IN THE SUPREME COURT OF FLORIDA

SYLVESTER WILLIAMS,

PETITIONER,

VS. CASE NO. 66,075

STATE OF FLORIDA,

RESPONDENT.
_____/

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, Sylvester Williams, the criminal defendant, movant for Fla.R.Crim.P. 3.850 relief, and appellant in Williams v. State, 455 So.2d 543 (Fla. 1st DCA 1984) below, will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority and appellee below, will be referred to as "the State."

References to the one volume record on appeal containing the legal documents and transcript of testimony and proceedings attending petitioner's Fla.R.Crim.P. 3.850 motion, will be designated "(R:)."

All emphasis is supplied by the State.

STATEMENT OF THE CASE AND FACTS

The State rejects petitioner's statement of facts because it presents the legal occurrences and evidence adduced below in the light most favorable to him, contrary to the policy that such matters should be presented in the light most favorable to the State as the prevailing party, e.g. Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 457 U.S. 31 (1982). The State therefore substitutes the following statement of the case and facts for purposes of resolving the narrow legal issues presented upon certiorari.

In late 1982 and early 1983, petitioner was charged in the Circuit Court of the Eighth Judicial Circuit in and for Alachua County, Florida, with the first degree murder of Grady Jones, with armed burglary, and with the aggravated assault with a firearm of Anita Roberts (R 1; 88; 120). Assistant Public Defender John Carlin was appointed to the case and, with the help of Assistant Public Defender John Kearns, negotiated an agreement with State Attorney Eugene Whitworth and Assistant State Attorney Gordon Groland that the State would "nolle pross" the two lesser charges and reduce the charge of first degree murder to second degree murder in return for a plea of guilty to this latter charge (R 82-85; 1). Carlin explained the ramifications of accepting or rejecting the agreement to petitioner "ten times or more" (R 85-86). Carlin explained that if petitioner went forward with a trial and was convicted of first degree murder, he would necessarily receive a mandatory minimum prison sentence of twenty-five years; but that if he accepted the deal

and pled to second degree murder, he would receive a "life" sentence which would, in actuality, likely result in a prison term of from five to seven years and be followed by parole (R 86-94). In either case, petitioner was told, he would necessarily receive a mandatory minimum prison sentence of three years because he had used a firearm during the murder (R 93). Mr. Carlin felt that acceptance of the offer was in petitioner's best interest considering the strength of the prosecution's case, but petitioner balked (R 85-86). Carlin asked his investigator, Maurice Wilson, to visit petitioner in jail and re-explain the aforecited ramifications, which Wilson did (R 65-68). Carlin and Wilson then explained the situation to petitioner's family to enlist their aid in encouraging petitioner to accept the State's offer (R 86-88). Petitioner eventually decided to accept the offer, and filed the standard plea forms on March 30, 1983 (R 17-21).

On April 18, the parties appeared in court to formalize their agreement (R 115-126). Mr. Carlin confirmed petitioner's understanding of the standard plea forms, and then specifically addressed petitioner as follows:

> Mr. Carlin: Mr. Williams, do you understand that by pleading guilty to second degree murder with a firearm, the maximum possible sentence the Court could impose is life imprisonment and/ or a fine of $10,000?
>
> The Defendant: Yes, sir.
>
> Mr. Carlin: And do you understand that because the offense was committed with a firearm, there is a three-year mandatory minimum penalty?
>
> ...The Defendant: Yes, sir.

(R 118). Mr. Carlin nonetheless detected some "reticence" in petitioner, and Judge Elize S. Sanders inquired of petitioner if he would prefer to withdraw his plea (R 121-122). Petitioner stated "I will go along with it" three times (R 122-124). Nonetheless, Mr. Carlin asked for a recess and then thoroughly explained the ramifications of the agreement to petitioner once again. Mr. Kearns did the same (R 94-96; 74-77). Petitioner then returned to court and reaffirmed his desire to accept the deal (R 124-125). Judge Sanders accepted the plea (R 125; 22) and sentenced petitioner to life imprisonment with a three-year mandatory minimum on May 23 (R 2).

