

IN THE SUPREME COURT OF FLORIDA

TROY MERCK, :
Appellant, :
vs. : Case No. 91,581
STATE OF FLORIDA, :
Appellee. :
_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
FLORIDA BAR NUMBER 0236365

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831

(941) 534-4200

ATTORNEYS FOR APPELLANT

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STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

PRELIMINARY STATEMENT

The state's brief will be referred to by the use of the symbol "S". Other references are as denoted in appellant's initial brief.

STATEMENT OF THE FACTS

The state's attempt to trash the credentials of Dr. Kathleen Heide is transparently misleading. The state writes:

Kathleen Heide, a criminologist licensed as a mental health counselor and who had appeared on Sally Jesse Raphael, Geraldo, and Maury (Vol. XVI, R996, 1018), stated on voir dire that she has a Bachelor's degree in psychology, did not have a Master's degree in psychology and was not a licensed psychologist and was not allowed by law to refer to herself as a psychologist and did not have a Ph.D. in psychology and was not allowed to call her report a psychological report or hold herself out as a licensed psychologist (Vol. XVI, R1023-1025). She was allowed to testify. While not holding herself out as a psychologist

(S13-14, emphasis in state's brief).

The state's implication is that she is, if not an out-and-out quack, at least patently unqualified to form a meaningful expert opinion.

Nobody -- not Dr. Heide herself nor trial counsel nor appellate counsel -- has ever tried to pass Dr. Heide off as a psychologist. She was tendered by the defense and accepted by the trial court as an expert in the areas of criminology, forensic evaluation, adolescent homicide, personality assessment, child abuse, and the dysfunctional family (16/1022,1028); fields of study in which she does have a Master's degree and a Ph.D. (16/997), as well as extensive post-doctoral work, and clinical experience, and teaching (at the university level) experience, and on which she has written

numerous books and scholarly articles. Dr. Heide's 49-page resume is contained in the record at 7/823; suffice it to say that her professional activities and accomplishments are so numerous that it is exhausting to read it. Her testimony regarding her background and experience, based upon which the trial court accepted her as an expert witness in the above fields, is in the trial transcript at 16/996-1028. The state can of course properly argue matters of weight, credibility, and (to the extent that it exists) conflicting testimony, but its misleading attack on Dr. Heide's credentials is inexcusable.

ARGUMENT

ISSUES I & II

THE TRIAL COURT ERRED IN FAILING TO FIND, WEIGH, OR EVALUATE AS A NON-STATUTORY MITIGATING FACTOR THE SUBSTANTIAL AND UNCONTROVERTED EVIDENCE OF APPELLANT'S LONG HISTORY OF ALCOHOL ABUSE.

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In light of the way the state has argued these issues, appellant will address them together in this reply brief. At the outset, appellant would note that both his long-term alcohol abuse (4/721), and his being under the influence of alcohol at the time

of the offense (4/719-20), were brought to the attention of the trial court as proffered nonstatutory mitigating factors. Moreover, the trial court in her sentencing order expressly recognized that the defense had asked the court to consider each of these as nonstatutory mitigating circumstances (4/772,773). Thus the state cannot justify the trial court's failure to do so by contending that the error is unpreserved.

The state acknowledges that it "has no quarrel with many of the decisions cited [in appellant's initial brief] and would not dispute that in a given case long term abuse of alcohol might be a mitigating circumstance, in an appropriate context. A proper mitigating circumstance is one that either helps to explain or to mitigate an accused's conduct or otherwise describes some quality or characteristic or talent of a defendant that argues for a sanction less than death" (S28-29).

First of all, what would be a more "appropriate context" for consideration of a history of alcohol abuse mitigator than a case involving a sudden homicide after a meaningless argument outside a bar at closing time, where nearly all the participants and witnesses had been drinking excessively? Appellant, who was still too young to legally buy a drink, had consumed at least (according to the state's witness Neil Thomas) five or six beers and a couple of shots of liquor. Neil -- who outweighed appellant by forty pounds -- claimed to have had the same amount to drink, and he felt "buzzed" or "fairly drunk". Based on this state witness' testimo-

ny, the chief toxicologist for the medical examiner's office estimated Neil's blood alcohol at .15 and appellant's at .21; the latter is consistent with a significant degree of impairment (14/752-57). Four witnesses with four different areas of expertise¹ agreed that appellant's blood alcohol level was high enough to cause significant intoxication and impairment. The state's psychologist, Dr. Merin, acknowledged that .21 "certainly suggests there is a high level of probable intoxication" (17/1223). Nevertheless, Dr. Merin (unlike Dr. Heide) did not think appellant was significantly impaired at the time of the offense because, as he put it:

You have to understand here is a man who had been drinking for many, many years. He had developed -- had to have developed a tolerance for it. So that if he drank that amount it's something that would have intoxicated someone else to a very significant extent, in my opinion, but would not have any significantly adverse effect on him. This is something that he just does all the time. So that his behavior would stem from who and what he was all about. All people who drink that amount of alcohol don't do what he is alleged to have done.

