IN THE SUPREME COURT OF FLORIDA

FRANK SMITH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 65991

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Frank Smith, was the defendant in the Circuit Court of Wakulla County. The State of Florida was the plaintiff and is the Appellee on appeal. At the time this brief is being prepared, the State of Florida has not received a copy of the Appellant's brief. Consequently, this brief will attempt to answer what the State expects Appellant to raise on appeal. However, the State's brief should not be construed to add new issues to the case should Appellant elect not to raise certain issues in his brief.

STATEMENT OF THE CASE AND FACTS

The State relies upon this Court's statement of facts in Smith v. State, 424 So.2d 726 (Fla. 1982), concerning the facts leading up to Appellant's judgments and sentences which are now being challenged. Concerning the facts brought out at the evidentiary hearing held in front of Judge Cooksey on October 9, 1984, the State relies upon the trial court's findings of fact contained in his order which denied Appellant's motion to vacate judgment and sentence and Appellant's application for stay of execution. A copy of this order has been included in the appendix to this brief.

Appellant's death warrant was signed by Governor Graham on September 19, 1984. It was not until the morning of October 8, 1984, that Appellant's present counsel filed their motion to vacate judgment and sentence and application for stay of execution with Judge Cooksey. Judge Cooksey set a hearing for the afternoon of October 8, and at that hearing present defense counsel stated "we can be prepared tomorrow to cross-examine or to present evidence regarding the ineffectiveness issue . . . ." (Transcript of October 8, 1984, hearing at 30). Defense counsel went on to state "we have some evidence that we are willing to submit for this Court's consideration." (Transcript of October 8, 1984, hearing at 31).

However, at the hearing on October 9, 1984, defense counsel refused to put on evidence concerning the ineffectiveness

of counsel claim. That was the only claim upon which Judge Cooksey had decided to hear evidence. At the beginning of this hearing, Judge Cooksey stated that all other issues were not cognizable on collateral attack pursuant to Rule 3.850 because they could have been raised on direct appeal had they been properly preserved or had already been raised on direct appeal. See Judge Cooksey's order at 2.

Although it was Appellant's burden under Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to affirmatively prove his claim of ineffective assistance of counsel, since Mr. Padovano was present in the courtroom at that time, the Judge, in an abundance of caution, called him as a court witness and allowed both sides to cross-examine him on the issue of ineffective assistance of counsel at the sentencing phase.

Judge Cooksey's lengthy recitation of facts will not be repeated in this brief. However, Judge Cooksey's ultimate factual conclusions should be emphasized. He specifically found that Mr. Padovano's decision not to present character testimony "was a considered strategic choice" which would not be second guessed by hindsight. Judge Cooksey found that in light of the fact that Mr. Padovano's choice not to present character evidence was strategic, there could be no possibility of a finding of deficiency under the first prong of the Strickland v. Washington test.

The trial court then ruled alternatively that even if Mr. Padovano's strategy could somehow be found inappropriate,

Appellant's claim would still fail because he had failed to demonstrate the prejudice which he was required to prove under Strickland v. Washington.

The trial court concluded by finding as a matter of historical fact that Appellant had received a fair trial during the sentencing phase and that the result was "reliable" under the standards enunciated by the United States Supreme Court in Strickland v. Washington. The court specifically stated that even if he had been presented "all of this allegedly mitigating evidence now being offered by the defendant, it would have in no way altered my decision to impose the death penalty." See Judge Cooksey's order at 10, 11.

Judge Cooksey then denied the motion to vacate judgment and sentence, denied the application for stay of execution, and Appellant then filed this appeal.

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY RULED THAT ALL ISSUES EXCEPT THE ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE WERE NOT COGNIZABLE ON 3.850 BECAUSE OF APPELLANT'S PROCEDURAL DEFAULTS.

Judge Cooksey ruled that nine of the ten issues asserted in the motion for post conviction relief were not cognizable on 3.850 because they either were raised on direct appeal or could have been raised on direct appeal had they been properly preserved at trial. See Judge Cooksey's order at 2. See also Thompson v. State, 410 So.2d 500, 501 (Fla. 1982); Booker v. State, 441 So.2d 148, 150 (Fla. 1983); and Armstrong v. State, 429 So.2d 287, 288 (Fla. 1983).

