

IN THE SUPREME COURT OF FLORIDA

FRED ANDERSON,)
)
 Appellant,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

CASE NUMBER SC01-336

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LAKE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ARGUMENTS

POINT I

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OR MORAL OR LEGAL JUSTIFICATION WHERE THE FINDING IS UNSUPPORTED BY THE EVIDENCE.

The record in this case is inconclusive that Fred Anderson planned and calculated the killing of Heather Young well in advance of the shooting. The totality of the evidence indicates that the shooting was quickly accomplished in seconds and was probably the product of panic. In the state's answer brief, there is

reference to Anderson's extensive planning of the bank robbery. The appellant conceded that the evidence was overwhelming that Fred Anderson had planned the bank robbery for two days. The actions in furtherance of planning the bank robbery do not mean there was a careful plan or prearranged design to kill. See Rogers v. State, 511 So.2d 526 (Fla. 1987)

The trial court and state emphasized that Anderson entered the bank with two guns to support heightened premeditation. This ignores the uncontroverted evidence that Anderson did not know whether the guns were loaded, nor did he know how to load the guns. Moreover, Anderson had no previous experience with guns, nor history of violence. By his own account, he had no intention of hurting anyone.

The state relies upon Card v. State, 803 So.2d 613 (Fla. 2001) and Farina v. State, 801 So.2d 44, 54 (Fla. 2001) to support their appellate argument. Both of these cases are distinguishable from the instant case. In Card the relevant facts were as follows:

On the afternoon of June 3, 1981, the Panama City Western Union office was robbed of approximately \$1,100. Blood was found in the office and the clerk, Janis Franklin was missing. The following day, Mrs. Franklin's body was discovered beside a dirt road in a secluded area approximately eight miles from the Western Union office. Her blouse was torn, her fingers severely

cut to the point of being almost severed and her throat had been cut.

As early as 6:30 on the morning of June 3, 1981, the appellant telephoned an acquaintance, Vicky Elrod, in Pensacola, Florida, and told her that he might be coming to see her to repay the \$50 or \$60 he owed her. At approximately 9:30 that night Vicky Elrod met with the appellant. He took out a stack of twenty and one-hundred dollar bills and she asked if he had robbed a 7 Eleven store. He told her that he had robbed a Western Union station and killed the lady who worked there. He described scuffling with the victim, tearing her blouse and cutting her with his knife. He said he then took her in his car to a wooded area and but her throat saying, "Die, die, die." Several days after their meeting, Vicky Elrod went to the police with this information. The appellant was then arrested.

See Card v. State, 453 So.2d 17, 18-19 (Fla. 1984) In the instant case, Anderson denied any premeditated plan to kill anyone, and has no history of violence or use of guns. By contrast, in Card there was a confession to Vicky Elrod that Card cut the victim's throat saying "Die, die, die." Moreover, Card took his victim from the scene with the intent of murdering the victim. By contrast, in the instant case Anderson shot his victims after panicking when they began to scream.

In Farina this court relied upon the comment by Anthony Farina that is was "[Jeffrey's] call" showed intent to carry out a prior plan to kill. In the instant case, Anderson denied any premeditated plan to kill anyone, and has no history of

violence or use of guns.

This was a shooting that happened after a robber panicked. This type of homicide does not qualify as cold, calculated, and premeditated without any pretense of moral or legal justification. See e.g., Crump v. State, 622 So.2d 963, 972 (Fla. 1993); Mitchell v. State, 527 So.2d 179 (Fla. 1988); and Jackson v. State, 648 So.2d 85 (Fla. 1994). In the penalty phase, witness after witness testified that Fred Anderson was a quite, non-violent man dedicated to his family and his church. Moreover, Anderson had never used a gun before, and did not even know whether the guns were loaded or knew how to load guns. This should eliminate the application of this aggravating factor.

