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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
v.
JOHN S. BUCHERIE,
Respondent.

Case No. 65,700

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, STATE OF FLORIDA, was the Appellee and Respondent, JOHN S. BUCHERIE, was the Appellant, before the Fourth District Court of Appeal.

In this Brief, the STATE OF FLORIDA will be referred to as "Petitioner," and JOHN S. BUCHERIE, as "Respondent."

"R" will refer to the Record-on-appeal of the trial proceedings, before the Circuit Court in and for Broward County, Florida; "SR" will refer to the pleadings related to post-conviction proceedings, held on Respondent's Motion for Post-Conviction relief; "T" will refer to the transcript of the hearing on said proceedings; and "SR" will refer to the trial court's written findings after said hearing. The symbol "e.a." means emphasis added and "A" refers to the Appendix, attached to and incorporated within this Brief.

STATEMENT OF THE CASE

On February 6, 1981, Respondent was charged, by information, with having committed the offense of robbery, in violation of Section 812.13(2)(b) of the Florida Statutes, by taking money from a Margaret Cantor on January 28, 1981, in an amount less than one-hundred dollars, and using a knife to commit said robbery (R 4-5, 9-11). Co-defendants Thomas Capozio and Arthur Hoffman were also charged in the crime (R 4-5, 9-10). After a jury verdict of guilty (R 115), Respondent was sentenced to nine years imprisonment (R 37). On direct appeal, the Fourth District affirmed his sentence per curiam (A 3).

Respondent filed a motion to vacate his sentence, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure (SR 1-5). After a hearing on said motion was held on November 28, 1982 and December 10, 1982 (T 1-154), the trial court denied said motion and made specific written findings (SR 1-2), on January 18, 1983.

On appeal of the trial court's denial of collateral relief, the Fourth District reversed said denial, specifically finding, inter alia, that Respondent had specifically and sufficiently made a "prima facie showing of prejudice," as a result of alleged ineffective assistance of trial counsel (A 1-2). The Fourth District based this conclusion on its

rejection of the trial court's finding that any counsel ineffectiveness had not affected the trial's outcome, stating, in pertinent part:

> It is never possible to know precisely what will affect a jury's determination of guilt or innocence. It is only necessary that the defendant show a substantial deficency which presents a prima facie showing of prejudice.

(A 2).

Petitioner timely filed its Notice to Invoke Discretionary Jurisdiction, on July 27, 1984.

STATEMENT OF THE FACTS

This appeal arises as a result of the Fourth District's opinion, vacating the denial of post-conviction collateral relief, by the Circuit Court, in and for Palm Beach County, Florida, and remanding to the trial court for further proceedings (A 1-2). Bucherie v. State, 450 So.2d 882 (Fla. 4th DCA 1984).

In his motion for post-conviction relief, Respondent alleged, inter alia, that his trial counsel, Richard A. McClain, failed to take necessary pre-trial depositions and statements; and failed to properly advise Respondent as to the relative merits of a plea bargain, in that said counsel was allegedly unaware and misinformed on the length of the possible maximum sentence for Respondent's offense, and did not advise Respondent as to his "sentencing guidelines" options (SR 1-5). Respondent asserted these, and additional deficiencies in performance by trial counsel, denied him effective assistance of trial counsel (SR 5).

At the hearing on said motion, trial counsel indicated he was not made aware, by reading Officer Fideisen's police report, relating the nature and circumstances of said officer's apprehension of Respondent, that Respondent had made any inculpatory statements (T 30). Counsel testified that no other discovery materials provided by the State, noted

or reasonably indicated the existence of such a statement (T 30). Mr. McClain objected to Officer Fideisen's testimony at trial, to this effect, and requested a Richardson hearing.[1/] (T 26, 27, 32, 33). The trial court granted said request, and the relative voluntariness of Respondent's statement was argued, outside the jury's presence (T 33) (R 94-109). Although the trial court ruled adversely to Respondent, and found such statement to be voluntary, defense counsel testified that he impeached the officer, on the absence of this information from his police report (T 33); (R 133, 134). Respondent's own expert witness, Michael Dubiner, conceded at the post-conviction hearing, that a suppression motion, challenging the admissibility of Respondent's inculpatory statement, would not have prevailed (T 73). Dubiner further conceded that there was other testimony presented by the State, at trial, demonstrating Respondent's knowledge and participation in the robbery (T 71, 72). It was further demonstrated that the trial court judge concluded that Respondent's own testimony, not that of the police officer, was the probable basis for the jury's finding that Respondent was guilty of the robbery (T 34) (R 115-116).

