

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 70,234

GEORGE MORRIS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

FILED
SID J. WHITE

APR 17 1989

CLERK, SUPREME COURT
By  Deputy Clerk

REPLY BRIEF OF APPELLANT

[On direct appeal from sentence of death imposed by the Circuit Court of the 17th Judicial Circuit, Patti Englander Henning, Judge]

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State v. DiGuillo,
491 So.2d 1129 (Fla. 1986) 4

STATEMENT OF CASE AND FACTS

The Appellant has presented a detailed history of the case and the facts, which, in fact, the accepted as its own statement thereon. No further expansion is necessary.

POINTS INVOLVED ON APPEAL

POINT ONE

WHETHER THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS APPELLANT'S VARIOUS STATEMENTS AND EITHER OF THEM OR ALLOWING OVER FURTHER IN-TRIAL OBJECTIONS SAID STATEMENTS TO BE PUT BEFORE THE JURY.

POINT TWO

WHETHER THE APPELLANT WAS DENIED A FAIR TRIAL AND BASIC DUE PROCESS WHEN ALLOWED TO TAKE THE WITNESS STAND AND CONFESS TO FELONY MURDER BY A FELONY NOT ASSERTED BY THE STATE.

POINT THREE

WHETHER THE EVIDENCE^y EITHER THEREAFTER OR PRIOR TO THE APPELLANT'S TESTIFYING IS SUFFICIENT TO SUSTAIN THE VERDICT RETURNED BY THE JURY.

POINT FOUR

WHETHER THE INDICTMENT SUFFICIENTLY APPRISED APPELLANT OF THE CHARGES AGAINST HIM TO SATISFY BASIC DUE PROCESS GUARANTEES.

POINT FIVE

WHETHER THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY AS SUCH WERE OBJECTED TO BY APPELLANT AS WELL AS IN THE VERDICT FORM PROVIDED BY THE JURY.

POINT SIX

WHETHER THE COURT ERRED IN IMPOSING THE DEATH PENALTY IN A CASE WHERE THE JURY, THE POLICE, THE PRE-SENTENCE INVESTIGATION AND NUMEROUS MEMBERS OF THE COMMUNITY HAVE RECOMMENDED LIFE IMPRISONMENT.

SUMMARY OF ARGUMENT

The arguments will briefly rebut or differentiate the position of the Appellee in the area of the admission of the entire statements of Appellant.

It will also address whether the Appellant ought have testified and confessed to a separate and distinct felony for which felony murder will lie.

Argument will also be addresses to the override of the life sentence recommended by the **jury**.

The Appellant will stand upon the arguments he has already advanced on issues **III, IV, and V**.

POINT ONE

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS APPELLANT'S VARIOUS STATEMENTS AND EITHER OF THEM OR BY ALLOWING, OVER FURTHER IN-TRIAL OBJECTIONS, SAID STATEMENTS TO BE PUT BEFORE THE JURY.

A. SUPPRESSION OF THE STATEMENTS [CONSTITUTIONAL GROUNDS]

The Appellant adopts the arguments heretofore advanced.

B. ERROR IN ADMISSION OF STATEMENTS, OVER OBJECTION, REGARDING CONTENTS THEREIN

The Appellant, both pre-trial and during trial, made objection to the admission of the taped statements of the Appellant due to the nature of the hearsay and other prejudicial matters contained therein (i.e., witnesses not called that heard child crying in the woods).

The State asserts that somehow the jury's determination of voluntariness allows in whatever may be contained in and on the taped statement. The Appellee cites to Donovan v. State, 417 So.2d 674 (Fla. 1982) and Correll v. State, 523 So.2d 562 (Fla. 1988), each of which case, in scope note, might contain language to support the quotes offered, but which cases are clearly inapposite factually. In fact, Correll, supra, probably supports the issues at bar. As the Correll, court noted, "hearsay is inadmissible in the absence of an applicable exception," and none exists at bar.

The harmless error rule, State v. DiGuillio, 491 So.2d 1129 (Fla. 1986), was not satisfied, nor can it be employed in that the jury heard the policeman say that witnesses were telling him the Appellant in essence was beating the child in the woods.

