IN THE SUPREME COURT OF FLORIDA

RAYMOND STONE,

Appellant,

vs. Case No. 63,638

STATE OF FLORIDA,

Appellee.

On Appeal From Denial of Motion To Vacate By The Circuit Court of The Eighth Judicial Circuit, In And For Union County, Florida.

INITIAL BRIEF OF APPELLANT

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Issue Presented For Review

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DISMISSING THE MOTION TO VACATE AS A MATTER OF LAW.

TABLE OF AUTHORITIES

Preliminary Statement

This is an appeal from summary denial of a Motion to Vacate in a death case.

Raymond Stone, the defendant, will be referred to as Stone or the Appellant. The State will be referred to as the State or as the Appellee.

"R" refers to the Record on Appeal of the trial.

"T" refers to the transcript of the guilt phase of the trial. (July 8-11, 1975).

"TP" refers to the transcript of the penalty phase of the trial. (July 18, 1975).

"TS" refers to the transcript of the sentencing hearing. (October 1, 1975).

"RMV" refers to the Record of the Motion to Vacate.

Statement of the Case

Raymond Stone was convicted of First Degree Murder on July 11, 1975, in the Circuit Court, Eighth Judicial Circuit, Union County, Florida, The Honorable John J. Crews presiding. The advisory sentencing proceeding was held July 18, 1975. The jury recommended a death sentence. Argument of counsel to the court was held on October 1, 1975, after which Stone was sentenced to death.

The conviction and sentence were upheld on direct appeal. Stone v. State, 378 So.2d 765 (Fla. 1980).

A Petition for Writ of Certiorari was filed in the Supreme Court of the United States. The petition was denied. Stone v. Florida, 449 U.S. 986 (1980).

Executive clemency proceedings were commenced, with the clemency hearing held February 22, 1983. There has been no decision rendered on the issue of clemency.

A Motion to Vacate Conviction and Sentence pursuant to Fla. R. Crim. P. 3.850 was filed on February 22, 1983. The motion was denied without a hearing on March 2, 1983, by the Honorable R.A. Green, Jr.

Notice of Appeal was filed March 28, 1983.

Statement of Facts

The facts relevant to each claim of the Motion to Vacate are detailed in the Motion to Vacate. The complete facts of the trial are detailed in the brief on direct appeal. A summary follows.

Mrs. Jackqueline J. Smith failed to return home from work on or about August 23, 1974. Raymond Stone, an employee of the Smiths who lived in their residence, disappeared the same night. Stone was taken into custody in Missouri after a traffic accident on August 31, 1974. A body, alleged to be that of Mrs. Smith, was found in the Santa Fe River near the Alachua - Union County line on September 1, 1974. Stone was returned to Florida and questioned over several days. After a polygraph examination, he implicated himself in Mrs. Smith's death and led law enforcement officials to certain physical items.

A Motion to Suppress the confession and the physical evidence was denied. Stone was brought to trial, the confession and evidence were introduced, and Stone was convicted of first degree murder on July 11, 1975.

Penalty phase before the jury was held July 18, 1975. The State introduced evidence of a prior conviction for robbery, a prior conviction for sodomy, and a "retake order" entered after the sodomy conviction had been vacated and then reinstated. Defense evidence was the testimony of Raymond Stone. The jury recommended death.

A sentencing hearing involving argument of counsel to the court was held October 1, 1975. Stone was sentenced to death at the conclusion of that hearing.

ARGUMENT

THE COURT BELOW ERRED IN SUMMARILY DISMISSING THE MOTION TO VACATE AS A MATTER OF LAW.

The Motion to Vacate Conviction and Sentence pursuant to Fla. R. Crim. P. 3.850 presented for the court's consideration four major issues involving substantial claims of constitutional deprivation at both the guilt and penalty phases of Raymond Stone's trial. Specific factual details and brief notations of relevant law were given in support of each claim. The trial court rejected all of the claims as a matter of law without conducting an evidentiary hearing or permitting argument of counsel.