According to Carlin, Wilson and petitioner himself, petitioner was not under the influence of intoxicating drugs at any time during the aforediscussed transactions (R 89-90; 68; 18; 118-119). He appeared to the three men to understand the ramifications of the proposed agreement (R 89-90; 67-68; 77; 81). Neither Carlin nor anyone else ever represented to petitioner that he would receive a fifteen year sentence (R 70; 80; 91).

On September 12, 1983, petitioner filed a Fla.R.Crim.P. 3.850 motion for post-conviction relief with the trial court, alleging essentally that his plea was involuntarily induced because he had been under the influence of drugs, because the ramifications of the plea had not been adequately explained, and because he had been promised a fifteen-year sentence in return (R 2-10). Judge Sanders responded to an unpreserved letter from petitioner by stating that, if he determined the

matter required an evidentiary hearing, "you will be afforded your right to be represented by counsel during that proceeding" (R 13). The judge declined (R 53) petitioner's request for appointed counsel (R 16) after scheduling an evidentiary hearing (R 14-15).

At the February 1, 1984 hearing, petitioner testified consistently with the allegations in his motion (R 43-53; 98-99). He obviously knew that he had the right to summon witnesses, since he summoned several. Petitioner's sister, Cheristeen Markham, testified that Carlin had told her petitioner might get "fifteen (years), at the most", but admitted on cross that Carlin might have been talking about actual time served rather than the total length of the sentence (R 58). Rose Sheffield, petitioner's mother, testified that Carlin had told her that petitioner would get a three year mandatory minimum and could get twenty five years or more in discretion of the judge (R 59-62). Wilson, Kearns and Carlin testified for the State that the operative events surrounding petitioner's plea occurred as previously described (R 64-98). Judge Sanders accepted their view of events to deny the motion for post-conviction relief on March 14, finding that petitioner's plea was not involuntary induced by drugs, by misunderstandings, or by false promises (R 105-106).

Upon timely appeal (R 127), the First District affirmed, Williams v. State, holding only that petitioner's allegation that his plea had been involuntarily induced by a promise of a three year sentence was not of sufficient complexity, under Graham v.

State, 372 So.2d 1363 (Fla. 1979), to have compelled the trial judge to appoint counsel to assist petitioner for the evidentiary hearing to be held thereupon. However, pursuant to Fla.R.App.P. 9.030(a)(2)(A)(v), the First District certified the following question to this Court as being of great public importance:

> When a trial Court has determined that it is necessary to hold an evidentiary hearing on allegations raised in a motion for post-conviction relief, is court-appointed counsel for an indigent defendant mandatory or is such appointment properly left to the discretion of the trial court?

Williams v. State, 455 So.2d 543, 544. This Court accepted jurisdiction in order to answer this question on October 29, 1984.

ISSUE

WHEN A TRIAL COURT HAS DETERMINED THAT IT IS NECESSARY TO HOLD AN EVIDENTIARY HEARING ON ALLEGATIONS RAISED IN A MOTION FOR POST-CONVICTION RELIEF, IS COURT-APPOINTED COUNSEL FOR AN INDIGENT DEFENDANT MANDATORY OR IS SUCH APPOINTMENT PROPERLY LEFT TO THE DISCRETION OF THE TRIAL COURT?

ARGUMENT

The State would submit that this Court should answer the above-certified question, as the First District did, by holding that the appointment of counsel for a movant for post-conviction relief found entitled to an evidentiary hearing is discretionary with the trial judge, who shall consider in resolving this matter the complexity of the issue presented pursuant to this Court's command in Graham v. State.

Although Fla.R.Crim.P. 3.111(b)(2) provides for the discretionary appointment of counsel "in all proceedings arising from the initiation of a criminal action against a defendant, including post-conviction proceedings", Fla.R.Crim.P. 3.850 itself authorizes evidentiary hearings without authorizing the appointment of counsel to represent the movants at these hearings, which virtually compels the conclusion that such appointments were intended to be wholly discretionary with the trial judge. In Graham v. State, 372 So.2d 1363, 1366, this Court appeared to slightly qualify the plain language of the aforecited rules by holding that such appointments are largely discretionary in the following passage, which also

outlines those factors a trial judge should consider in exercising this discretion:

> The adversary nature of the proceeding, its complexity, the need for an evidentiary hearing, or the need for substantial legal research are all important elements which may require the appointment of counsel. This appointment authority is discretionary, with any doubts being resolved in favor of an indigent defendant. There is no absolute duty to appoint counsel for an indigent defendant in a post-conviction relief proceeding unless the application on its face reflects a colorable or justiciable issue or a meritorious grievance.

