O/a 11-8-84

IN THE SUPREME COURT OF FLORIDA

ERNEST FITZPATRICK, JR.,

Petitioner,

-v-

Case No. 65,785

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of
Florida,

Respondent.

______________________________/

FILED
SID J. WHITE
SEP 28 1984
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

RESPONSE

Comes now, Louie L. Wainwright, by and through undersigned counsel, and pursuant to this court's order shows cause why the petition for habeas corpus relief should not be granted.

Petitioner's death sentence was affirmed by this court in Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983). By prayer for habeas corpus relief, petitioner claims that he was denied the effective assistance of appellate counsel before this court. Respondent will demonstrate that these claims are groundless, and that petitioner did, in fact, receive effective appellate representation.

I.

In a recent habeas corpus petition before this court alleging ineffective representation of appellate counsel, this court stated:

> The standards to be applied in determining whether a defendant was denied his sixth amendment right to effective assistance of counsel were set forth by the United States Supreme Court in Strickland. The standards enunciated in that case do not "differ significantly" with those espoused by this Court in Knight v. State, 394 So.2d 997 (Fla. 1981); Jackson v. State, Nos. 65,429, 65, 430, 65,431 slip op. at 3 (Fla.June 12, 1984)[9 F.L.W. 223]. See also Downs v. State, No. 64,184 (Fla. June 21, 1984)[9 F.L.W. 253]. Strickland held that a defendant's claim for ineffective assistance of counsel has two components:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors

> so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
>
> 104 S.Ct. at 2064.
>
> * * *
>
> To prove prejudice, the court further stated that "the defendant must show that there is a reasonable probablity that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. _Id_. at 2068.

Adams v. Wainwright, ____So.2d____(Fla. 1984)(9 F.L.W. 357).

The application of these criteria obviously cannot occur without reference to procedural rules. Specifically, this court has vigorously enforced the rule that an erroneous ruling by a trial court will not be the basis for reversible error without a specific contemporaneous objection. _See_ _Clark v. State_, 363 So.2d 331 (Fla. 1978); _Castor v. State_, 365 So.2d 701 (Fla. 1978); _State v. Cumbie_, 380 So.2d 1031 (Fla. 1980). Further refining this rule is this court's decision in _Steinhorst v. State_, 412 So.2d 332 (Fla. 1982).

> [I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.

_Id_. at 338.

Certainly, an appellate counsel who, out of deference to these procedural rules, declines to exceed the parameters set for him by trial counsel's failure to object, cannot be found ineffective. Whether trial counsel's failure to object was strategic, or careless, is a question not before this court. _See_ _Knight v. State_, 394 So.2d 997 (Fla. 1981); _State v. Barber_, 301 So.2d 7 (Fla. 1974).

II.

To fully counter the claim of ineffectiveness of counsel on appeal, respondent is compelled to address each of the alleged omissions of counsel, and demonstrate that these would not have provided a different result to petitioner's direct appeal. However, respondent notes that in answering the merits of these claims, petitioner is accomplishing exactly what this court disapproved by the following language in McCrae v. State, 439 So.2d 868 (Fla. 1983).

> Allegations of ineffective appellate counsel . . . should not be allowed to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal.

Id. at 870.

A.

Alleged Violation of Maggard v. State, 399 So.2d 973 (Fla. 1981)

Petitioner contends that appellate counsel was ineffective in failing to urge this court to find that the lower court erred in failing to follow the mandates of Maggard v. State, 399 So.2d 973 (Fla. 1981).

Maggard, petitioner argues, stands four-square for the rule that the state attorney should not have been allowed to introduce evidence to rebut the possible mitigating circumstance of no significant prior criminal history. Petitioner is incorrect in that interpretation of Maggard. The rule expressed by this court in Maggard holds that in a limited situation found when the defendant expressly waives the mitigating circumstance of no significant prior criminal activity, the state may not introduce evidence which is designed to rebut that mitigating factor. This court found that the mitigating factor is for the defendant's benefit, and when defendant concedes that the circumstance does not exist, the state may not introduce evidence designed only to rebut that circumstance. The fact that petitioner here did

not expressly waive that mitigating circumstance is dispositive of the issue. It is difficult to imagine how appellate counsel may be faulted for failing to argue Maggard, when the issue was never presented in those terms below.