A carefully delineated procedure has been established for consideration of motions pursuant to Rule 3.850. State v. Weeks, 166 So.2d 892 (Fla. 1964). Under this procedure, the trial court must initially consider the motion to determine if it sets forth allegations sufficient to constitute a legal basis for relief. If the motion on its face states grounds for relief, the trial court must then look at the files and records in the case to ascertain whether they conclusively reveal that the movant is entitled to no relief. In making this determination the court may not look to matters outside the official court records. The court below was in error to deny the Motion summarily.

Issues One, Three and Four the court rejected because they had been determined on direct appeal or other recent death penalty cases. The court stated that the motion could be resolved without an evidentiary hearing. (RMV 48). Stone maintains that a fair determination of his claims requires a hearing and the taking of evidence. The errors alleged go to the constitutionality of his conviction and death sentence. They are fundamental errors which may be reviewed at any time. Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Flowers v. State, 351 So.2d 387 (Fla. 1st DCA 1977); O'Neal v. State, 308 So.2d 569 (Fla. 2nd DCA 1975); French v. State, 161 So.2d 879 (Fla. 1st DCA 1964). Stone asks this court to reconsider these issues in light of subsequent relevant caselaw. See, e.g., Godfrey v. Georgia, 446 U.S. 420 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Goode v. Wainwright, _____ F.2d _____, (11th Cir. 1983); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982); Henry v. Wainwright, 661 F.2d 56 (5th Cir. Unit B 1981), adhered to on remand 686 F.2d 311 (5th Cir. Unit B 1982) and Washington v. Watkins, 655 F.2d 1346 (5th Cir. Unit A 1981).

As to Issue Two, relating to ineffective assistance of counsel, the trial court referred to a gratuitous comment of this Court in Stone v. State, 378 So.2d 765, 773 (Fla. 1979), to support its theory that this Court had reviewed the issue of counsel's ineffectiveness while considering the direct appeal. In

fact, counsel's performance was not at issue on direct appeal, nor could it have been.

At the penalty phase of his trial, Raymond Stone was the only witness who testified. As detailed in Paragraph 14 of the Motion, specifically at RMV 5-7, a taped confession by Stone had been introduced during the guilt phase of the trial. Without the confession, there was no evidence to connect Stone to the death of Jackqueline Smith. (T 900) The jury would convict Stone if it believed the confession. In order to discredit the confession, Stone's trial counsel had put on several witnesses who testified about Stone's terrible reputation for truth and veracity (R 875, 882). Counsel argued in closing that his client was "someone with a deluded mind that can't seem to grasp at the truth, that makes up stories." (T 943)

After Stone was characterized as a habitual liar by his own attorney and found guilty of first degree murder, he was then used as the only witness to persuade the jury that he was deserving of mercy. He recounted an incredible history of institutionalization - a history that has now been verified through investigation in preparation for Executive Clemency*- but

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*The court below incorrectly noted that Executive Clemency had been denied. (RMV 48) There has been no decision from the Clemency Board.

which in all likelihood was not believed by the jury. Extensive records and affidavits were attached to the Motion to Vacate as Appendix A. The truth is far worse than Raymond Stone described it to the jury. The investigation done for the clemency hearing should have been done before the penalty phase. Had the jury been given the information - all of which was available in 1975 - they may well have recommended a life sentence which the court would have been bound to follow absent clear and convincing evidence that the jury's recommendation was in error. Spaziano v. State, ___ So.2d __, 1983 F.L.W., S.C.O. 178, May 27, 1983; Tedder v. State, 322 So.2d 908 (Fla. 1975).

