

IN THE SUPREME COURT OF FLORIDA

JOHNNY L. ROBINSON,)
)
 Appellant,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

CASE NO. 68,971

FILED ✓
FEB 19 1987

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APPEAL FROM THE CIRCUIT COURT
IN AND FOR ST. JOHNS COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN CONDUCTING PORTIONS OF THE TRIAL WITHOUT APPELLANT'S PRESENCE THEREBY DENYING HIM HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL STAGES OF THE TRIAL GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Contrary to Appellee's assertion at the beginning of her argument on this point, Appellant does not concede that his absences were voluntary and at his request. It appears from the record that Robinson's absence during Dr. Krop's testimony was voluntary. (R754-757) Appellee's conclusion that Robinson's absence during the venire's general qualifications was voluntary is not supported by the record. Trial counsel waived Robinson's presence before Robinson had even entered the courtroom. (R181) It later became apparent from the record that Robinson was in the hallway waiting for a suit of clothes to be worn in place of prison garb. (R188) From this portion of the record, Appellee

surmise that Robinson's absence was voluntary. A defendant should not be forced to choose between civilian clothes for trial or presence in the courtroom during that trial. Appellee does not explain why the beginning of trial could not be postponed for a few minutes in order that Robinson could don suitable clothing. Perhaps even a better practice would have been for Robinson's jailers to transport him to court in order to allow plenty of time for Robinson to dress for the event.

Appellant also disputes Appellee's claim that, "Appellant acknowledges this position is contrary to this Court's holding in Amazon v. State, 487 So.2d 8 (Fla. 1986)." (Appellee's brief, p.4). Appellant does not so concede. In Amazon, supra, this Court relinquished jurisdiction for an evidentiary hearing on the circumstances surrounding the waiver of Amazon's presence by his attorneys. This Court held that counsel may waive his client's presence, "provided that the client, subsequent to the waiver ratifies the waiver either by examination by the trial judge, or by acquiescence to the waiver with actual or constructive knowledge of the waiver." Id. at 11. It is impossible to tell from this record whether or not Robinson knew of trial counsel's waiver of presence during jury selection. Unlike Amazon, it is not clear whether or not Robinson had actual notice. Furthermore, it is not crystal clear from the record that Robinson was brought into the courtroom when Appellee maintains he was. After the second sidebar conference, the court ordered the bailiff to "go get the defendant." (R188) The defense and state then announced "ready" and the proceedings

began. While one would assume that Robinson was brought into the courtroom at the point or shortly thereafter, it is not unambiguous. An evidentiary hearing on Robinson's absence from the courtroom may be necessary to clarify the facts pertaining to this issue.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER EVIDENCE OF A COLLATERAL CRIME WAS ADMITTED IN VIOLATION OF A PRETRIAL RULING.

In spite of the state's willingness to attempt to prove that the Appellant burglarized Lloyd Cogburn's house and, in the process, stole three firearms, Appellant does not concede on appeal that this evidence would have been admissible at trial. Appellant submits that this evidence was not relevant to the instant murder charge. Therefore, Appellant maintains that the stipulation entered into at trial was an enormous concession on his part.

The question of whether or not the improper remark was invited by defense counsel must ultimately be decided by this Court. Appellant is confident that scrutiny of the record on appeal supports his contention that the detective's remark was inappropriately interjected. The detective's answer was completely unresponsive to defense counsel's question and, as such, was not invited.

The opinion of this Court in Johnston v. State, 11 FLW 585 (Fla. November 13, 1986), is distinguishable. Johnston's defense counsel never asked for a curative instruction and also failed to make a motion for mistrial. This Court refused to find that the trial court erred in denying a motion that had never been made. Id. at 587.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, THE TRIAL COURT ERRED IN REFUSING TO GIVE A REQUESTED INSTRUCTION ON THE AFFIRMATIVE DEFENSE OF VOLUNTARY INTOXICATION WHERE THERE WAS EVIDENCE PRESENTED AT TRIAL IN SUPPORT THEREOF.

