IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,030

ROBERT LARRY GIBSON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

* *

BRIEF OF APPELLEE

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INTRODUCTION

Robert Larry Gibson, the appellant, was the defendant in the court below. The appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appear before this Court. The symbol "R" will be used to designate the record on appeal. The seven-page transcript of proceedings taking place on January 17, 1984 will be designated by the symbol "T." All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and Facts as a generally accurate account of the proceedings at the trial level with such additions and exceptions as are set forth below and in the argument portion of this brief.

Appellee specifically notes the following additions:

On July 2, 1976, an indictment was filed in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County charging Appellant with the commission of the first-degree felony murder of one Shirley Bryant, the involuntary sexual battery of the same victim and burglary of a structure. (R.1-3A). On July 15, 1976, the trial court ordered a psychiatric examination of Appellant and

noted that he also be evaluated to determine "whether he is a danger to himself or society and whether he had a suicidal tendency." (R.21). The trial court entered an order adjudging Appellant competent on August 12, 1976. (R.24). Another psychiatric evaluation order was entered on September 24, 1976 (R.29). A hearing was conducted and Appellant was at that time found incompetent and committed to the Division of Mental Health (R.30). The South Florida State Hospital subsequently petitioned for an order continuing involuntary hospitalization. An order for continued hospitalization was entered pursuant to §394.467, Florida Statutes (Baker Act provisions). (R.532-533).

Appellant was subsequently discharged and additional evaluations were ordered to determine Appellant's competency to stand trial. (R.33, 34). On August 2, 1978, the trial court entered an order adjudging Appellant competent to stand trial. (R.35). Appellant was subsequently re-committed. (R.36). Additional competency hearings were held in April, 1981 (R.38, 122-170). On April 24, 1981, the trial court found Appellant competent to stand trial, yet questions as to Appellant's competency arose again. Additional evaluations were ordered and hearings were held in October and November of 1981. (R.179-355). As a result of the November, 1981, hearings the trial court found Appellant "competent as a matter of law," yet found him to be incompetent to stand trial. Based upon the testimony of Drs. Fallon, Miller and

Mutter, the Court nonetheless ascertained that Appellant might be malingering and that he be mentally competent to stand trial in the foreseeable future. (R.196-199). On January 30, 1984, Appellant was found competent to stand trial and the case proceeded to trial. Pursuant to guilty verdicts, Appellant was convicted of the offenses charged in the indictment and sentenced to death as to the murder conviction pursuant to Count I. (R.566-577).

Appellant's confession admitted at trial indicates that he entered the victim's apartment, while she lay sleeping in her bed, with the intention to rape her. (R.459). He left the apartment and returned with an iron pipe about one and one-half inches wide and two feet long. (R.460). He re-entered the apartment, went into the victim's bedroom and hit her twice on the head with the iron pipe and proceeded to rape her by engaging in non-consensual vaginal intercourse for approximately ten minutes. (R.461-462). During the course of these events, the victim was moaning and moving. (R.462). The victim continued moving and making noises as Appellant left the room (R.463).

Appellee respectfully reserves the right to argue additional facts in the argument portion of this brief.

POINTS INVOLVED ON APPEAL

Appellee respectfully rephrases Appellant's Points on Appeal as follows:

I

WHETHER THE TRIAL COURT PROPERLY FOUND APPELLANT COMPETENT TO STAND TRIAL AND CORRECTLY PROCEEDED TO TRIAL? (Appellant's Point I, Restated).

II

WHETHER THIS COURT SHOULD CONSIDER ON DIRECT APPEAL THAT APPELLANT'S CLAIMS THAT HIS TRIAL COUNSEL'S ASSISTANCE WAS INEFFECTIVE, AND IF SO, WHETHER COUNSEL'S ASSISTANCE WAS INEFFECTIVE? (Appellant's Points II, III and IV, Restated).

III

WHETHER THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY IN QUESTION WAS HEINOUS, ATROCIOUS OR CRUEL PURSUANT TO §921.141(5)(h), FLORIDA STATUTES? (Appellant's Point V, Restated).

