

IN THE SUPREME COURT OF FLORIDA

FILED

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CASE NO. 88-690

MORRIS BROWN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR JACKSON COUNTY, FLORIDA.

REPLY BRIEF OF APPELLANT

MICHAEL E. ALLEN
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SECOND JUDICIAL CIRCUIT

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ISSUE II

THE COURT ERRED IN GRANTING THE STATE'S MOTION FOR ALTERNATIVE VENUE RELIEF AND MOVING BROWN'S TRIAL TO BAY COUNTY INSTEAD OF ANOTHER COUNTY WHERE THE RATIO OF BLACKS TO WHITES WAS SIMILAR TO THAT IN JACKSON COUNTY.

The state has divided its argument on this issue in two parts: a claim of procedural default because Brown did not move for a second change of venue (Appellee's brief p. 7), and a claim that in any event the jury need not reflect the composition of the community, so long as it was fairly selected. (Appellee's brief p. 9) The state has completely misunderstood Brown's argument on this issue.

Regarding the first claim, that Brown did not file a second motion for change of venue, the state is correct. That fact, however, has no relevance to Brown's argument that by moving his trial from Jackson County to Bay County, the court denied his Sixth and Fourteenth Amendment rights to a fair cross section of the community.

Brown never waived that constitutional requirement; to the contrary, he vigorously argued that the racial makeup of Bay County was significantly different from that of Jackson County. At the hearing on his motion to challenge the jury panel selected in Bay County, venue was not the issue, and everyone knew it. The issue was whether Brown could get a fair cross section of the Jackson County jury in Bay County. As he showed at the hearing on the issue, he could not.

To say that Brown should lose because he did not file a second motion for a change of venue is to drastically misinterpret the intent of Brown's motion to challenge the jury panel.

Moreover, if Brown should have filed a second motion to change venue, the state should have raised that issue at the hearing on the Motion to challenge the jury panel rather than "sandbagging" the issue to raise on appeal. That is, until the state raised the argument in its answer brief, no one ever conceived this issue in those terms; if the defense must object to purported errors in order to preserve them, Clark v. State, 363 So.2d 331 (Fla.1978), the state must do the same thing.

As to the second point, Brown's argument is that it was the jury panel and not the jury itself that did not represent a fair cross-section of the community. Thus, the cases cited by the state on this point are irrelevant. See Carwise v. State, 454 So.2d 707 (Fla. 1st DCA 1984); Grech v. Wainwright, 492 F.2d 747 (5th Cir. 1974) (Appellee's brief pp 8-9). Similarly, Brown's failure to meet a test fashioned by the state (see Appellee's brief p.9) is irrelevant. The U.S. Supreme Court articulated the test he had to pass in Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 589 L.Ed.2d 579 (1972), and which Brown discussed in his initial brief (see initial brief at pp.20-21). The state makes no argument that Brown failed that test.

Regarding the State's claim that Brown failed to show a lack of randomness in the jury summoning process and that his jury was not fairly selected (Appellee's brief p.9), it has missed the point of Brown's argument. That is, the systematic exclusion of blacks from

the jury venire and hence the unfair bias against the selection of blacks as jurors came from the court's moving this case to Bay County. Brown needed only to show the systematic exclusion of a distinctive class; he did not have to prove that any particular juror was prejudiced against him.

ISSUE III

THE COURT ERRED IN OVERRIDING THE JURY'S
RECOMMENDATION OF LIFE AND SENTENCING BROWN
TO DEATH AS THERE WERE SEVERAL REASONABLE
BASES UPON WHICH THE JURY COULD HAVE
RECOMMENDED LIFE.

The problem with the state's argument on this issue is that it presumes the trial court is free to make a determination of whether Brown should live or die without considering the jury's recommendation. Brown's argument, however, is that when the jury recommended Brown live, that recommendation created a significant bias in favor of imposing a life sentence. When a jury has recommended life, the analysis the trial judge engages in is very different from that if the jury had recommended death.

That is, when the jury has recommended life, the court should examine the record with the intent to impose a life sentence. Only if there is no support for that recommendation can the court weigh the aggravating and mitigating circumstances it finds and impose a death sentence if it believes the evidence warrants it.

The state presents a three part response to this argument. Attacking the jury's recommendation head on, it says that there was no reasonable basis for its recommendation. That argument, however, presumes that death was the appropriate sentence, and the evidence supporting a life sentence should either be ignored or explained away. Thus, for example, the state argues that because Cotton said that Brown killed Bevis in "cold blood", Dr. Davidson's testimony that Brown lacked premeditation should be ignored or given no weight (Appellee's brief at p 16). The state claims that the jury could not

believe both witnesses and that Brown tried to raise a "doubt as to guilt" argument condemned by this court in Burr v. State, 466 So.2d 1051 (Fla. 1985).

As this court said in Burr, however, the jury can determine what weight to give to the evidence, and it is not for the appellate courts to reexamine their decisions, only to determine if the evidence supports it. Here, the jury could have found Brown guilty under a felony-murder theory (as the state charged and the court instructed). Or the jury could have believed Cotton, that Brown committed this murder in "cold blood" and disbelieved Dr. Davidson regarding the element of premeditation. That does not mean that it disbelieved Dr. Davidson regarding his other testimony that Brown committed this murder while he was under the influence of an extreme mental or emotional disturbance, and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (R 6567). The state's argument is that if the jury disbelieved Dr. Davidson regarding Brown's premeditation, it had to reject all his testimony. That it is patently incorrect as this court in Burr made clear.

