation, the Attorney General cannot argue against its presence before this Court.

The state has made no attempt to explain why the jury was unreasonable in listening to the testimony of Parole Officer Rhodes, who indicated that appellant would be a model prisoner if returned to the general prison population. As stated by the United States Supreme Court in Skipper v. South Carolina, 476 U.S. ___, 90 L.Ed.2d 1, 7 (1986):

Evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. ... Such evidence of adjustability to life in prison unquestionably goes to a feature of the defendant's character that is highly relevant to a jury's sentencing determination.

Id., 90 L.Ed.2d at 8, note 2.

As to the voluminous non-statutory mitigation, presented by appellant, the state concedes that he, in the words of the trial judge, merely "was a good worker and a responsible employee" but agrees with the trial judge that

this non-statutory mitigation is entitled to very little weight. Again, the prosecutor below conceded that this evidence mitigated against the death sentence (R 1382) and so the state on appeal must try to be consistent by conceding its presence but denigrating its probative value.

Appellant disagrees that the non-statutory mitigation carries little weight. The predominantly white jury was made up of rural, North Florida folks who know the value of a hard day's work-out in the scorching heat. Appellant spent the majority of his adult life working at the feed mill, working his way up to a supervisory position, and saving his money to buy a house, i.e., the American dream. Appellee's depreciation of appellant's employment history is remarkable. This Court must find it to be a strong mitigating circumstance.

The state fails to address, except in footnote 2, AB at 15, appellant's argument that the judge has convicted appellant of another crime (possession of a firearm by a convicted felon) even though the record contains no evidence that this offense was ever prosecuted to any conclusion. Appellant continues to maintain that the judge has improperly found a non-statutory aggravating circumstance, on authority of the discussion in his initial brief at pages 30-31.

The state also makes no direct reference to the proportionality argument presented at pages 31-34 of the initial brief. It is apparent that the sentencing judge felt compelled to impose the death sentence because appellant had committed a prior second degree murder. It is likewise apparent that the lower court ignored the substantial statutory and non-statutory mitigation, as well as the jury's recommendation of life. It is likewise apparent that this middle age man's tendency toward violence is triggered only by domestic disputes, with his young girlfriends, especially when coupled with intoxication. Otherwise, Buddy Fead is a hard working, trouble-free member of society. He does not deserve the death penalty. This Court has previously noted in quite colorful language the problems which arise when an older man takes up with a young woman. Diem v. Diem, 141 Fla. 260, 263-64, 193 So. 65 (1940). As pointed out in the initial brief, most domestic homicides do not call for the death sentence, particularly where the jury recommends life, but also where the jury recommends death. See, e.g., Ross v. State, 474 So.2d 1170 (Fla. 1985). See also Wilson v. State, 11 FLW 471 (Fla. Sept. 4, 1986), a case decided subsequent to the filing of the initial brief, in which this Court reduced Wilson's sentence to life, even though the jury recommended death, where he killed his father because:

We find it significant that the record also reflects that the murder of Sam Wilson, Jr. was the result of a heated, domestic confrontation and that the killing, although premeditated, was most likely upon reflection of a short duration.

Id., 11 FLW at 472. Likewise, in another case decided after the filing of appellant's initial brief, Irizarry v. State, #66,947 (Fla. Oct. 30, 1986), the defendant, a Puerto Rican, killed his ex-wife and shot her Cuban lover. The jury recommended life for the murder. The trial judge imposed death, finding four aggravating circumstances and two mitigating circumstances. This Court adhered to the Tedder standard and reduced the death sentence to life because:

The jury could have reasonably believed that appellant's crimes resulted from passionate obsession. In fact, the jury recommendation of life imprisonment is consistent with cases involving similar circumstances. See Ross v. State, 474 So.2d 1170 (Fla. 1985); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Blair v. State, 406 So.2d 1103 (Fla. 1981); Kampf v. State, 371 So.2d 1007 (Fla. 1979); Chambers v. State, 339 So.2d 204 (Fla. 1976).

Id., slip opinion at 7.

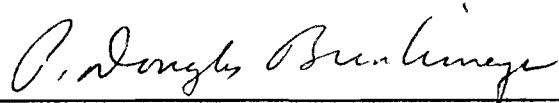
In summary, then, this Court should reject appellee's invitation to overrule Tedder. This Court should follow Tedder and find there are several reasons why appellant's jury recommended life. This Court must reduce appellant's sentence to life.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, as well as that contained in his initial brief, appellant requests that this Court vacate his death sentence and remand with directions that a life sentence be imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mr. John Koenig, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, Mr. J. C. Fead, Sr., #039429, Post Office Box 747, Starke, Florida, 32091, this 6 day of November, 1986.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER