

IN THE SUPREME COURT OF FLORIDA

**FILED**  
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TONY LEON HAYES, )  
 )  
Appellant, )  
 )  
vs. )  
 )  
STATE OF FLORIDA, )  
 )  
Appellee. )  
\_\_\_\_\_ )

CASE NO. 75,040

APPEAL FROM THE CIRCUIT COURT  
IN AND FOR VOLUSIA COUNTY  
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

TONY LEON HAYES,                    )  
                                          )  
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                                          )  
vs.                                        )  
                                          )  
STATE OF FLORIDA,                    )  
                                          )  
                  Respondent.         )  
\_\_\_\_\_  
                                          )

CASE NO. 75,040

REPLY BRIEF OF APPELLANT

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF  
THE CONTENTION THAT THE TRIAL COURT  
ERRED IN ALLOWING THE STATE TO PRESENT  
EVIDENCE OF APPELLANT'S TESTIMONY FROM  
THE SUPPRESSION HEARING.

Appellee contends that this issue was not preserved for appellate review. Although defense counsel failed to cite Simmons v. United States, 390 U.S. 377 (1968), he clearly stated that he objected to "this testimony about something at a hearing. I don't think it's admissible. . . . I would object to this witness being allowed to testify to what he's heard the defendant say. . . . The statement was not offered to Greg Smith [the witness]. It was just said in the Courtroom." (R680-82) Defense counsel is clearly objecting on the basis that his own testimony at a suppression hearing was inadmissible at that point in the

trial. Contrary to the assistant attorney general's contention, this issue has clearly been preserved for review by this Court.

All of the cases cited by the state in an attempt to refute the argument set forth in the initial brief are clearly inapposite. Appellee attempts to rely on cases where the defendant testified during the trial. Appellant agrees that, if he had testified at trial, his testimony at the suppression hearing could have been used to impeach his trial testimony. However, Appellant did not testify at his trial. This fact is extremely important in this Court's consideration of this point and the inapplicable case law cited by the state. Greg Smith's testimony relating Appellant's testimony at the suppression hearing was clearly inadmissible during the state's case-in-chief.

Contrary to Appellee's assertion, this error is not harmless. The issue does deal with Appellant's guilt since it directly affects the voluntariness of Appellant's statement. Although the trial court had already made a preliminary finding that Hayes' statement was voluntary, that issue was still a matter yet to be determined by the jury. See, e.g., Palmes v. State, 397 So.2d 648 (Fla. 1981). As such, the error cannot be considered harmless in this case.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF  
THE CONTENTION THAT THE TRIAL COURT  
ERRED IN DENYING APPELLANT'S MOTION TO  
SUPPRESS HIS STATEMENTS TO DETECTIVE  
SMITH.

Appellee contends that Appellant was not in custody at the time of the interview. Although Detective Smith testified that Hayes was free to leave at any time, the inquiry is how a reasonable man in the suspect's position would have understood his situation. Roman v. State, 475 So.2d 1228, 1231 (Fla. 1985). This Court should remember that Hayes was of limited intelligence. In such a case, courts have taken a less objective view of custody when a more vulnerable class of suspects is involved. See, e.g., United States v. Berun-Perez, 812 F.2d 878 (9th Cir.) modified on other grounds, 830 F.2d 127 (9th Cir. 1987). In Dunaway v. New York, 442 U.S. 200 (1979), the United States Supreme Court held that bringing a suspect to the station house for questioning was tantamount to an arrest. Tony Hayes was reasonable in his belief that he was in custody at the time of the interview.

POINT IX

IN REPLY TO THE STATE AND IN SUPPORT OF  
THE CONTENTION THAT THE TRIAL COURT  
ERRED IN THE WEIGHING OF THE AGGRAVATING  
AND MITIGATING CIRCUMSTANCES.

Appellee defends the trial court's treatment of the mitigating evidence. Appellee appropriately points out this Court's recent opinion in Campbell v. State, 15 FLW S342 (Fla. June 14, 1990) as being applicable to this case. In Campbell, this Court clearly stated that the trial court "must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature." Campbell, 15 FLW at S344. This Court also stated, "Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight." Id.

The trial court in Hayes' case failed to comply with Campbell. The trial court specifically rejected a finding of the mental mitigator listed in Section 921.141(6)(f), Florida Statutes (1989). (R1315) The trial court wrote that, while the evidence indicated that Hayes was of lower than normal intelligence and may have been somewhat impaired, Hayes nevertheless understood the criminality of his conduct and had the ability to conform his conduct to the requirements of the law. (R1315) The only evidence dealing with this evidence is the testimony of Dr. Malcolm Graham. It was Dr. Graham's opinion that, within a reasonable degree of psychological probability,

Tony Hayes' ability to conform his conduct to the requirements of the law was definitely impaired. (R1096) This evidence was not refuted in any way by the state. Under this Court's holding in Campbell, the trial court clearly erred in its treatment of the un rebutted mitigating evidence presented by the defense. A proper weighing of the evidence should result in a life sentence for Tony Hayes.

CONCLUSION

Based on the cases, authorities, and policies cited herein and in the Initial Brief, Appellant requests that this Court grant the following relief:

As to Points I-VII, and XI-XII, reverse and remand for a new trial;

As to Points VIII-IX, remand for the imposition of a life sentence;

As to Point X, remand for the imposition of a life sentence or, in the alternative, a new penalty phase; and,

As to Point XIII, remand for the imposition of a life sentence, or in the alternative, declare Florida's Death Penalty Statute to be unconstitutional.

Respectfully submitted,

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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, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Tony Leon Hayes, #595233, P.O. Box 747, Starke, Fla. 32091 on this 5th day of September, 1990.

  
CHRISTOPHER S. QUARLES  
ASSISTANT PUBLIC DEFENDER