In Booker v. State, 397 So.2d 910, 918 (Fla. 1982), this court stated that evidence of defendant's prior criminal history is properly admitted so that the jury is not left without information to determine the existence or nonexistence of that mitigating circumstance.

The United States District Court for the Middle District of Florida cited Booker in Alvord v. Wainwright, 564 F.Supp. 459 (M.D.Fla. 1983), in finding that the claim of ineffective assistance of appellate counsel for failure to raise a Maggard claim, was not demonstrated.

This court has held that to preserve an issue for appeal, the objection made at trial must be the specific allegation also made on appeal. Steinhorst, supra. Petitioner's appellate counsel in no way could place the square peg of Maggard in the round hole of the general objection to the state's evidence at the penalty phase. Never was there any mention of a waiver of the specific mitigating factor of no significant history of criminal activity. Without such a waiver, the holding of Maggard does not apply. There is no merit to petitioner's claim that appellate counsel was ineffective for failing to raise this issue.

B.

Pretrial Publicity

In alleging that appellate counsel was ineffective for failing to present the issue of pretrial publicity on

appeal, petitioner sloughs off the recent United States Supreme Court opinion of Patton v. Yount, ____U.S.______, 81 L.Ed.2d 847 (1984), by saying that it does not reverse the holding of Irvin v. Dowd, 366 U.S. 717 (1961). Irvin held that substantial publicity can create a presumption of prejudice in the community. Petitioner, of course, must rely on Irvin since not one juror who sat on petitioner's jury stated that he could not be impartial.

However, the Supreme Court in Patton v. Yount faulted the lower court for failing to follow the dictates of Irvin v. Dowd. Specifically, Irvin held that a trial court's finding of impartiality might be overturned only for "manifest error." The Patton Court reversed the circuit court's finding based on Irvin because the publicity did not reveal a "barrage of inflammatory publicity immediately prior to trial," Murphy v. Florida, 421 U.S. 794, 798 (1975), amounting to a "huge . . . wave of public passion," Irvin, supra, at 728 . . .." Patton at 81 L.Ed.2d 855.

Thus, Patton makes clear the correct interpretation of Irvin v. Dowd, without regard to the fact that Patton occurred four years after petitioner's trial. (See Petition, p. 23, footnote 20.)

In the last analysis, the Patton Court reaffirmed the holding of Irvin that it is not

> Whether the community remembered the case, but whether the jurors at Yount's trial had such fixed opinions that they could not judge impartially the guilt of the defendant.

81 L.Ed.2d at 856.

The United States Supreme Court in Dobbert v. Florida, 432 U.S. 282 (1977), citing to Murphy v. Florida, 421 U.S. 794 (1975), stated:

> Petitioner in this case has simply shown that the community was made well aware of the charges against him and asks us on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do in the absence of a 'trial atmosphere . . . utterly corrupted by press coverage.' Murphy v. Florida, supra, at 798. One who is reasonably suspected of murdering his children cannot expect to remain anonymous.

Dobbert v. Florida, 432 U.S. at 303.

Petitioner selects several jurors who sat on his case, and attempts to show that they were biased. The state will examine the statements of all twelve jurors in an effort to fully portray the slight effect of pretrial publicity.

Roselli

Juror Roselli did say "where there's smoke there is fire," but this was not stated in the context of what he knew about the case. Instead, he stated that he had heard about the case but that all he knew about was that a police officer was shot. (Record on direct appeal, p. 217)

Smallwood

Smallwood had contributed to a fund to the benefit of the slain officer's family, but the contribution was made through a union fund which also included another cause. Concerning his knowledge of the case, Smallwood stated that he had no independent recollection of the facts. (Record on direct appeal, p. 295)

Barton

Juror Barton stated that she had heard of the incident but that she did not know what went on in the case. (Record on direct appeal, p. 522)

Vick

Like Barton, Vick stated that she did not know anything about the case. (Record on direct appeal, p. 478)

Selvidge

Selvidge heard about the case at work, but had read nothing in the papers. She stated that the only thing she knew about the case was that Deputy Heist was shot. (Record on direct appeal, p. 265)