The state's second attack is to say that this really is a death case because this court had affirmed death sentences in other "very similar cases." (Appellee's brief at p. 19.) The very similar cases it cited were Thomas v. State, 456 So.2d 454 (Fla. 1984), and Burr v. State, 466 So.2d 1051 (Fla. 1985). Those cases, however, are not factually similar to this case and do not support the state's argument, if it is valid.

In Thomas, Thomas killed two people in one night. The first he killed by stabbing him in the chest. The second was "beaten, kicked, or bludgeoned so severely that his skull was fractured in many places. He was rendered unconscious and was not treated until he was discovered the next day." Id. at 457. This victim died several months later. The facts in Thomas are not "very similar" to the facts of this case.

Similarly, in Burr, Burr robbed a clerk at a convenience store and then deliberately had him kneel so he could shoot him in the back of the head. After this murder, he went to Melbourne where he committed several other convenience store robberies in which the clerks in each robbery were shot. The only mitigation that Burr argued before this court and the only evidence before the trial court was the doubt as to his guilt. There was nothing else in mitigation. Id at 1054. Like Thomas, Burr is not "very similar" to this case.

Finally, the state argues that Brown's closing arguments misled the jury so that their recommendation is unreliable. (Appellee's brief at p.20.) If counsel for Brown made improper arguments, the state never complained or objected to them when they were made, and the state's belated complaint on appeal has the appearance of "sandbagging." Clark v. State, 363 So.2d 331 (Fla. 1978).

Nevertheless, the comments made by counsel were proper when read in the context they were given. For example, Defense counsel Mayo's comment which likened this murder to a suicide by officer Bevis (R 6438-6439) was just that, an analogy. (The

argument was made during the closing argument of the guilt phase of the trial, and by its verdict the jury rejected it.) That is, officer Bevis carelessly tried to arrest two presumably dangerous men by himself. It was asking for trouble, and it was suicidal in the same sense that some people drive a car without wearing a seat belt. From the context of his argument that was what Mr. Mayo meant.

Similarly, Defense counsel Stone's "bad lawyer" argument occurred at the very beginning of his sentencing argument, and in context presented it meant that they were now in that unique part of the trial where society has given a person or group of persons the right to determine whether a person will live or die. That Mr. Stone was scared was a natural feeling, and it was legitimate for him to tell the jury this to impress upon them the serious responsibility of their deliberations.

Similarly, informing the jury of the possibility that Brown will never be released from prison was permissible. See California v. Ramos, 463 U.S. 992, 103 S.Ct. 344, 77 L.Ed.2d 1171(1983)

The state then ties this argument together by saying that the jury's recommendation was predicated upon this misleading information. (Appellee's brief at 21). Assuming these arguments were improper, it is pure conjecture for the state to argue that the jury based its life recommendation on them, especially when it had an abundant amount of mitigating evidence from which it could have reasonably based its recommendation.

Thus, the court should have followed the jury's recommendation and imposed a sentence of life in prison without the possibility of parole for twenty-five years.

ISSUE IV

THE COURT ERRED IN FINDING THAT BROWN COMMITTED THIS MURDER IN AN ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL MANNER.

The state cites four cases to support its argument that Brown committed this murder in an especially heinous, atrocious, and cruel manner. None of them withstand scrutiny.

Henderson v. State, 463 So.2d 196 (Fla.1985), and Hargrave v. State, 366 So.2d 1 (Fla.1978), are distinguishable from this case simply from the facts provided by the state in its brief. (Appellee's brief p.22). Here there is no evidence Brown gagged or bound Officer Bevis or that he left him helpless for a significant period before Bevis was finally killed. Here there was a fight, a shot, a plea, and immediately after, two more shots. There was no prolonged suffering of Bevis or any enjoyment by Brown.

Likewise, in Phillips v. State, 476 So.2d 194 (Fla.1985), the facts show that the victim and the defendant had time to contemplate the victim's fate. There, Phillips stalked his victim, shot him twice, and shot him several more times after the victim had run 100 feet, and Phillips had reloaded his gun. Here Bevis did not flee, and Brown did not stalk him. If Bevis had any time to reflect on his fate, it was only for a moment, and Brown lacked time to reload the gun. Instead, Brown reacted as a scared kid, shot Bevis, and fled. Unlike Squires in Squires v. State, 450 So.2d 208 (Fla.1984), the evidence does not show that Brown killed Bevis to cause him any unnecessary or prolonged pain. The killing was not cold-blooded, and Brown took no painstaking efforts to kill Bevis.

Finally, in Troedel v. State, 462 So.2d 392 (Fla. 1985), Troedel deliberately tormented one of his victims before killing him, and he killed both victims in their home. Those facts made the killings especially heinous, atrocious, and cruel. Here, Brown did not torment Bevis, and Bevis certainly was not at home when he was killed.

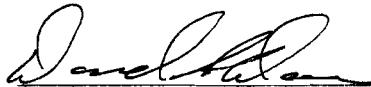
Thus, for the reasons Brown provided in his initial brief, this murder was not committed in an especially heinous, atrocious, and cruel manner.

CONCLUSION

Based upon the arguments presented above, Morris Brown respectfully asks this honorable court to either reverse the trial court's judgment and sentence and remand for a new trial, or reverse the trial court's sentence of death and remand with instructions to sentence Brown to life in prison without the possibility of parole for twenty-five years.

Respectfully submitted,

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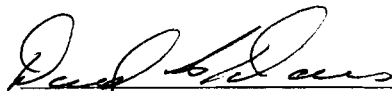


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to John Tiedemann, Assistant Attorney General, The Capitol, Tallahassee, FL, 32301, this 7 day of August, 1987.



David A. Davis
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