(17/1189).

In other words, the only piece of testimony which might rebut the statutory (impaired capacity) or nonstatutory (under the influence of alcohol at the time of the offense) mitigating circumstances arising from appellant's excessive alcohol consumption in the

¹ These are Dr. Merin (psychologist called by the state); Dr. Willey (pathologist called by the defense); Dr. Heide (criminologist called by the defense); and the toxicologist Ron Bell.

bar just prior to the homicide is Dr. Merin's assumption that -- as a result of his long history of excessive drinking -- this nineteen-year-old must have developed a tolerance.² Yet the state, in a Catch-22 maneuver, now appears to be arguing on appeal that there is no evidence that appellant has a long history of excessive drinking. (S28, 30-31).

The evidence shows otherwise. In addition to being raised in a drunken, violent environment, appellant was often given liquor by relatives or friends of relatives when he was a small boy. According to his older sister, if there was any liquor on the table or in the refrigerator, he would get it, or someone would give it to him. Appellant started to drink on a regular basis at about the age of eleven. By the time he was hanging out with Neil Thomas during the weeks leading up to the crime, the two of them were drinking heavily every day; it was commonplace for them to share a bottle of Jack or a case of beer. The state's expert, Dr. Merin, who (as did the defense's expert Dr. Heide) testified that appellant had been drinking heavily for many years, also mentioned that on the MMPI scale measuring one's potential for substance abuse and especially

² The testimony of witnesses where were themselves intoxicated or close to it that appellant appeared to walk and talk okay and could catch a set of keys does not negate that probability that he was intoxicated, in light of his estimated blood alcohol level and in light of the otherwise inexplicable nature of the crime. Contrast Banks v. State, 700 So. 2d 363, 366 (Fla. 1997) (cited at pages 37-38 of the state's brief).

alcohol abuse, appellant is "in the pathological range." See appellant's initial brief, p. 48-50.

Which is it? Either appellant, at the age of nineteen, had a severe alcohol problem of long duration, or else his excessive drinking in the bar (resulting in an estimated .21 blood alcohol level) just prior to the argument and stabbing in the parking lot impaired his ability to reason and to exercise control, or -- most likely -- both. In sentencing appellant to death for this mindless, alcohol-fueled homicide, the trial court reversibly erred in failing to weigh either of these extremely relevant factors in mitigation.

ISSUE III

THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE IN LIGHT OF THE CIRCUMSTANCES OF THE HOMICIDE, AND IN LIGHT OF APPELLANT'S YOUTH (AGE 19) AND IMMATURITY, HIS DEPRIVED BACKGROUND, THE EXTREME PHYSICAL AND PSYCHOLOGICAL ABUSE AND NEGLECT HE SUFFERED AS A CHILD, HIS LONG HISTORY OF ALCOHOL ABUSE FROM THE AGE OF ELEVEN, HIS EXCESSIVE DRINKING ON THE NIGHT OF THE CRIME, AND OTHER MITIGATING FACTORS.

Appellant will rely on the evidence, argument, and case comparisons in his initial brief to show that this was not one of the most aggravated, and certainly not one of the least mitigated, of first-degree murders, and that life imprisonment rather than death is the appropriate sentence.

The state seeks to undermine the principle of proportionality review by suggesting that "[t]he frequently-cited dictum that the death penalty has been `reserved for only the most aggravated and least mitigated' of first degree murders . . . represents a misapplication" of the precedent of State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973) (S43,44-46). The state's implication that this Court's proportionality review usurps the function of the trial judge and jury, or the legislature, is wrong. The jurors typically have seen one first degree murder case, and the trial judge a limited number, out of his or her own circuit. Only this Court is in a position to compare the hundreds of capital cases, from all regions of Florida, to determine which murders are so set apart from the norm to require the ultimate penalty, and in which ones can justice be satisfied by a sentence of life imprisonment. That determination constitutes a substantial part of this Court's death penalty jurisprudence over the past three decades. As this court re-emphasized in its July 8, 1999 decisions of Cooper v. State, 739 So. 2d 82, 85 (Fla. 1999) and Almeida v. State, ___So. 2d ___ (Fla. 1999)[24 FLW S336,339]:

The Court in State v. Dixon, 283 So. 2d 1 (Fla. 1973), held that the death penalty is reserved for only the most indefensible of crimes:

Review of a sentence of death by this Court . . . is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again

presents evidence of legislative intent to extract the penalty of death for only the most aggravated, and most indefensible of crimes.