After the jury recommended a death sentence counsel received and submitted to the court some psychiatric records that told part of the tale of Stone's unfortunate history of child abuse and institutionalization. Those reports were not made part of the record on direct appeal. Not until the trial court responded to this Court's order pursuant to Gardner v. Florida, 430 U.S.349 (1977), and attached the reports were they made a part of the record in this Court. Appellate counsel then filed a motion for leave to file a supplemental brief to address the matters contained in the reports. The motion was granted and a supplemental brief was filed urging, among other things, that the psychiatric evidence should be put before the jury, citing Messer v. State, 330 So.2d 137 (Fla. 1976) and Miller v. State, 332 So.2d 65 (Fla. 1976). This Court distinguished the procedural

history of those two cases to note that while in Messer and Miller the evidence had been kept from the jury by evidentiary rulings, in Stone, the information had not been received until after the penalty phase. The court then stated

> Neither the judge nor defense counsel could be faulted for the absence of the reports at the jury phase of the sentence hearing.
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> Stone, 378 So.2d at 773.

On the record then before the court, that statement seemed correct. But, in fact, counsel could - and should - be faulted for the absence of the reports because he did not even request them until after the penalty phase had been concluded and the jury had recommended death. These and other facts are matters outside the record as it now exists and Stone should be given an opportunity to prove his allegations.

The matter of inadequacy of counsel is not one which can be raised on direct appeal. State v. Barber, 301 So.2d 7 (Fla. 1974). See also Manker v. State, 429 So.2d 373 (Fla. 3d DCA 1983); Valero v. State, 393 So.2d 1197 (Fla. 3d DCA 1981). Indeed that issue was raised on direct appeal in another capital case involving adequacy of representation at penalty phase. Gibson v. State, 351 So.2d 948 (Fla. 1977). This Court cited Barber and held that, except where the error is fundamental, the appellate court may not review questions that were not presented first to the trial court. Gibson, 351 So.2d at 950. Gibson said that the

alleged ineffectiveness must have reduced the trial to a mockery or a sham. Gibson 351 So.2d at 950.

The Florida standard for effectiveness of counsel is now that enunciated in Knight v. State, 394 So.2d 997 (Fla. 1981):

First, the specific omission or overt act upon which the claim is based must be detailed in the appropriate pleading.

Second, the Defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. The Court recognized that death penalty cases are different and that, consequently, the performance of counsel must be judged in light of these circumstances.

Third, the Defendant has the burden to show that the alleged deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the Defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings.

Fourth, if a defendant shows a substantial deficiency and presents a prima facie case of prejudice, the State can rebut the assertions by showing beyond a reasonable doubt that there was no prejudice in fact. The oppportunity to rebut applies even if a constitutional violation has been established.

This Court ruled subsequently in Washington v. State, 397 So.2d 285 (Fla. 1981), that the standards adopted in Knight are

to be applied in assessing whether the claims of ineffective counsel warrant an evidentiary hearing. The pleadings must meet the Knight criteria to make a prima facie showing of substantial deficiency or possible prejudice. Washington v. State, 397 So.2d at 287.

Because the Motion to Vacate in this case meets the Knight standards, the trial court erred in dismissing the motion as a matter of law without conducting an evidentiary hearing. Stone is entitled to relief on the face of this Motion to Vacate, or at the least, to an evidentiary hearing in which to prove his claims.

The record in this case does not show conclusively that Stone is entitled to no relief. The record does not refute the allegations made in the Motion to Vacate for the allegations concern matters that are not now a matter of record. These grounds are appropriate bases for collateral attack. LeDuc v. State, 415 So.2d 721 (Fla. 1982); Meeks v. State, 382 So.2d 673 (Fla. 1980); Henry v. State, 377 So.2d 692 (Fla. 1979).

When no evidentiary hearing is held, the court must attach to its order of denial the portions of the record which show conclusively that the petitioner is entitled to no relief. Offord v. State, 427 So.2d 1080 (Fla. 2d DCA 1983); Jones v. State, 384 So.2d 736 (Fla. 4th DCA 1980).