It is worth nothing that in the recent decision of Jones v. State, 446 So.2d 1059, 1062 (Fla. 1984), this Court "encourage[d] trial judges to conduct evidentiary hearings when faced with" motions for post-conviction relief alleging the ineffective assistance of counsel without even intimating a corresponding preference for the appointment of new counsel to assist at such proceedings. Yet the Second District, in Halpin v. State, 448 So.2d 1153 (Fla. 2nd DCA 1984), thereafter concluded that Graham v. State absolutely required the appointment of new counsel in such a situation. This clearly erroneous decision demonstrates why this Court must return Graham v. State to its roots in deciding the instant case.

The people of Florida are not required by the Constitution of the United States to provide convicted criminal defendants with an appeal at all, see Griffin v. Illinois, 351 U.S. 12 (1955), but they do, see Article V, Sections 3(b)(1), 4(b)(1) and 5(b)(1) of the Constitution of the State of Florida;

§924.06, Fla.Stat.; Fla.R.App.P. 9.030(a)(1)(A)(i-ii), (b)(1)(A), and (c)(1)(A)(1); Fla.R.App.P. 9.140(b). They also provide attorneys to indigent appellants free of charge. See Article V, Section 18 of the Constitution of the State of Florida; §27.50 et. seq., Fla.Stat.; Fla.R.Crim.P. 3.111(b)(1). The people of Florida are not required by the Constitution of the United States to provide convicted criminal defendants whose convictions have been affirmed by a state appellate court with a discretionary review to a higher state appellate court, or with effectively free counsel to pursue such discretionary review or discretionary review to the Supreme Court of the United States, see Wainwright v. Torna, 455 U.S. 586 (1982), but they do, see Article V, Sections 3(b)(3-5), 4(b)(3), 5(b), and 18 of the Constitution of the State of Florida; §27.50 et. seq., Fla.Stat.; Fla.R.App.P. 9.030(a)(2)(A)(i-vi); Fla.R.Crim.P. 3.111(b)(2); but see State ex.rel. Smith v. Brummer, 443 So.2d 957 (Fla. 1984). The people of Florida are not required by the Constitution of the United States to provide criminal defendants whose convictions have been affirmed by a state appellate court with means for collaterally attacking this disposition, cf Mitchell v. Wyrick, 727 F.2d 773 (8th Cir. 1984) and 18 U.S.C. §3006(A)(g), but they do, see Article I, Section 13, and Article V, Sections 3(b)(9), 4(b)(3), and 5(b) of the Constitution of the State of Florida; Fla.R.App.P. 9.030(a)(3), (b)(3), and (c)(3); Fla.R. Crim.P. 3.800 and 3.850. Are the tolerant and charitable people of Florida now also to be told that they shall pay for counsel to represent movants at hearings held upon these

collateral attacks under any but the most narrow of circumstances? NO! As Justice Cardozo stated in Snyder v. Massachussetts, 291 U.S. 97,122 (1933):

> [J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

* * *

The State therefore submits that this Court should answer the certified question by holding that the appointment of counsel for a movant for post-conviction relief found entitled to an evidentiary hearing is discretionary with the trial judge, who shall consider in resolving this matter the complexity of the issue presented pursuant to this Court's command in Graham v. State. Because this case is before this Court only to determine whether the First District answered this question correctly, the State would submit that petitioner's attempts to show alternate ways in which the First District erred are inappropriate. See Barket v. State, 356 So.2d 263, 264 (Fla. 1978), cert. denied, 439 U.S. 848 (1978), in which this Court resolved a certified question but "[d]eclined to entertain other issues raised...by petitioner but resolved by the district court." The prohibition against going beyond the parameters of the certified question does not, however, apply to the State as the prevailing party below, for axiomatically the decision reached by the lower courts must be upheld upon review where those courts have reached the right result, regardless of their reasoning. See e.g., Smith v.