Appellee maintains that insufficient evidence was introduced to justify a jury instruction on intoxication and its relation to specific intent crimes, particularly, the issue of premeditation. The state introduced Appellant's voluntary statement made shortly thereafter his arrest. (R32-34) Appellant admitted to drinking cognac, gin or vodka, and beer. The consumption of this quantity of alcohol extended over a three hour period. Even his accomplice admitted that Robinson had been drinking during the evening. (R497-498) It is clear that the Appellant continued drinking at the cemetery where Ms. St. George was shot. Several fresh beer cans were found in the area. (R432-433) The medical examiner testified there was no alcohol in Beverly St. George's blood. (R460) This evidence was established at the guilt phase. At the penalty phase, the large quantity of alcohol consumed by the Appellant that night was more fully revealed. Robinson drank a cup of vodka and a pint of Canadian Mist. While he was driving in his car prior to the offense, he consumed a six-pack of beer. Dr. Krop opined that Robinson consumed quite a bit of alcohol that evening, particularly for someone like him who does not drink excessively. (R764-765) Dr. Krop concluded that Robinson's severe

intoxication resulted in impaired judgment which, in part, led to the unfortunate chain of events. Krop concluded that this was definitely a mitigating factor in the offense. (R770-773)

The trial court denied the requested instruction after reviewing Robinson's statement concerning his consumption of alcohol. Since the document did not state with particularity that Robinson was intoxicated or impaired, the trial court denied the motion. (R561-563) Appellant's written request for instruction on the defense of intoxication included an instruction on partial intoxication. (R36)

Appellant submits that he met his burden in coming forth with evidence that justified some type of jury instruction as to intoxication, at the very least, one for partial intoxication. Appellant submits that this burden has especially been met in the instant case where he did not dispute the fact that he killed the victim. Robinson did in fact stipulate that he was the culprit in the killing. The only question left to be resolved was that of the degree of the homicide. This was set forth with great clarity in final summation of defense counsel. (R573) Left without an instruction as to intoxication, defense counsel was left only with his attempt to discredit Clinton Fields, Robinson's accomplice. As for issues to argue to the jury, that of intoxication was taken away completely by the trial court's ruling.

Furthermore, Appellant submits that premeditation was indeed an issue in the instant case. Appellant's statement reveals that the gun was fired during a struggle after Robinson

negligently brandished the gun. Even the state's case does not support the theory of a preconceived abduction and planned murder. The state's case supports the theory that the intent to kill the victim arose at the graveyard immediately before the victim's death. The instant case can be distinguished from the facts in Jacobs v. State, 396 So.2d 1113 (Fla. 1981), where the accomplices' testimony showed that the robbery was carried out from a preconceived plan and, until the shooting erupted, was successful. The evidence in Jacobs clearly showed that the defendant was capable of reflection at the time of the homicides and premeditation was thus proved. Appellant submits that the quantity of proof in this regard in the instant case is not so conclusive. The instruction on complete or partial intoxication was warranted by the evidence.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AT THE PENALTY PHASE WHERE THE STATE INJECTED NON-STATUTORY AGGRAVATING FACTORS.

Appellee states that there is nothing in the record to substantiate Appellant's claim that Johnny Robinson, a black man, was being tried by an all-white jury for the abduction, rape, robbery, and murder of a white woman. Defense counsel mentioned all three of these facts in argument presented in a side-bar discussion. (R788-789) If the state was going to dispute any of these facts, the time to do so certainly would seem to be at that point. Since the prosecutor did not dispute any of these claims, it seems that this Court could accept these facts at face value.

In dealing with Appellant's contention regarding the prosecutor's argument to the jury that Robinson showed no remorse, Appellee contends that the prosecutor was simply commenting on testimony that was not objected to during the penalty phase. Appellant points out that the testimony of Dr. Krop was presented primarily to establish certain mitigating circumstances. A large part of Dr. Krop's testimony dealt with a process by which Mr. Robinson's personality became warped as a result of his extremely difficult childhood. This resulted in a character disorder, namely anti-social tendencies. (R780) In this regard, the prosecutor explored that issue further on cross-examination.