Rustand

Ms. Rustand stated that she saw almost nothing in the papers, and that in any event, she remembers nothing of the story she saw. (Record on direct appeal, p. 233)

Harrison

Juror Harrison made the statement that she knew of the case, but remembers no facts of the incident. (Record on direct appeal, p. 108)

Pettway

Like Harrison, Pettway also knew of the case but remembers nothing about it. (Record on direct appeal, p. 133)

Sellers

The statement from Sellers indicates that he remembers "about nothing" of the case. (Record on direct appeal, p. 277)

Spellings

Spellings had no independent recollection of the case. (Record on direct appeal, p. 349)

Rathel

Elizabeth Rathel stated that she saw the news item on TV but formed no opinion. (Record on direct appeal, p. 436)

Brown

Mrs. Brown stated that she read about the case and that she knows that the deputy was shot. (Record on appeal, p. 453)

Petitioner cites extensively from the questioning of prospective juror Rushing. Rushing never sat on petitioner's jury. (See Record on Appeal, p. 460) Petitioner's motion for individual voir dire of prospective jurors was granted, futher protecting the proceedings from taint. (Record on appeal, p. 1270) Clearly, the record does not demonstrate a "huge . . . wave of public passion." Irvin at 728. Counsel was not ineffective in choosing not to present this issue on appeal.

C.

Use of Petitioner's Juvenile Record
During the Penalty Proceeding

It is interesting that petitioner would begin the discussion of this alleged omission of appellate counsel by acknowledging, as he must, that the law in Florida is contrary to the position he would have had appellate counsel argue. (See Petition, p. 27)

To counter the allegation of ineffectiveness, respondent need do no more than cite Quince v. State, 414 So.2d 185 (Fla. 1982), and the instant case on direct appeal before this court. Fitzpatrick v. State, 437 So.2d 1072, 1078 (Fla. 1983). This court did find that the use of the juvenile history was appropriate. That these findings were not made in the context of Maggard, supra, is without relevance since respondent has demonstrated earlier that Maggard does not apply without an express waiver of the mitigating circumstance by defendant.

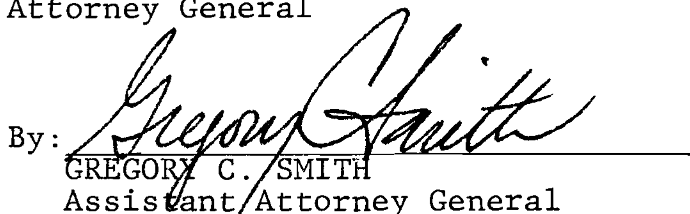
III.

The United States Supreme Court, and this court, has recognized the propriety of presenting only those issues on appeal which are most likely to be successful. Jones v. Barnes, ____U.S._____, 77 L.Ed.2d 987 (1983); Thomas v. State, 421 So.2d 160, 164 (Fla. 1982). It is exactly this that appellate counsel

chose to do. The frivolous issues which have been recounted in this petition for habeas corpus relief would not have changed the result of the appeal before this court. See Adams v. Wainwright, supra. Therefore, this court should deny petitioner's prayer for relief as nonmeritorious.

Respectfully submitted:

JIM SMITH
Attorney General



By: GREGORY C. SMITH
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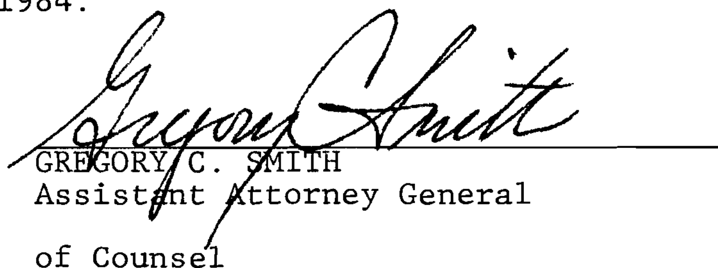
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Response to Mr. Michael A. Millemann, 510 West Baltimore Street, Baltimore, Maryland 21201, by U.S. Mail, this 28th day of September, 1984.



GREGORY C. SMITH
Assistant Attorney General

of Counsel