Phillips, 455 U.S. 209 (1982); City of Miami Beach v. 8701 Collins Ave., 77 So.2d 428 (Fla. 1954); Cohen v. Mohawk, 137 So.2d 222 (Fla. 1963); and Savage v. State, 156 So.2d 566 (Fla. 1st DCA 1963), cert. denied, 158 So.2d 518 (Fla. 1963). In the instant case, the State would submit that even if the First District answered the certified question incorrectly, the decision of the trial judge not to afford petitioner counsel for his evidentiary hearing is sustainable because petitioner was plainly not even entitled to such a hearing.

The trial judge could have prefunctorily dismissed petitioner's motion for post-conviction relief for the simple reason that petitioner's claim that his plea was involuntarily induced because he had been under the influence of drugs was inherently inconsistent with his simultaneous claim that the plea was involuntarily induced because he had been promised a fifteen-year sentence in return. The former claim implies an absence of memory and an inability to enter a binding contract, while the latter claim implies a clear memory of the very same events and an ability to enter a binding contract. In Johnson v. Massey, 516 F.2d 1001, 1002 (5th Cir. 1975), the court upheld the dismissal of the habeas corpus petition of a prisoner who claimed that his plea was entered in contemplation of a breached plea agreement, reasonsing that this claim was "inherently inconsistent" with the prisoner's earlier claim that his plea was involuntarily induced due to his alleged mental incapacity. This federal precedent may be applied to the case at bar insofar as this Court long ago stated that its rule authorizing a motion

for post-conviction relief (now Fla.R.Crim.P. 3.850) is patterned after the federal standards authorizing a petition for writ of habeas corpus (28 U.S.C. §§2254 and 2255), and held that the Florida courts should look to federal precedents in interpreting this rule. See Roy v. Wainwright, 151 So.2d 825 (Fla. 1963); see also Dickens v. State, 165 So.2d 811 (Fla. 2nd DCA 1964); but see Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980). The Florida courts have, moreover, held that a criminal defendant who seeks to maintain palpably inconsistent positions during the course of a criminal proceeding, in order to suit the needs of the moment, may be collaterally estopped from doing so. See State v. Beamon, 298 So.2d 376 (Fla. 1974), cert. denied, 419 U.S. 1124 (1975), in which a defendant who had secured a judgment of acquittal at his first trial for robbery on grounds that the proof adduced at trial regarding the date of the offense differed from the date alleged in the bill of particulars, was held estopped from asserting a double jeapordy defense in a retrial based on the same incident where the proper date was specified; see also Robles v. State, 210 So.2d 441, 442 (Fla. 1968), Ivory v. State, 173 So.2d 759 (Fla. 3rd DCA 1965), cert. dismissed, 183 So.2d 212 (Fla. 1965), and Pearson v. State, 221 So.2d 760 (Fla. 2nd DCA 1969), holding that a defendant who denies committing the acts which led to the charges against him may not inconsistently rely and receive a jury instruction upon an affirmative defense which legally requires an admission of these same acts. Contra, Pope v. State,

___So.2d___(Fla. 1st DCA 1984), 9 F.L.W. 2102, 2352, review pending (Fla. 1984), Case No. 66,162. Essentially, "he who seeks equity must do equity." Williamson v. Williamson, 367 So.2d 1016, 1018 (Fla. 1979). It would be both inequitable and unlawful to reward a movant for post-conviction relief who pleads schizophrenically with an evidentiary hearing. See generally J. Tiedemann, "State Prisoner Abuse of The Federal Writ of Habeas Corpus Through Factual Misrepresentation: Suggested Sanctions", *Florida Bar Journal*, December 1984, p. 677.

CONCLUSION

WHEREFORE, the State of Florida requests that the certified question be answered as indicated and, in any event, the First District's affirmance of the trial judge's denial of petitioner's motion for post-conviction relief be APPROVED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Respondent has been forwarded to Sylvester Williams, Petitioner Pro Se, 089845, P.O. Box 500, Olusteen, FL 32072 on this 26th day of November, 1984.

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