Should Appellant attempt to persuade this Court that some of these claims were "fundamental," the State submits that Appellant would be incorrect. As this Court has repeatedly held, the fundamental error rule is not an "open sesame" for trial errors which were not properly preserved. Smith v. State, 240 So.2d 807, 810 (Fla. 1970). This Court has also repeatedly held that issues which could have been raised on direct appeal had they been properly preserved are not cognizable on collateral attack pursuant to Rule 3.850. Booker, supra. Judge Cooksey correctly noted that the only exception to this general rule of law concerned major constitutional changes of law by either this Court or the United States Supreme Court. See Judge Cooksey's order at 3;

Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980); State v. Washington, 453 So.2d 389, 392 (Fla. 1984).

The State respectfully requests the Court not to rule on any of the nine issues upon which Judge Cooksey found procedural default. It is apparent from defense counsel's argument that he misconstrued Rule 3.850 to allow presentation of unpreserved issues as long as the collateral attack was the first time these issues were raised. See transcript of October 8, 1984, hearing at 19, 23. Otherwise, why was Witt, supra, written in the first place? In summary, the trial court's summary denial of the nine issues which either were raised or could have been raised on direct appeal had they been properly preserved at trial is fully supported by the record and the case law. Accordingly, the trial court's order should be affirmed.

ISSUE II

APPELLANT RECEIVED A FULL AND FAIR HEARING ON HIS COLLATERAL ATTACK OF HIS TRIAL COUNSEL'S REPRESENTATION DURING THE SENTENCING PHASE OF APPELLANT'S TRIAL.

As the Court is well aware, this is not the first case in which a defendant under imminent sentence of death has come to this Court at the last minute claiming ineffectiveness of counsel and numerous other complaints. Present counsel waited until after the death warrant was signed and then waited even longer until filing with the trial court the motion for post conviction relief. During both hearings, defense counsel complained that they had not had enough time to prove their allegations and that they were entitled to more time. The trial court accommodated defense counsel by having the defendant transported from the Florida State Prison to the hearing, and he was prepared to permit the defense to present whatever evidence they deemed appropriate in order to prove their claim of ineffective assistance of counsel during the sentencing phase. Yet, after asking for a hearing, defense counsel refused to offer any evidence--this was so even after defense counsel specifically stated at the October 8, 1984, hearing that they were prepared to present evidence on the issue of ineffective assistance of counsel. How then can the same lawyers legitimately complain that they were deprived of a full and fair hearing in the state courts? Obviously, they cannot.

It is significant that under Strickland v. Washington, supra, it is the defense, not the State, that is required to prove the allegation of ineffective assistance of counsel. Since the defense declined to present any evidence whatsoever on that issue, Judge Cooksey legally could have summarily denied the motion since the defense had chosen not even to attempt to prove its allegations. But Judge Cooksey gave the defense an opportunity to raise their claims anyway by calling Mr. Padovano as a court witness. How then can the defense seriously argue that they were deprived of a full and fair hearing?

ISSUE III

THE RECORD SUPPORTS THE TRIAL COURT'S FINDINGS OF HISTORICAL FACT AND ULTIMATE CONCLUSIONS OF LAW THAT APPELLANT RECEIVED EFFECTIVE REPRESENTATION BY COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL.

Under Strickland v. Washington, supra, and Downs v. State, 453 So.2d 1102 (Fla. 1984), it is apparent that a defendant challenging his lawyer's representation must prove both (1) acts or omissions resulting in a finding of deficiency in that the lawyer did not function as the type of counsel guaranteed by the Sixth Amendment, and (2) that this deficient performance prejudiced the defense to the extent that the defendant was deprived of a fair trial whose result is reliable. See Judge Cooksey's order at 8; Strickland v. Washington, supra at 104 S.Ct. 2064.