Id. at 8. We later explained: "Our law reserves the death penalty only for the most aggravated and least mitigated murders." Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993). Thus, our inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders.

(Emphasis in opinions).

In the instant case, considering the totality of the circumstances surrounding the commission of the crime, and the combination of mitigating factors including appellant's youth (age 19); his immaturity (uncontroverted testimony that his personality development was that of a 10, 12, or at most 14 year old); the extreme physical and psychological abuse inflicted on him during his childhood; his history of emotional instability (documented as early as age seven); his learning disability; his history of alcohol abuse (from the age of eleven or even earlier); and the fact that he was under the influence at the time of the homicide (estimated blood alcohol level of .21), life imprisonment rather than death is the appropriate penalty.

ISSUE IV

THE TRIAL COURT'S FINDING OF, AND
INSTRUCTION TO THE JURY ON, THE
AGGRAVATING CIRCUMSTANCE THAT THE
CRIME WAS COMMITTED WHILE APPELLANT

WAS ON FELONY PROBATION VIOLATED THE
STATE AND FEDERAL CONSTITUTIONAL
PROHIBITION AGAINST EX POST FACTO
LAWS.

The state, quoting selectively and deceptively from Peek v. State, 395 So. 2d 492, 499 (Fla. 1980), argues that there was no ex post facto violation because "Merck satisfied the under sentence of imprisonment aggravator under the exception noted in Peek, supra." The relevant paragraph in Peek contains five sentences, the first three of which are quoted by the state, as follows:

Probation is a sentence alternative but is not generally considered to be a sentence of imprisonment. An exception arises, however, if the order of probation includes as a condition a term of incarceration and the capital felony is committed while the defendant is or should be incarcerated. We find that the phrase "person under sentence of imprisonment" includes (a) persons incarcerated under a sentence for a specific or indeterminate term of years, (b) persons incarcerated under an order of probation, (c) persons under either (a) or (b) who have escaped from incarceration, and (d) persons who are under sentence for a specific or indeterminate term of years and who have been placed on parole.

(S68-69, emphasis in state's brief).

To borrow a phrase from Paul Harvey, here is the rest of the story -- the next two sentences which the state leaves out:

Person who are under an order of probation and are not at the time of the commission of the capital offense incarcerated or escapees from incarceration do not fall within the phrase "person under sentence of imprisonment" as set forth in section 921.141(5)(a). Consequently, this aggravating circumstance was improperly found in the instant case.

Peek v. State, supra, 395 So. 2d at 499.

As the state's brief recognizes, appellant had a split sentence, and had been released from prison after serving the incarcerative portion. Since appellant, like Peek, was neither incarcerated nor an escapee at the time of the offense, the exception noted in Peek does not apply.

Regarding the merits of the ex post facto issue, the state's suggestion that the legislature's 1996 adoption of felony probation as an aggravating circumstance is "merely a refinement" (S71) in the law is wrong. The inclusion of probationary status within the (5)(a) aggravator was a 180-degree change in the law. From the early 1980s until May 30, 1996, the law of this state was absolutely clear that this aggravator was not applicable to persons on probation. Peek v. State, 395 So. 2d 492, 499 (Fla. 1981); Ferguson v. State, 417 So. 2d 631, 636 (Fla. 1982); Bolender v. State, 422 So. 2d 833, 837-38 (Fla. 1982). Unlike the situation in Trotter,³ there was never any ambiguity, and no swift legislative response to "clarify its intent." The legislature simply decided to change the existing substantive law, effective May 30, 1996. The legislature, of course, can do that. What the state cannot do is apply the new law retroactively to offenses committed before its effective date. That is the essence of the state and federal constitutional protection against ex post facto laws.

³ Trotter v. State, 576 So. 2d 691 (Fla. 1990) [Trotter I] and Trotter v. State, 690 So. 2d 1234 (Fla. 1996) [Trotter II].

The state's obligatory "harmless error" argument is not only refuted by the substantial mitigating evidence in this record, it is also refuted by the state's own argument on the proportionality issue (S51, n.5), where it urges that three aggravating circumstances make a much stronger case for a death sentence than two. Clearly the state cannot meet its burden of showing beyond a reasonable doubt that consideration of the legally invalid third aggravator could not have contributed to the jury's recommendation of death and the trial judge's decision to impose death, especially since the trial judge expressly accorded great weight to the felony probation aggravating factor (4/763).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, and the Troy Merck, Appellant, Inmate No. 118167, Union Correctional Institution, P. O. Box 221, Raiford, FL 32083, on this _____ day of December, 1999.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number 0236365
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

SLB/ddv