This Court has rejected this particular aggravating factor in other cases where the prof was much greater than in the instant case. See e.g., Barwick v. State, 660 So.2d 685, 696 (Fla. 1995) (defendant selected his victim in a calculated manner and armed himself but only planned to rape, rob, and burglarize - -not kill); Douglas v. State, 575 So.2d 165 (Fla. 1991) (following prison release, defendant kidnapped girlfriend and her new husband at gunpoint, let them to a remote location, forced them to have sex at gunpoint [like a last meal], then shattered the man's skull with the stock of the rifle and fired several shots into his head); Irizarry v. State, 497 So.2d 822 (Fla. 1986) (ex-wife killed and her new lover critically

injured in machete attack by defendant who had a prearranged alibi¹).

The state failed to meet its burden of proving this circumstance beyond a reasonable doubt. The State failed to show **any** evidence of a calculated plan to kill. The State clearly failed to prove that the killing was the product of cool and calm reflection. The shooting was accomplished in a matter of seconds, not minutes. At the very least, he acted in a panic. Accordingly, this aggravating circumstance should be struck, the death sentences vacated and the matter remanded for resentencing.

¹ This Court's opinion did not directly address whether the aggravating factors were improperly found; it simply reversed the death sentence as disproportionate under the circumstances.

POINT II

IN REPLY AND IN SUPPORT THAT THE
TRIAL COURT ERRED IN FINDING THAT
THE MURDER WAS COMMITTED FOR
PECUNIARY GAIN.

In order for this Court to uphold this aggravating factor there must be substantial competent evidence that financial gain was the reason for the killing. The State as in Point I, argues that the fact that there was a preexisting plan to rob a bank, therefore, the integral step in the robbery was the murder of Heather Young.

The trial judge found the existence of this aggravating circumstance because of Anderson's desire to obtain funds to repay his restitution. The killing of Heather Young was not an integral step in accomplishing this goal. The twllers had fully cooperated with Anderson's demands and Anderson already had the money out of the vault. Once Anderson had the bank security tape that had recorded his image he would have completed the crime, and no one would have been hurt.

The murder occurred after Anderson panicked during a confrontation with Ms. Scott. Therefore, the murder was not an integral part of the robbery. Since the evidence in this case fails to show beyond a reasonable doubt that Anderson committed the murder to improve his own financial gain, the pecuniary gain aggravating circumstance must be stricken, the death sentence vacated, and the

matter remanded for resentencing with a new penalty proceeding.

POINT III

IN REPLY AND IN SUPPORT THAT UNDER FLORIDA LAW, THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THIS CASE.

The trial court imposed a death sentence here after finding four statutory aggravating factors. As previously set forth in Point I and Point II, the findings of cold, calculated and premeditated murder and pecuniary gain were improper both legally and factually. Only two statutory aggravating factors may properly be said to have been proven beyond a reasonable doubt, that being that Anderson was under confinement for the third degree felony of grand theft which the trial court gave little weight and the contemporaneous violent felony of attempted murder of Miss Scott (great weight).

The state relied upon both Card v. State, 803 So.2d 613 (Fla. 2001) and Farina v. State, 801 So.2d 44, 54 (Fla. 2001) to support their appellate argument. For the reasons set out in Point I, both Card and Farina are factually distinguishable from the instant case. The trial court improperly found two aggravating circumstances, gave great weight and little weight to the two aggravating circumstances, while they gave substantial weight and moderate weight to several non-statutory mitigating circumstances. Comparison of the facts of this case to

those of the preceding cases shows that the death penalty here is disproportionate because other similarly culpable defendants have been sentenced to life imprisonment. Accordingly, the death sentence should be reversed and the matter remanded for imposition of a life sentence.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to vacate Fred Anderson's convictions and remand for a new trial as to Points VI, VII, and VIII. As for Points I, II, III, IV, V and IX vacate his death sentence and remand for the imposition of a sentence of life in prison without possibility of parole.

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, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Fred Anderson, #218693, Florida State Prison, 7819 N.W. 228th St., Raiford, FL 32026, this 26th day of April, 2002.

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

GEORGE D.E. BURDEN
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