

IN THE SUPREME COURT OF FLORIDA

FRANK SMITH,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,

Respondent.

_____ /

CASE NO. 65,992
FILED

SID J. WHITE

OCT 11 1984

CLERK, SUPREME COURT

By *Amya*
Chief Deputy Clerk

RESPONSE TO PETITION FOR
WRIT OF HABEAS CORPUS

Comes now Respondent, Louie L. Wainwright, represented by the undersigned counsel, and files this Response to Petitioner's Petition for Writ of Habeas Corpus which has just been received by counsel.

The gist of Petitioner's claim appears to be that he was denied effective assistance of counsel because his lawyer (the same lawyer who represented him at trial) failed to raise certain issues Petitioner now claims would entitle him to relief. However, Respondent submits that none of the issues now being asserted as meritorious on habeas corpus could have been raised on direct appeal because they were not preserved at trial. Appellate counsel are bound by the acts of trial counsel even if the same lawyer is involved. If a matter is not presented to the trial court, under Florida law it is waived. State v. Barber, 301 So.2d 7 (Fla. 1974). Unless fundamental error is involved, an appellate court cannot consider an issue unless it was first presented to the lower court. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

There is no special rule for capital cases. In fact, in Jackson v. State, ___ So.2d ___, 9 F.L.W. 223, 224 (Fla. 1984), this Court very recently reiterated in a capital case

that "[a]ppellate counsel cannot be ineffective for failing to raise issues which were not properly preserved at trial, because the appellate court may not review those issues."

Present counsel's implicit complaint that they have not had enough time to review the case properly does not entitle Petitioner to relief. In Antone v. Dugger, ___ U.S. ___, 104 S.Ct. ___, 79 L.Ed.2d 147, 153, n.4 (1984), the Supreme Court rejected a similar last minute complaint - the Court specifically noted how long the case had been in litigation and that during most of that time Mr. Antone had been represented by counsel. The Court also noted that no excuse had been offered for failing to raise the allegedly meritorious issues between the time that his conviction had been affirmed and the filing of the Motion for Post Conviction Relief. As was argued to Judge Cooksey below, Petitioner's conviction was affirmed by this Court in January, 1983, when rehearing was denied. No explanation has been offered as to why Petitioner waited until just three days ago to file his collateral attack.

Finally, Respondent wishes to inform the Court of the United States Supreme Court's decision in Jones v. Barnes, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed.2d 987 (1983). In that case, the issue was whether a defense counsel had to raise non-frivolous issues at the defendant's behest even though the lawyer felt that in his professional judgment such issues would not be successful. The lawyer instead chose to rely on the issue he thought had the best chance for success. The Supreme Court reversed a federal court of appeals which had found that the failure to raise every non-frivolous issue constituted ineffective assistance of counsel. The Supreme Court noted that appellate courts often had page limitations on briefs and time limitations on argument. Thus, a brief that raises every colorable issue runs the risk of obscuring meritorious issues. Id.

77 L.Ed.2d 994.

This Court already has the appellate briefs filed by Mr. Padavano in this case. Certainly, the Court can judge for itself whether the claims raised constituted ineffective assistance of counsel under Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Respondent submits that there is simply no way Petitioner's allegations should be successful. See Aubrey Adams v. State, ___ So.2d ___, 9 F.L.W. 357, 358 (Fla. 1984), in which this Court rejected a similar claim on the basis that the defendant had suffered the prejudice required under Strickland in that he had not proven reasonable probability sufficient to undermine competence in the outcome.

WHEREFORE, Respondent respectfully requests that the Petition for Writ of Habeas Corpus be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



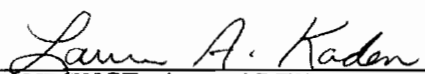
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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been forwarded to Mr. Billy Nolas, 517 E. College Avenue, Tallahassee, Florida 32301, on this 11th day of October, 1984.



LAWRENCE A. KADEN
ASSISTANT ATTORNEY GENERAL