I

THE TRIAL COURT PROPERLY FOUND APPELLANT COMPETENT TO STAND TRIAL AND CORRECTLY PROCEEDED TO TRIAL. (Appellant's Point I, Restated)

The trial court correctly found Appellant competent to stand trial and allowed the case to proceed to trial, declining to interpret Rule 3.213, Florida Rules of Criminal Procedure as requiring dismissal of the felony charges in the instant case. In the instant case, Appellant was charged with the crimes in question in 1976 (R.1-3A). Appellant was found incompetent on October 13, 1976 (R.28). A period of five (5) years from the initial commitment ran in October, 1981, when the present Rule 3.213, Fla.R.Crim.P. was already in effect. Appellant was actually given the requisite "five year hearings" at that time. (R.179-203; 214-355).

In Warwick v. State, 443 So.2d 188 (Fla. 3d DCA 1983), the Third District Court of Appeal held that Fla.R.Crim.P. 3.213(a), which became effective in July, 1980, established the controlling standard to be applied in determing a defendant's entitlement to dismissal. This rule permitted a dismissal hearing within five years after the initial commitment. The defendant was given a five-year-rule hearing and was found competent. This new rule was held to be applicable to resolve the issue, even though it became effective after

the defendant's initial commitment in 1977. Implicit in the court's holding in Warwick, supra, is that a "reasonable time" for a determination is approximately five (5) years after the date of the initial commitment to a mental hospital.

Warwick, supra, was decided on the following facts. The defendant was charged with first-degree murder in October of 1976. Four months later, in February of 1977, the defendant was found incompetent to stand trial and was committed to a mental hospital. Approximately two years after commitment, a hearing examiner (at a Baker Act hearing held pursuant to Chapter 394, Fla.Stat.) found both that the defendant was still incompetent to stand trial and that there was no substantial probability that the defendant would become competent in the foreseeable future. As late as four years after commitment, the court still found that the defendant was incompetent to stand trial. Four and three-quarter (4 3/4) years after the initial commitment, the mental hospital informed the trial judge by letter that the defendant "had mimicked the psychotic symptoms." Finally, five (5) years and one (1) month after the initial commitment, the trial judge found the defendant competent to stand trial. The trial court denied two motions to dismiss. The motions were filed after three years and after five years from the date of the initial commitment to the mental hospital.

In terms of Warwick and the standards for dismissal set in Rule 3.213, the crucial issues are: (1) At the "five-year" hearing, did the trial court find that there was a substantial probability that the defendant will become mentally competent to stand trial in the foreseeable future? and (2) Viewing the facts as they existed at the time of the five-year hearing was there substantial competent evidence to support the trial judge's finding? Both questions should be answered affirmatively in light of the record in the instant cause.

At the conclusion of the two-day hearing in the instant cause, the trial court expressly considered and found "that there is a substantial probability that the defendant will become mentally competent to stand trial in the foreseeable future." The court noted that it based its finding on Dr. Fallon's testimony that the defendant would become competent on his return to the state mental hospital, and the probability that the defendant could be "faking an illness". (R.109). The trial court's finding was supported by substantial, competent evidence. The same trial judge had already found Appellant competent to stand trial at hearings held six months earlier in April, 1981. (R.122-178). At the November, 1981 hearings, the testimony of various doctors supports the trial court's conclusion of competency.

Contrary to Appellant's contentions, the trial court's interpretation of Rule 3.213 is clearly consistent with the Third District's decision in Warwick, supra, as well as with the actual language of the rule. The rule itself specifies that felony charges should only be dismissed if after five years, after hearing, the defendant remains incompetent to stand trial, that there is no substantial probability that the defendant will become mentally competent to stand trial in the foreseeable future and that the defendant does not meet the criteria for involuntary hospitalization or admission to residential services. Rule 3.213, Florida Rules of Criminal Procedure. It is clear that the language of the rule is conjunctive.

Dismissal is not required if a defendant is given a hearing at the requisite time, such as in the instant case, and all provisions of the rule are not met. Here, defendant was found competent in the interim of the time frame and the delay was attributable to attorneys necessitating time to prepare for trial. (R.197-198). Even if the trial court's ruling is interpreted as a holding that Appellant was incompetent to stand trial at the November, 1981 hearing in question, the second provision of the rule was not met. The testimony of doctors Miller, Mutter and Fallon ultimately support the court's determination that there was a substantial probability that the defendant would become mentally competent to stand

trial in the foreseeable future. Thus, it is of no significant import whether Appellant was "competent as a matter of law," yet incompetent to stand trial as long as there was substantial probability of the establishment of competency in the foreseeable future. The trial court's ultimate determination not to dismiss the charges and to find Appellant competent to stand trial was correct. (R.430). Reversible error has therefore not been demonstrated. This Court is therefore urged to affirm the convictions and sentence imposed by the trial court.