McClain further testified that, regardless of any plea offers, Respondent consistently indicated he did not want to enter a plea bargain, maintained his innocence, and anti-

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1/ Richardson v. State, 246 So.2d 771 (Fla. 1971)

cipated he would be exonerated by his co-defendants Hoffman and Capozio (T 37-38). Respondent's expert witness conceded that the relative length of a sentence or penalty was irrelevant, if Respondent indicated he wanted to go to trial, and that in such event, trial counsel was obligated to follow his client's desire and try the case (T 67-68).

McClain further testified that he advised Respondent he would probably be sentenced to a 10-15 year prison sentence, if convicted, and thought this period to be the actual time Respondent would spend in jail (T 20, 21, 26). McClain also stated that Respondent would not even agree to a plea bargain, in return for a sentence of probation only (T 26). Further testimony at the Rule 3.850 motion hearing, established that the trial court judge was not among those judges in Palm Beach County at time of sentencing, who consistently followed or applied sentencing guidelines (T 68,69).

Respondent's trial counsel further testified that he spent 6 weeks preparing Respondent's case, reviewing Respondent's testimony, and that he had Respondent adjust to the trial setting by sitting in on other trials (T 37); that Respondent, despite this preparation, testified in a significantly different manner at trial (T 38, 39); decided not to use Respondent's co-defendant (Hoffman) as a defense witness, based on his analysis and conclusion that Hoffman had changed his story several times, and would have been detrimental to Respondent (T 34-37); and denied that he drank alcohol during

the trial (T 40).

At the conclusion of testimony at the post-conviction hearing, the State argued, inter alia, that Respondent's statement to Fideisen was litigated, as to admissibility, by way of a suppression type hearing, upon defense counsel's trial objections, that the evidence demonstrated Respondent's knowledge of the existence of a plea bargain, this unwillingness to take it, that the sentencing judge's view of Respondent's trial testimony, as well as his co-defendant's testimony, as the probable basis for conviction, matched the perceptions of Respondent's counsel; and that Respondent did not receive a higher sentence than the 10-15 years which counsel had so advised (T 144-152). The State further urged that, in any event, Respondent had failed to demonstrate any prejudice or effect on the outcome of Respondent's trial, as a result of trial counsel's alleged deficiencies (T 144-151).

The trial court's denial of Respondent's post-conviction was based on written findings, concluding, inter alia, that any deficiencies in the performance of trial counsel did not affect the outcome of the trial; that the admissibility of Respondent's inculpatory statement was determined by the trial court's Richardson hearing; that the decision not to use Hoffman as a defense witness was an appropriate, strategic one; that the misinformation received by Respondent, as to possible penalties, was not prejudicial, since Respondent's actual sentence (nine years) was less than the sentence counsel advised he would receive, and that all other alleged counsel errors did

not affect the outcome of Respondent's trial, and/or were strategic and tactical decisions by counsel (SR 1-2).

SUMMARY OF ARGUMENT

The Fourth District's reversal of the trial court's finding that Respondent had not been prejudiced, as a result of alleged deficiencies of trial counsel, was based on erroneous criteria, contrary to the mandates of Knight v. State, 394 So. 2nd 997 (Fla. 1981), and its progeny, and Strickland v. Washington, ____U.S.____, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Specifically, the Fourth District's conclusion that Respondent had made a prima facie showing of prejudice, based on the premise that it is never possible to measure the effect of counsel's actions on a judge or jury (A 2), is not in accordance with the tests for the existence of prejudice as a result of incompetent counsel, as stated in Knight and Strickland.

Further, the Fourth District failed to apply the fourth prong of the Knight test, which affords the State an opportunity to rebut allegations of prejudice, by showing the lack of any prejudice, Knight, supra, at 1001.

Under either Knight or Strickland, the Fourth District erred in finding that any of trial counsel's alleged deficiencies altered the outcome of the trial, since the record states and supports the contrary conclusion.