When evaluating the performance aspect of an ineffectiveness of counsel issue, the "inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id., at 104 S.Ct. 2065. As Judge Cooksey stated, when evaluating the totality of the circumstances, judicial scrutiny of counsel's performance must be highly deferential. See Judge Cooksey's order at 8, quoting from Strickland v. Washington, supra.

Also, as Judge Cooksey recognized, Strickland v. Washington states that it is not proper for a reviewing court to second guess counsel's assistance after a conviction or adverse sentence. In that regard, the United States Supreme

Court stated that "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. Judge Cooksey correctly recognized that because of the difficulties in making such a determination, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." See Judge Cooksey's order at 8, 9, quoting from Strickland v. Washington, supra at 104 S.Ct. 2066.

In Downs, supra, at 453 So.2d 1108, this Court specifically recognized the strong presumption that a counsel rendered adequate assistance and that all significant decisions were made in the exercise of reasonable professional judgment. The Court also recognized that strategic choices after investigation of the law and facts are virtually unchallengeable. In Magill v. State, ___ So.2d ___, 9 F.L.W. 399, 400 (Fla. 1984), this Court stated that counsel's choice "to present or not to present evidence in mitigation at the sentencing phase of trial is a tactical decision properly within counsel's discretion." See also Stanley v. Zant, 697 F.2d 955, 962 (11th Cir. 1983).

With the above standards in mind, it should be readily apparent that Judge Cooksey's conclusion of fact that there were no acts or omissions resulting in deficiency under Strickland v. Washington is amply supported by the record.

The record reveals that Mr. Padovano was an experienced trial lawyer who had handled at least fifty jury trials prior to Appellant's case. Mr. Padovano was assisted by an experienced attorney who had previously represented defendants in capital cases. During his preparation for trial, Mr. Padovano spoke with literally hundreds of potential witnesses including the members of Appellant's family. It is significant that Appellant's sister had no helpful information and that Appellant's grandmother didn't even want to testify for him. Although present counsel have submitted the affidavit of co-defendant Victor Hall, Mr. Padovano testified that this affidavit was inconsistent with Hall's testimony at trial. It is significant that at trial Mr. Padovano impeached Hall to the extent that Hall broke down on the witness stand and cried--how then can present counsel say it is unreasonable for Mr. Padovano not to have called Hall as a witness during the sentencing phase? This is especially true in light of the fact that it was Hall who placed the "smoking gun" in Appellant's hands. Was it unreasonable for Mr. Padovano to expect that Hall's testimony would only be more damaging during the sentencing phase? Certainly not.

Appellant has also complained that trial counsel failed to investigate properly his medical history. However, Appellant never informed trial counsel of his medical history, and the record reveals that when Mr. Padovano learned of it from Appellant's grandmother who had told Dr. Kennedy, he did in fact attempt an investigation. Significantly, Dr. Brickler's

office had no record of ever treating Appellant. How then can it be determined that Mr. Padovano's conduct was unreasonable?

Appellant has also complained that trial counsel failed to investigate the availability of psychiatric testimony which might have been helpful in mitigation. However, the record reveals that Mr. Padovano contacted a psychologist for just that purpose and that he made the choice not to call the psychologist after learning that the psychologist had concluded that Appellant was a "secondary psychopath," who was likely to kill again. In fact, the record reveals that Mr. Padovano was cautioned by the doctor that the doctor should not be called because his testimony would be aggravating rather than mitigating.

It should be apparent from Judge Cooksey's findings of fact and the facts as found by this Court on direct appeal that Mr. Padovano was faced with a tough case. His client had confessed to the underlying felonies and had admitted to being present when the murder occurred. Mr. Padovano reasonably chose to put the State to its proof while emphasizing Appellant's alleged lack of involvement as the actual trigger man. This strategy certainly was reasonable in light of the fact that the jury returned with a question concerning what was the highest degree of offense for which Appellant could be convicted had he not pulled the trigger--this was in spite of Victor Hall's testimony that Appellant returned from the woods along with Johnny Copeland and that Appellant was carrying the murder weapon. Mr. Padovano

testified at the evidentiary hearing that his preparation for the guilt phase was intertwined with his preparation for the penalty phase and that he did not want to lose credibility with the jury by arguing inconsistently between the two phases. Judge Cooksey found that this was a "considered" strategic choice. This Court held in Downs that such choices were virtually unchallengeable on review, especially when it is remembered that strategic choices are not to be second guessed by hindsight. Strickland v. Washington, supra; Downs, supra. See also Winfrey v. Maggio, 664 F.2d 550, 552 (5th Cir. 1981); Songer v. State, 419 So.2d 1044, 1047 (Fla. 1982).