II

THIS COURT SHOULD DECLINE TO CONSIDER ON DIRECT APPEAL APPELLANT'S SECOND, THIRD AND FOURTH CLAIMS TO THE EFFECT THAT HIS TRIAL COUNSEL'S ASSISTANCE WAS INEFFECTIVE, AND SHOULD THIS COURT ADDRESS THESE CLAIMS, APPELLANT HAS NOT DEMONSTRATED THAT ANY RELIEF IS WARRANTED. (Appellant's Points II, III and IV, Restated).

Appellant's second, third and fourth grounds allege that he was rendered ineffective assistance by trial counsel. Appellee submits that this Court should decline to address the merits of these claims. It is well-settled that as a general rule, a claim of ineffective assistance of counsel cannot be raised for the first time on direct appeal. Williams v. State, 438 So.2d 781, 786 (Fla. 1983); Gibson v. State, 351 So.2d 948, 950 (Fla. 1977), cert. denied, 435 U.S.1004, 98 S.Ct. 1660, 56 L.Ed.2d 93 (1978); State v. Barber, 301 So.2d 7, 9 (Fla. 1974). As was the case in Williams, supra, Appellant has not demonstrated any reason to deviate from this principle in the present case. This Court is therefore urged to decline review of Appellant's claims of ineffective assistance of counsel. Assuming arguendo that this Court should opt to address the merits of Appellant's contentions, Appellant is nonetheless not entitled to any relief as to these claims. No issues of fact as to Appellant's claims have been resolved in the trial court. See, Williams, supra.

In his second point, Appellant contends that his initial trial counsel was ineffective for failure to move for dismissal of charges on the grounds that his initial trial counsel did not move for dismissal of pending charges pursuant to the provisions of Rule 3.213, Fla.R.Crim.P. on the grounds that Appellant had been incompetent in excess of five years. Appellee submits that Appellant's conclusory allegations do not comport to the requirements of Strickland v. Washington, _____U.S._____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and Knight v. State, 394 So.2d 997 (Fla. 1981), See also: Jackson v. State, 452 So.2d 533, 535 (Fla. 1984). Appellant has not demonstrated that his first trial counsel's decision not to file the suggested motion rendered counsel's performance deficient and that his deficiency prejudiced the defense. It is clear from the fact that the suggested motion was actually made by subsequent counsel and, as Appellee contends in Point I, infra, properly denied by the trial court prior to trial (See, Appellant's Motion to Discharge and to Adjudicate Defendant Not Guilty by Reason of Insanity and Supplement to Motion, R.112-113a; 212-213). Appellant's second allegation, even if considered, does not warrant the granting of any relief as the motion that is claimed as a "deficiency" was in fact made prior to the trial in question in the instant proceeding.

The third claim raised by Appellant is that his trial counsel lacked the knowledge, preparedness and organization

to render reasonably effective assistance at the sentencing phase. Even though Appellant's counsel requested additional time to prepare for the sentencing hearing (R.599-601). Appellant's allegations that counsel was not sufficiently prepared are too speculative to sustain the heavy burden of demonstrating that counsel was actually ineffective. Moreover, the fact that counsel had tried only four or five capital murder cases previously did not render his assistance ineffective. The character of a lawyer's experience may shed light in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation. United States v. Cronic, _____ U.S. _____, 104 S.Ct. 2039, 2051, _____ L.Ed.2d _____ (1984). The instant record indicates that defense counsel was successful in persuading the trial court to consider two mitigating factors (R.569-576). The Court's finding of three aggravating factors was clearly predicated upon substantive evidence consisting in large part of Appellant's own admissions, not on any alleged deficiency on counsel's part.