POINT INVOLVED

WHETHER FOURTH DISTRICT COURT OF APPEAL MISINTERPRETED AND MISAPPLIED "PREJUDICE" PRONGS OF TEST FOR EVALUATING CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, AS ESTABLISHED BY FLORIDA AND UNITED STATES SUPREME COURT?

ARGUMENT

POINT INVOLVED

FOURTH DISTRICT COURT OF APPEAL MISINTERPRETED AND MISAPPLIED "PREJUDICE" PRONGS OF TEST FOR EVALUATING CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, AS ESTABLISHED BY FLORIDA AND UNITED STATES SUPREME COURT.

In reversing the trial court's finding that Respondent had not established any prejudicial effect, on the outcome of his trial, as the result of deficient performance of trial counsel, the Fourth District concluded that Respondent had made the appropriate "prima facie" showing of such prejudice (A 1-2). The Fourth District further observed that "it was never possible" to ascertain the effect of a particular deficient act by trial counsel, on the trial's outcome (A 2)(e.a.) In so ruling, the Fourth District incorrectly misinterpreted, and/or inadvertently failed to apply, the appropriate standard of review, established by this Court, to the claim of ineffective assistence of counsel.

It is evident that the Fourth District's decision expressly conflicted with this Court's enunciation of the four-part test, for measuring counsel - ineffectiveness claims, in Knight v. State, 394 So.2nd 997 (Fla. 1981). Specifically, this Court, in Knight, supra, imposed a specific and particular burden of proof upon a criminal defendant who claims that the outcome of his trial was prejudicially affected by his attorney's incompetence:

> .... the Defendant has the burden to show

> that this specific, serious deficiencies [omissions or acts of counsel, below that of competency], when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the extent that there is a likelihood that the deficient conduct affected the outcome of the proceedings.

Knight, at 1001 (e.a.). In fact, subsequent decisions of this Court have further delineated that this third prong of the Knight test, as to "prejudice", required a defendant to establish that, "but for" the incompetency of counsel, the outcome of trial "probably" would have differed. Messer v. State, 439 So.2d 875, 877 (Fla. 1983); Ford v. State, 407 So.2d 907, 909 (Fla. 1981).

Therefore, since a specific showing of prejudice must be established as in accordance with these clear and specific criteria, which the Fourth District apparently failed to apply, the Fourth Districts decision must be quashed, with instructions to apply the Knight-Ford-Messer progeny's test for "prejudice." Knight, supra. Acceptance of the Fourth District's conclusion that Respondent made a showing of prejudice, given its stated basis and assumption that a defendant can never possibly demonstrate whether a particular deficiency affected the jury's verdict, leads to the conclusion that defendants such as Respondent would always prevail in their claims, upon a mere prima facie showing of prejudice (A 2). Since such a conclusion is obviously not the intended result of application of the Knight test, and in effect places the burden of demonstrating

prejudice on the State, in a manner contradicted by the "outcome-determinative" nature of such test, the Fourth District's opinion should not stand.

Moreover, it is apparent that the Fourth District's analysis incorrectly ended, with its erroneous application and analysis of the "prejudice" element of Respondent's claim. As this Court indicated in Knight, the State can rebut allegations of prejudice on the outcome, by establishing that counsel's alleged acts of ineffective assistance, caused a defendant no "actual prejudice." Knight, at 1001. (e.a.). The express language of the Fourth District's opinion, clearly indicates that this aspect of Knight was never addressed or applied, thus constituting a further basis for reversal of the Bucherie decision. Knight; Messer, supra; Ford, supra. As specifically pointed out in Petitioner's Statement of Facts, the Record of the Rule 3.850 motion hearing contains substantial evidence demonstrating that Respondent's trial counsel's actions did not present a likelihood of prejudicial effect or doubt on the outcome of trial, and/or revealed that Respondent was not actually prejudiced by defense counsel's conduct. Knight, at 1001; Messer, at 877; Ford, at 909; Petitioner's Statement of Facts, supra. Additionally, appropriate application of the fourth prong of Knight should have resulted in an affirmance of the trial court's ruling, since no actual prejudice to Respondent is demonstrable on the record. Id.