It should be readily apparent that most of the allegedly mitigating evidence now being asserted by Appellant was not really mitigating at all. For example, wouldn't it make Appellant look bad to present the testimony of his sister who had had the same environment yet managed to become a law abiding citizen? Wouldn't it have been harmful to present the testimony of the psychologist who would testify that Appellant's problems were not congenital but rather had been acquired by Appellant's lifestyle and that Appellant was a secondary psychopath who would probably kill again? Wouldn't it have been harmful to have subpoenaed Appellant's grandmother and forced her to testify? Wouldn't it have been harmful to bring out the fact that Appellant had lived a life of crime and had been incarcerated in the state prison at the age of 15 after having been indicted because of another armed robbery with Johnny Copeland? Wouldn't it have been

harmful to prove that Appellant was a drug abuser and had been so for a number of years?

In any event, these questions need not be answered because the State does not wish to urge the Court to conduct the same type of second guessing which was condemned in Strickland v. Washington, supra, and Downs, supra. Judge Cooksey's findings of fact are amply supported by the record at trial and by the record produced at the evidentiary hearing. Accordingly, Appellant should not be persuasive on this issue.

ISSUE IV

APPELLANT WAS PROPERLY CALLED AS AN ADVERSE WITNESS AT THE 3.850 HEARING.

Should Appellant argue that he was improperly called as an adverse witness at the 3.850 hearing, the following argument is submitted. This Court has long recognized that a collateral attack pursuant to Rule 3.850 (formerly Rule 1.850) is civil in nature and analogous to post conviction habeas corpus. State v. Reynolds, 238 So.2d 598 (Fla. 1970). See also State v. Weeks, 166 So.2d 893 (Fla. 1964), which recognized that the rule was an adaptation of 28 U.S.C. §2255 and that the rule was co-equal to state habeas corpus proceedings. Appellant was properly called as an adverse witness since he had placed certain matters in issue. See State ex rel. Latino v. Buchanan, 189 So.2d 529 (Fla. 3d DCA 1966), which holds that a habeas petitioner may be called as an adverse witness and examined concerning the matters raised by him and placed in issue by his pleadings.

Should Appellant attempt to argue that he cannot be called as an adverse witness because it would incriminate him under the Fifth Amendment, such argument should not be accepted either. This is because Florida has a self-executing immunity statute. Jenny v. State, 447 So.2d 1351 (Fla. 1984). Moreover, such argument would obviously have to fail in this case in light of the fact that the State did not inquire into any incriminating matters when Appellant was examined.

CONCLUSION

The trial court's summary denial of nine of the ten issues because they either were raised or could have been raised on direct appeal had they been properly preserved is supported by the record and the case law. The trial court's denial of the ineffective assistance of counsel at sentencing claim should be affirmed in light of the trial court's specific findings of historical fact and his conclusions of law on the ultimate issue. The trial court specifically found that Mr. Padovano's theory of defense during the sentencing phase was a strategic choice, and Strickland v. Washington and Downs hold that such strategic choices are vitually unchallengeable. In any event, notwithstanding the fact that there were no acts or omissions which resulted in deficient representation under the Sixth Amendment, the claim must fail because Appellant totally failed to prove prejudice in that he totally failed to prove that the result of his sentencing hearing was unreliable. The State respectfully requests the Court to affirm the trial court's denial of the motion for post conviction relief and to affirm the trial court's denial of the application for stay of execution.

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 hand to Billy Nolas, 517 E. College Avenue, Tallahassee, Florida, 32301, on this 10th day of October, 1984.

Lawrence A. Kaden

LAWRENCE A. KADEN

OF COUNSEL