The court below did not evaluate Stone's claim of ineffective assistance of counsel because it believed that the

issue had been resolved on direct appeal. Since Stone's trial, a different judge has been assigned to Union County. Without reviewing the entire record and conducting an evidentiary hearing, Stone's claim cannot be evaluated. Trial counsel had serious deficiences in several areas. As alleged in detail in the Motion to Vacate, Paragraph 14 (RMV 5-26), counsel failed to investigate pre-trial, failed to request a change of venue, failed to conduct adequate Witherspoon inquiry, failed to question jurors adequately on their impartiality, failed to make appropriate objections, and totally failed to investigate for penalty phase. Stone has alleged that there are matters outside the record which support his claim. As stated by the Fifth Circuit Court of Appeals in Friedman v. United States, 588 F.2d 1010 (5th Cir. 1979), the court, judging from the record only, may overlook failures of trial counsel before trial which overshadow his courtroom performance. The Friedman court, for that reason, remanded for an evidentiary hearing.

The trial court erred in summarily dismissing the Motion to Vacate, ruling that as a matter of law Stone is entitled to no relief. There was strong mitigating evidence, both statutory and non-statutory, which counsel should have presented at penalty phase. This evidence is detailed in Appendix A of the Motion to Vacate. Counsel's failure to investigate and to present this evidence rendered him ineffective. There was no strategic reason for not introducing the evidence, for indeed, no choice was made.

There was no investigation done upon which a strategic decision could be based.

In Holmes v. State, 429 So.2d 297 (Fla. 1983), this Court ruled that Holmes had been denied effective assistance of counsel at penalty phase where counsel had failed to present available evidence of his mental and emotional condition and had failed to attack the applicability of several aggravating circumstances. In Holmes, psychiatric reports were received after the sentencing hearing was held, and it was noted that counsel made no attempt to re-open the proceeding to present the reports or the testimony of witnesses. Holmes, 429 So.2d at 300. Stone's counsel did not even request background reports or other evidence until the jury had given its recommendation and he did not seek to have the information brought to the attention of the jury.

Whether by his own neglect or by operation of law, trial counsel was ineffective. For example, there was strong evidence relating to statutory mitigating circumstances that was not investigated and presented to the jury. There was also evidence that would have proved circumstances not found in the statute - such as extreme child abuse and poverty - which was not presented. Counsel has a duty to investigate matters for penalty phase and to present such evidence from an informed strategic vantage point. Washington v. Strickland, 693 F.2d 1243 (11th Cir. 1982), en banc, cert. granted _____U.S._____ (1983), 51 U.S.L.W.

3871, Case Number 82-1554; Beaver v. Balkcom, 636 F.2d 114 (5th Cir. Unit B 1981).

Counsel's failure to present statutory mitigating evidence renders him ineffective because of his own actions; the failure to present non-statutory evidence may have occurred by operation of law.* In that case, the statute itself, as applied, has denied Stone his right to reliable non-arbitrary determination of penalty and has denied his rights guaranteed by the Sixth, Eighth and Fourteenth Amendments. [See Paragraph 15A, (RMV 27) and Paragraph 16C (RMV 36-39)]. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976).

By its wording, Section 921.141, Florida Statutes, appears to limit the consideration of mitigating circumstances to those enumerated in the statute. In discussing the advisory sentence by the jury, the statute explains that the jury must determine "whether sufficient mitigating circumstances exist as enumerated in subsection (7)."** Section 921.141 (2)(b), Florida Statutes

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* For example, at the sentencing hearing, counsel, referring to the psychiatric records which he obtained after the penalty hearing, said, "I seriously wonder under the Statute which allows aggravating, mitigating circumstances whether it was proper for it to go to the jury." (TS 8)

** Should read (6).

(1973). The statute requires the trial court in its written findings in support of a death sentence to show "that there are insufficient mitigating circumstances, as enumerated in subsection (7),"* to outweigh the aggravating circumstances. The roster of aggravating circumstances is "limited to the following. . . ." Mitigating circumstances "shall be the following. . . " Section 921.141 (5) and (6). Thus, the wording of the statute would lead counsel and the court to believe that the legislature intended a limited list of both aggravating and mitigating circumstances in order properly to channel the sentencer's discretion as required by Furman v. Georgia, 408 U.S. 238 (1972).