Appellant's fourth claim, that the trial court's denial of Appellant's trial counsel's motion for continuance as to the sentencing phase caused counsel's assistance to be ineffective is likewise without merit. Every refusal to postpone criminal trial proceedings will not give rise to a presumption that it is unlikely that any lawyer could provide effective assistance under the circumstances. United States v. Cronic,

supra at_____U.S._____, 104 S.Ct. 2048. As the Court noted in Cronic, supra, "Every experienced criminal defense attorney once tried his first criminal case." It therefore follows that counsel's statements to the effect that it was his first penalty phase did not render his assistance invalid per se. The instant record is clearly insufficient to allow for a determination that Appellant's trial counsel was ineffective. This is especially true in light of the fact that the instant record on appeal does not contain complete transcripts of actual trial proceedings during the conviction phase. Appellant has not met his burden of providing this Court with an adequate record to allow for consideration of his second, third and fourth claims, assuming arguendo that these claims are cognizable on direct appeal. See Morceau v. Meader, 179 So.2d 242, 243 (Fla.3d DCA 1965), citing to Hoodless v. Jernigan, 51 Fla. 211, 41 So.194 (1906). See also: Harmony Homes, Inc. v. Severud, Knight, Boerema, Buff, 355 So.2d 490 (Fla. 3d DCA 1978). The convictions and sentence entered by the trial court should therefore be affirmed.

III

THE TRIAL COURT DID NOT ERR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY IN QUESTION WAS HEINOUS, ATROCIOUS OR CRUEL PURSUANT TO §921.141 (5)(h), FLORIDA STATUTES. (Appellant's Point V, Restated).

In sentencing Appellant to death pursuant to his conviction for murder in the first degree as charged in Count I of the indictment (R.1), the trial court entered a specific order finding three aggravating circumstances and two mitigating factors. (R.571-573). Appellant is currently challenging the validity of the Court's finding that the capital felony was heinous, atrocious or cruel, in accordance with the provisions of §921.141(5)(h), Florida Statutes.

The trial court made the following specific finding as to this issue, in its sentencing order:

> Thirdly, the Court finds that the capital felony was especially heinous, atrocious or cruel. The Court's reasoning behind such a finding of this particular aggravating circumstance is that the killing of Shirley Bryant was especially heinous, atrocious or cruel in that the defendant first crushed the victim's skull with an iron pipe and as she lay moaning and dying in a pool of her own blood, and then he spread her legs and proceeded to engage in sexual intercourse with her.
>
> (R.572).

The record in the instant cause clearly supports the trial court's finding. (See R.441-47; 453-465). Appellant's own confession indicates that he entered the victim's apartment, while she lay sleeping in her bed, with the intention to rape her. (R.459). He left the apartment and returned with an iron pipe about one and one-half inches wide and two feet long. (R.460). He re-entered the apartment, went into the victim's bedroom and hit her twice on the head with the iron pipe and proceeded to rape her by engaging in non- consensual vaginal intercourse for approximately ten minutes (R.461-462). During the course of these events, the victim was moaning and moving. (R.462). The victim continued moving and making noises as Appellant left the room. (R.463).

Contrary to Appellant's assertions, the fact that the victim was asleep at the onset of the attack, should not negate the court's determinations as to this claim. In Breedlove v. State, 413 So.2d 19, (Fla. 1982), this court noted that the attack in question occurred while that victim lay asleep in his bed. This factor led the court to conclude that the felony in question was therefore far different from the norm of capital felonies and set the crime apart from murder committed in, for example, a street, a store or other public place.

Likewise, in Mason v. State, 438 So.2d 374, 379 (Fla. 1983) this Court upheld a finding that the capital felony was heinous, atrocious or cruel. In Mason, supra, evidence indicated that the victim was stabbed in her own bed and made choking and gurgling sounds for about one to ten minutes thereafter, as she choked on her own blood. The manner in which the victim in Mason died was also found to have been a crime set apart from the norm of capital felonies.

It is therefore readily apparent that contrary to Appellant's instant assertions, the events in question in the cause sub judice, when viewed in the totality of the circumstances, meet the standards enumerated in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974) for sustaining a finding of heinous, atrocious or cruel. The trial court's finding and imposition of the death sentence should clearly be affirmed as the aggravating circumstances outweigh the mitigating factors.

CONCLUSION

Based upon the foregoing reasons and citations of authority, Appellee, the State of Florida, submits that the judgment and sentence of the trial court should clearly be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to PHILLIP S. DAVIS, ESQUIRE, 1395-97 Northwest 15th Street, Miami, Florida 33125 on this 2nd day of January, 1985.

CALIANNE P. LANTZ
Assistant Attorney General

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