Prisoner's Name: MACK RUFFIN, JR.
Prisoner's Number: 065797
Prisoner's Confinements: Florida State Prison,
Starke, Florida

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAY 21 1984
CLERK, SUPREME COURT
By
Chief Deputy Clerk

MACK RUFFIN, JR.,

Petitioner,

- v -

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, and RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida,

Respondents.

Case No. 65,117

REPLY ON PETITION

To the Honorable Justices of the Supreme Court of the State of Florida:

1. Petitioner submits this Reply in further support of his Petition for Writ of Habeas Corpus ("Petition"), filed April 5, 1984.

2. On May 10, 1984, Petitioner received Respondents' Response to his Petition. Most of the arguments contained therein are fully answered in the Petition, to which the Court is respectfully referred. A few issues, however, warrant comment.

A. The Strickland v. Washington Case

3. In the Petition (p. 14 n.4), Petitioner advised the Court that the case of Strickland v. Washington, dealing with the appropriate standard for ineffective assistance of

counsel claims, was then pending in the Supreme Court of the United States. On May 14, 1984, the Court rendered its decision. It held that the claimant must (i) identify "acts or omissions" whereby the counsel's performance "fell below an objective standard of reasonableness" and (ii) "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, ___ U.S. ___, No. 82-1554, slip op. at 17, 20, 24 (U.S. Sup. Ct. May 14, 1984).

4. The standard established varies from the test articulated by this Court in Knight v. State, 394 So.2d 997 (Fla. 1981) (see Petition ¶¶ 90-94) most significantly in that the claimant need not show a "likelihood" that the deficient conduct affected the proceeding, but need only show a "reasonable probability" of such an effect.

5. As noted in the Petition (¶¶ 90-94) the Knight test's requirement have been met by Petitioner here. A fortiori, so have the Supreme Court's new Strickland standards.

B. There Was No Procedural Bar Preventing Appellate Counsel From Raising the Issues Discussed in the Petition

6. Respondents' principal argument is that appellate counsel's failure to raise certain issues is excused by trial counsel's failure to do so, because appellate counsel was thereby "procedurally barred" from raising the errors. No such bar exists.

7. The issues that were not raised by trial counsel

include (i) the prosecutor's egregious misstatements of critical facts and law in his summation, (ii) the inadequacies of the trial court's charge to the jury and findings as to the aggravating and mitigating circumstances, (iii) the inadequacies of the grand and petit jury selection process and (iv) the arbitrary and discriminatory manner of the imposition of the death penalty in Florida. All involve fundamental error, which will be reviewed by this Court even in the absence of objection below and which should therefore be raised by appellate counsel. See Franklin v. State, 403 So.2d 975 (Fla. 1981) (first-degree murder conviction); Henderson v. State, 155 Fla. 487, 20 So.2d 649 (1945); Hamilton v. State, 109 So.2d 422 (Fla. Dist. Ct. App. 3d Dist. 1959) (indictment for first-degree murder, conviction for manslaughter); Bateh v. State, 101 So.2d 869 (Fla. Dist. Ct. App. 1st Dist. 1958), cert. dismissed, 110 So.2d 7 (Fla. 1959), cert. denied, 361 U.S. 826 (1959).

8. Indeed, gross prosecutorial impropriety in summation (see Petition ¶¶ 42-57), such as occurred here, has previously been recognized as fundamental. For,

> "when an improper remark to the jury can be said to be so prejudicial to the rights of an accused that neither rebuke nor retraction could eradicate its evil influence, then it may be considered as ground for reversal despite the absence of an objection below, or even in the presence of a rebuke by the trial judge. [Citations omitted.]"

Grant v. State, 194 So.2d 612, 613 n.1 (Fla. 1967), quoting Pait v. State, 112 So.2d 380, 385 (Fla. 1959). Among such errors specifically referred to in Grant is "any attempt to pervert or misstate the evidence or to influence the jury by the statement of facts or conditions not supported by the

evidence." 194 So.2d at 613, quoting Washington v. State, 98 So.605, 609 (1923). See also Thompson v. State, 318 So.2d 549 (Fla. Dist. Ct. App. 4th Dist. 1975), cert. denied, 333 So.2d 465 (Fla. 1976); Knight v. State, 316 So.2d 576 (Fla. Dist. Ct. App. 1st Dist. 1975) (second-degree murder).