In its first post-Furman decision this Court discussed the legislative intent to "provid[e] a system whereby the possible aggravating and mitigating circumstances are defined." State v. Dixon, 283 So.2d 1,7 (Fla. 1973).

> The most important safeguard presented in Fla. Stat. Section 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed.
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> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances

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* Should read (6).

> provided in Fla. Stat. Section 921.141(7), F.S.A.
>
> Dixon, 283 So.2d at 8-9.

The Dixon court discussed each of the circumstances enumerated in the statute, and no others. "The first mitigating circumstance. . . " is lack of significant history of criminal activity." "Finally," the age of the defendant may be considered. Dixon, 283 So.2d at 9-10.

Subsequent to Stone's trial but while his appeal was pending, this Court decided Cooper v. State, 336 So.2d 1133 (Fla. 1976), and stated explicitly that the statutory mitigating circumstances were exclusive.

Cooper had proffered testimony during penalty phase about his employment, the victim's reputation for violence, and Cooper's attempts to avoid the victim on prior occasions. The evidence was excluded as irrelevant. This Court affirmed:

> We held in State v. Dixon that the rules of evidence are to be relaxed in the sentencing hearing, but that evidence bearing no relevance to the issues was to be excluded. The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia, 408 U.S. 238 , 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

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> As to proffered testimony concerning Cooper's prior employment, it is argued that this evidence would tend to show that Cooper was not beyond rehabilitation. Obviously, an ability to perform gainful work is generally a prerequisite to the reformation of a criminal life, but an equally valid fact of life is that employment is not a guarantee that one will be law-abiding. Cooper has shown that by his conduct here. In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty for "the most aggravated and unmitigated of serious crimes," and we are not free to expand the list.
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> Cooper, 336 So.2d at 1339, footnotes omitted, emphasis added.

The Supreme Court of the United States in Lockett v. Ohio, 438 U.S. 586 (1978), reaffirmed in Eddings v. Oklahoma, 455 U.S. 104 (1982), has required that the sentencer not be precluded from considering in mitigation any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

The discrepancy between Cooper and the Constitutional mandate of Lockett was raised in this Court in Songer v. State, 365 So.2d 696 (Fla. 1978). This Court on rehearing said that Cooper was "not apropos [sic] to the problems addressed in Lockett," and that "the list of mitigating factors is not exhaustive." Songer, 365 So.2d at 700.

This Court has recently implied, however, that Lockett was not the law of Florida at the time of Stone's trial. In a case alleging counsel's ineffectiveness for failure to present evidence in mitigation - some relevant to circumstances not listed in the statute - the Court rejected the claim because "[i]t presupposes that counsel was expected to predict the decision in Lockett v. Ohio." Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982).

Here, counsel failed to investigate and present any mitigating evidence, other than Stone's testimony, when such evidence was available. Stone has been denied his rights guaranteed by the Sixth, Eighth and Fourteenth Amendments.

The trial court erred in summarily dismissing the Motion to Vacate. Stone's claims involve fundamental errors which may be corrected at any time, even though previously decided adversely by the appellate court. Flowers v. State, 351 So.2d 387 (Fla. 1st DCA 1977). The issue of counsel's ineffectiveness was not raised on direct appeal, nor could it have been. The Motion to Vacate should be granted.

CONCLUSION

For the reasons discussed above, this court should reverse the decision of the trial court and grant the Motion to Vacate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jim Smith, Esquire, Office of the Attorney General, Suite 1501, The Capitol, Tallahassee, Florida, 32301, this 20th day of June, 1983.

Respectfully submitted,

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