Q. And you mentioned and touched upon persons such as Mr. Robinson that suffer from this have an indifference to the people who are his victims.

A. In many cases, yes.

Q. How about in Mr. Robinson's case.

A. Apparently, that has been the case in many of the victims or many of the individuals he deals with.

Q. Did he show any remorse to you in regard to Mrs. St. George's death?

A. Not really. I think he indicated that he was sorry that the incident occurred, both because of the victim and both because of himself but in terms of --

Q. Because of himself, because he was caught, do you mean?

A. Because of himself, partly because he was caught and partly because he did not see that as being totally characteristic that he would murder somebody. But again, he did not show what I would consider considerable remorse for the victim, no. (R780-781)

Appellant quotes from the record above in an attempt to show the context of the testimony to which Appellant did not object. The testimony goes more to establishing mitigating circumstances regarding Mr. Robinson's character disorders. As such, the testimony was admissible and tended to establish factors of mitigation.

The prosecutor utilized this testimony in an improper manner during closing argument. The prosecutor focused upon this portion of testimony to support a non-statutory aggravating circumstance:

One thing to know about Dr. Krop's testimony is the Defendant suffers from anti-social tendencies. He has a total indifference as to who he's hurt, as to killing Beverly St. George. He really doesn't care that much. He showed no remorse, according to Dr. Krop. (R821)

In denying Appellant's motion for mistrial, the trial court stated that the prosecutor could comment on the doctor's unobjectionable testimony. Defense counsel correctly pointed out that the state is restricted to argument as to statutory aggravating circumstances. (R822) This is a clear example of evidence that is admissible, but improper argument based upon that evidence is not permitted. An analogous situation would be where a capital defendant introduces evidence of his young age for purposes of mitigation. If the prosecutor argues that the defendant's young age could be viewed as an aggravating factor (defendant's young enough to serve twenty-five year minimum mandatory, get paroled, and commit further crimes), this Court would not hesitate to reverse. In mitigation, defense counsel decided to introduce testimony concerning Robinson's character disorders. This evidence was used by the state in an improper argument which resulted in a tainted jury recommendation for death.

CONCLUSION

Based upon the foregoing cases, authorities, and policies and those in his initial brief, Appellant respectfully requests that this Court grant the following relief:

As to Point I, vacate the judgments and sentences and remand for a new trial or, in the alternative, remand for an evidentiary hearing;

As to Points II through IV, vacate the judgments and sentences and remand for a new trial;

As to Point V, reduce Appellant's death sentence to a life sentence or , in the alternative, remand for a new penalty phase;

As to Point VI, vacate Appellant's three consecutive life sentences and remand for resentencing within the guidelines;

As to Point VII, reduce Appellant's death sentence to a life sentence; and

As to Point VIII, declare Florida's death penalty statute to be unconstitutional.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

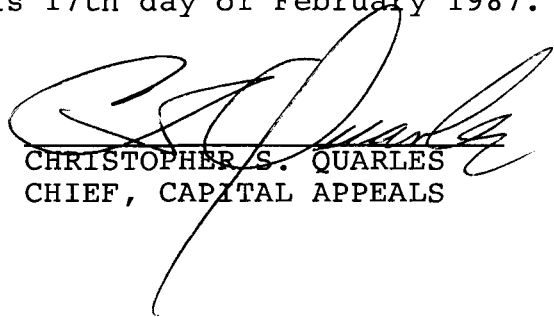


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th floor Daytona Beach, Fla. 32014, in his basket at the Fifth District Court of Appeal and mailed to Mr. Johnny Robinson, #102767, P.O. Box 747, Starke, Fla. 32091 on this 17th day of February 1987.



CHRISTOPHER S. QUARLES
CHIEF, CAPITAL APPEALS