Among the egregious errors of the prosecutor at bar are numerous misstatements of fact, most critically the prosecutor's unsupported assertion that Petitioner had "said that Hall [his alleged accomplice] and he both had guns" (see Petition ¶ 52), when in fact Petitioner unequivocally asserted that only Hall had a gun, and that, as a result, Petitioner was afraid of him. Appellate counsel should have known that such egregious misstatements may be challenged on appeal even in the absence of an objection.

9. In addition, the appellate courts of Florida have also often recognized that charge errors may be raised on appeal even in the absence of an objection. See, e.g., Franklin v. State, 403 So.2d 975 (Fla. 1981); Henderson v. State, 20 So.2d 649 (Fla. 1945); Bennett v. State, 127 Fla. 759, 173 So. 817 (Fla. 1937). As succinctly and accurately stated by the Bennett court:

> "Inasmuch as this charge of the court complained of involved instructions pertaining to the fundamental rights of the defendant who was being tried at that time on a charge of murder in the first degree, a capital offense, we will consider the correctness of the instruction, though it was not excepted to below or assigned as error." 173 So. at 819.

10. Of course, the fundamental error rule is not limited to instances of prosecutorial misconduct or inadequate jury charges. The principle is fully applicable to the

issues regarding the grand and petit jury composition and selection process and the arbitrary and discriminatory manner of the death penalty's imposition in Florida. Because of the particular responsibility placed upon this Court in its review of death penalty cases, see, e.g., Wilkins v. State, 155 So.2d 129, 131 (Fla. 1963), and the often-expressed desire of this Court to insure utmost fairness in such cases, see, e.g., Bennett v. State, 172 Fla. 759, 173 So. 817, 819 (Fla. 1937), any decision on the part of appellate counsel to abandon these issues because of procedural technicalities would have been an egregious and reckless error of judgment.*

11. Jacobs v. Wainwright, 9 FLW 66, ____ So.2d____ (FSC Case No. 62,595, Opinion filed February 23, 1984), on which Respondents place substantial reliance, is not to the contrary. In that case, to be sure, the Court rejected certain claims of ineffective assistance of appellate counsel because there petitioner had failed to demonstrate a fundamental or plain error cognizable on appeal without having been preserved. But, as noted, the errors described here do constitute plain and fundamental error.

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* It should also be noted that the issue regarding the grand jury's composition and selection was raised by trial counsel in a pre-trial motion. Further, as to the alleged inadequate record regarding the grand and petit jury composition, it must be stressed that this Court may take judicial notice of the statistics set forth in the Petition, which were provided by the U.S. Bureau of Census, and the various Florida County Supervisors of Elections. Moreover, the record material cited by Respondents (p.7, see R. 268-69) lists the pool of grand jurors at issue by name. It appears that women were indeed under-represented. Finally, as this Court is aware, the statute challenged by Petitioners as causing such under-representation, Fla. Stat. § 40.013(4) (which allowed mothers to be excused upon request), was held unconstitutional in Alachua County Court Executive v. Anthony, 418 So. 2d 264 (Fla. 1982), a case cited by Respondents.

12. Respondents fall back (Response pp. 7-8, see also p. 9), on the argument that competent counsel simply need not raise every potentially meritorious claim. Whatever the validity of this principle in the abstract, it is plain that appellate counsel cannot ignore fundamental errors such as those found here.

D. Conclusion

13. For the above-stated reasons, and those previously set forth at length in the instant Petition, Petitioner is entitled to the relief requested in his Prayer therefor, set forth at pages 39-40 of the Petition.

May 18, 1984

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply on Petition has been furnished by U. S. Mail to William I. Munsey, Assistant Attorney General, at Park Trammel Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602, this 21 day of May, 1984.

Joyce Davis