This uncalled witness or witnesses greatly assisted the State's case, yet the Appellant could neither confront nor cross examine them. This, under the facts, cannot be harmless error.

POINT TWO

APPELLANT WAS DENIED A FAIR TRIAL AND BASIC DUE PROCESS WHEN ALLOWED TO TAKE THE WITNESS STAND AND CONFESS TO FELONY MURDER BY A FELONY NOT ASSERTED BY THE STATE.

The issues presented in this point apparently cause the State no pause for concern as they blithely responded, inter alia, in their one-half page, that "Inasmuch as the record clearly discloses that Appellant voluntarily exercised his constitutional right to testify against his trial counsel's expressed advice, citing to R. **216;396.**"

The State apparently forgets that the defense counsel offered the drug-deal theory in opening. The Appellant, having read the two pages cited by Appellee to suggest that testimony was over counsel's advice, is hard pressed to find anything on page **216** and page **396** that "clearly" evidences what is suggested.

A lawyer must do more than merely give advice; he must apprise and advise the Defendant of the consequences.

It is suggested by Appellant that even the cold record bespeaks the surprise of defense counsel when informed that his defense, as the trial judge put it, just happens **to** be a confession to first-degree murder.

Due process of law as well as the essence of a fair trial was denied Appellant and reversal must result.

POINT THREE

THE EVIDENCE WAS INSUFFICIENT TO WARRANT THE
SUBMISSION OF THE MATTER TO THE JURY OR TO
SUSTAIN THE VERDICT.

Appellant relies on the arguments presented in his main
brief.

POINT FOUR

THE INDICTMENT FAILS TO COMPLY WITH DUE
PROCESS OF LAW IN LIGHT OF THE OCCURRENCE AT
TRIAL.

Appellant relies on the argument presented in his main
brief.

POINT FIVE

THE COURT ERRED IN ITS INSTRUCTIONS TO THE
JURY AS OBJECTED TO BY THE APPELLANT.

The Appellant again relies on the arguments presented
in his main brief.

POINT SIX

THE COURT ERRED IN OVERRIDING THE RECOMMENDED
LIFE SENTENCE AND IMPOSING THE DEATH SENTENCE
IN APPELLANT'S CASE.

The Appellant has fully briefed this issue, and in its reply, the State, for the most part, reprints the trial court's death order.

Since Appellant has addressed that in some detail, response will be made in a limited fashion to those certain arguments that literally beg response.

The State, in an effort to sustain the "override," authored the following: "This Court has upheld an override for the brutal murder of a child, Dobbert v. State, 328 So.2d 433 (fla. 1976), and in the name of consistency should do so here..." based on the trial judge's findings. To compare the case at bar to Dobbert is ludicrous; Dobbert was so offensive and so heinous that even those such as the undersigned, who oppose the death penalty, felt an exception was warranted and justified.

The Appellant in the case at bar falls under the Tedder standard. Most reasonable people, it is suggested, would agree that for George Morris, life imprisonment is more than appropriate.

The State, echoing the sentencing order of Judge Henning, recites that the jury's recommendation of life was induced by defense counsel's emotional penalty phase argument (State's Brief, page 25), and cites to Francis v. State, 473 So.2d 672 (Fla. 1985), a case involving a plea to the jury

shortly before Easter that evoked, apparently, every tenant of Christian thought save the Resurrection. Such was clearly not the case at bar. The argument presented by Appellant's counsel was not even really emotional. It merely stressed that George Morris was not an evil man and that he did not deserve to die.

Any emotion in the sentencing phase that might be classified as error originated with the trial judge, and need be corrected by reinstating the life sentence the jury recommended.

Belying the State's argument parenthetically, is the fact that numerous persons, as quoted in the pre-sentence investigation, who did not hear defense counsel's arguments at sentencing, also recommended life.

CONCLUSION

That Orders, Judgment and Sentence ought be REVERSED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to JOHN TIEDEMANN, ESQUIRE, Office of the Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 14th day of April 1989.

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