Furthermore, the Fourth District's ruling, on the required showing of prejudice, in a ineffective assistance claim, was contrary to the mandate of the United States Supreme

Court in Strickland v. Washington, ____U.S.____, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984),[1] subsequently adopted and acknowledged by this Court in Downs v. State, 453 So.2d 1102 (Fla. 1984), and Jackson v. State, 452 So.2d 533 (Fla. 1984). Under the two-part test announced in Strickland, Supra, the Supreme Court stated that a defendant must prove prejudice, under the following criteria:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.
>
> ...When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.

Strickland, at 2068, 2069. (e.a.) Downs, supra, at 1108. In enunciating this test for prejudice, the Court further noted that "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome." Strickland, at 2067. (e.a.). In acknowledging these standards, this Court mandated that, in determining whether a defendant has made a sufficient showing of prejudice, "...a court should presume that the judge or jury acted according to the law", and consider the

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1/ Although the Strickland decision was not addressed by the Fourth District in its opinion, or in the briefs of the parties before the Fourth District (filed before the issuance of Strickland), it is nevertheless submitted that Strickland should be considered and applied to this case by this Court, as the current and binding law on this point, at this time. Smigiel v. State, 439 So.2d 239, 243 (Fla. 5th DCA 1983); Wheeler v. State, 344 So.2d 244, 245 (Fla. 1979).

evidence presented, on the question of guilt. Downs, at 1108. This "harmless error" analysis, when there is substantial evidence of guilt, appears to have been adopted in Strickland. Strickland, supra, at 2068-2069; Raulerson v. Wainwright, 732 F.2d 803, 810 (11th Cir. 1984).

As with Knight, the establishment of such criteria in Strickland mandates reversal of the Fourth District. The appeals court's finding of prima facie prejudice, as apparently based on a perceived inability of a court to be able to measure prejudice, is just as directly at odds with the U.S. Supreme Court's standards, as applied by this Court, as it is with Knight. The Fourth District appears to have embraced the idea, expressly rejected by Strickland, that an error with a conceivable or possible prejudicial effect, established prima facie prejudice. Bucherie, slip op. at 2. Because this view is contrary to the mandate of Strickland, it should be rejected by this Court.

Although this Court has ruled that the Strickland and Knight tests, as to the component of prejudice, do not "differ significantly", Jackson v. State, 452 So.2d 533, 535 (Fla. 1984), it is submitted that the Strickland test may impose a more stringent criteria, in that Strickland requires a showing of prejudice which essentially denied the defendant a fair trial or reliable result. Strickland, at 1064; Downs, at 1108-1109; Jackson, supra, at 535. Furthermore, the "but for" formulation in Strickland appears to require a more substantial and stronger showing by a defendant, than a "Likelihood that the defendant's conduct affected the outcome...". Knight, at

1001; Strickland, at 2068. In any event, the record before the Fourth District clearly demonstrates, as the trial court had concluded, that the outcome of trial would not have been altered by any or all of trial counsel's alleged errors, under the Strickland test. Moreover, the evidence of guilt, including Respondent's own testimony (as observed by the trial court, SR 34, R 115-116), substantiates this conclusion Strickland, Raulerson, supra.

Thus, under either Knight or Strickland, the Fourth District applied erroneous criteria and rationale, in measuring the "prejudice" allegedly caused to Respondent by counsel's allegedly deficient acts, particularly in further view of this Court's recent observations that a claim of ineffective assistance of counsel is extraordinary, and should be "the exception rather than the rule." Clark v. State, 9 F.L.W. 455, 456 (Fla. Supreme Court, October 18, 1984); Downs, at 1107. It is suggested that a judicial perspective that a defendant make a prima facie showing, on the premise that a defendant can never sustain a greater showing, would produce more intensive scrutiny of performance of counsel, of a less differential nature, contrary to the mandates of Knight or Strickland.

CONCLUSION

Based on the forgoing arguments and authorities, Petitioner respectfully requests that this Court reverse the Fourth District's ruling in this cause, and remand to said court with instructions to affirm the trial court's ruling, or, in the alternative, to apply the appropriate criteria set out in Strickland, supra.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 7th day of January, 1985 by Mail/Courier to MICHAEL SALNICK, ESQUIRE, of KOHL, SPRINGER, SPRINGER, MIGDOLL AND SALNICK, PA, 3003 South Congress Avenue, Suite 1A, Palm Spring, Florida 33461.

_____

Of Counsel