IN THE SUPREME COURT OF FLORIDA 66,445

LARRY JOE JOHNSON,

Petitioner,

Case No: _____

v.

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

Respondent.

_____/

FILED
SID J. WHITE
JAN 22 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Larry Joe Johnson, by undersigned counsel, pursuant to Rules 9.030 (a) (3) and 9.100, Fla. R. App. P., petitions this court to issue its Writ of Habeas Corpus.

Petitioner alleges he was convicted and sentenced to death in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under the statutory and case law of the State of Florida for the reason petitioner was denied effective assistance of counsel at the appellate level, on his direct appeal to this court from his conviction and sentence of death.

In support of this petition and in accordance with Rule 9.100 (e), Fla. R. App. P., petitioner states:

I. JURISDICTION

This is an original action under Rule 9.100 (a), Fla. R. App. P. This court has original jurisdiction pursuant to Rule 9.030 (a) (3), Fla. R. App. P. and Article V, Section 3 (b) (9) of the Florida Constitution.

As described more fully below, petitioner was denied effective assistance of appellate counsel in proceedings before this Court at the time of his direct appeal. Counsel failed to raise or adequately address issues which, if raised

and properly argued, would have required (1) the reversal of petitioner's conviction and death sentence, and (2) a new trial and sentencing hearing.

Since the ineffective assistance of counsel allegations stem from the acts or omissions before this court, this court has jurisdiction to hear petitioner's habeas corpus petition. Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984); Arango v. State, 437 So.2d 1099 (Fla. 1983); Buford v. Wainwright, 428 So.2d 1389 (Fla. 1983), cert. denied, 104 S.Ct. 372 (1983); Knight v. State, 394 So.2d 997, 999 (Fla. 1981).

If this court finds petitioner's appellate counsel was ineffective, it can and should consider, on the merits, appellate issues which should have been raised earlier. Florida law has consistently recognized that the appropriate remedy where the appellate right has been abrogated due to the ineffectiveness of appellate counsel is a new review of the issues raised by petitioner. State v. Wooden, 246 So.2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); Futch v. State, 420 So.2d 905 (3d DCA 1982); Ross v. State, 287 So.2d 372, 274-75 (Fla. 2d DCA 1973); Davis v. State, 276 So.2d 846, 849 (Fla. 2d DCA 1973) aff'd, 290 So.2d (Fla. 1974).

The proper means of securing such a belated appeal is a petition for writ of habeas corpus, filed in the appellate court empowered to hear the direct appeal. See Barclay, supra; Baggett, supra, 229 So.2d at 244.

Accordingly, the habeas corpus jurisdiction of this court is properly invoked to review "all matters which should have been argued in the direct appeal," Ross v. State, supra, 287 So.2d at 374-375, where such matters were originally overlooked or otherwise not adequately and effectively pursued by appellate counsel. See id. at 374; Kennedy v. State, 338 So.2d 261, 262 (Fla. 4th DCA 1976);

Davis, supra, 276 So.2d at 849.

II. FACTS UPON WHICH PETITIONER RELIES

1. Background

Petitioner was found guilty after a jury trial of First Degree Murder on Count One of an indictment and Armed Robbery with a Firearm on the Second Count. The state trial court followed the jury recommendation of death and sentenced petitioner to death on January 9, 1980.

Petitioner was adjudged insolvent and the Public Defender for the Second Judicial Circuit was appointed to represent him on appeal. A number of issues were raised. This court affirmed the judgment and sentence.

2. The Trial

At voir dire, a prospective juror, Miss Stephenson, was asked by defense counsel whether she thought her reservations about the death penalty were so strong she couldn't put them aside even if the judge so instructed her. Mis Stephenson responded, "Yes, I might. But not about the death penalty, no." (TR. 135-6).

The state questioned Mrs. Bellamy, another prospective juror, at voir dire concerning whether her reservations about the death penalty were such that she didn't think she could ever vote to impose or to recommend the death penalty. "Right," Mrs. Bellamy responded. (TR. 197-200).

Furthermore during the penalty phase of the trial, petitioner was removed from the courtroom after one of the psychologists, Dr. McMahon, began her testimony. Petitioner was removed at the request of Dr. McMahon and with his counsel's consent. (TR. 903). However, at no time did the trial court advise petitioner of his right to be present at his trial and seek or obtain from petitioner his permission to be taken away from the court room. Although the trial record

does not reflect when petitioner was returned to the courtroom, it is clear he was not present during the entire testimony of Dr. McMahon, including her cross and re-cross examination by the State. (TR. 901-925). Nor was petitioner present when the Court instructed the jury before releasing them for dinner recess (TR. 926-927), and when defense counsel made several motions in relation to individual voir dire of jurors and jury instructions. (TR. 926-930).

III. NATURE OF THE RELIEF SOUGHT

Petitioner seeks an order of this court, in light of the undisputable constitutional and statutory violations set forth herein, vacating the judgment and conviction and remanding the case for a new trial. Alternatively, Petitioner seeks an order of this court, as in Ross v. State, granting petitioner belated appellate review from the death sentence imposed by the trial court, and permitting petitioner full briefing of the issues presented herein.

IV. BASES FOR THE WRIT

The failure of petitioner's appellate counsel to raise and effectively argue the necessary and critical issues on his direct appeal to this court denied petitioner his right to a full and meaningful direct appeal, and to effective assistance of appellate counsel guaranteed by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution, Articles I and V of the Florida Constitution, and Florida statutory and case law. See Proffitt v. Florida, 428 U.S. 242 (1976) at 253; State v. Dixon, 283 So.2d 1, 110 (Fla. 1973); Article V, Section 3 (b) (1), Florida Constitution; Section 921.141, Fla. Stat. (1977).

To be effective, counsel must be "an active advocate," and must "support his client's appeal to the best of his ability." Anders v. California, 386 U.S. 738, 744

(1967). "The advocate's duty is to argue any point which may reasonably be argued...." Wright v. State, 269 So.2d 17, 18 (Fla. 2d DCA 1972). Thus, if appellate counsel fails to raise issues on direct appeal, the appellant is entitled to renewed appellate review if there existed "an arguable chance of success with respect to these contentions." Thor v. United States, 574 F.2d 215, 221 (5th Cir.1978); accord, Hugh v. Rhay, 519 F.2d 109, 112 (9th Cir.1975); Hooks v. Roberts, 480 F.2d 1196, 1197 (5th Cir.1973), cert. denied 414 U.S. 1163 (1974).

As noted above in the jurisdictional statement, Florida law requires an appellant who is deprived the effective assistance of appellate counsel be granted belated appellate review. See e.g., Ross v. State, supra, 287 So.2d at 375.

In Knight v. State, 394 So.2d 997 (Fla. 1981), this court set forth the four part test with respect to a claim of ineffective assistance of appellate counsel. First, a petitioner must specify the "omission or overt act upon which the claim of ineffective assistance of counsel is based". Second, he must show that "this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel." This court recognized, however, that "in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances." Third, Knight provides that petitioner must demonstrate that "this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings," Id. at 1001.

The fourth part of the Knight test places a burden of rebuttal on the state, which need not be addressed at this

time.

As demonstrated below, petitioner has satisfied the parts of the Knight test imposed upon him, and has succeeded in establishing a prima facie case that he was denied the effective assistance of appellate counsel as guaranteed by the United States Constitution and the constitutional laws of the State of Florida.

V. SPECIFIC ERRORS AND OMISSIONS OF WHICH PETITIONER COMPLAINS

The Petitioner was denied the effective assistance of appellate counsel with respect to the acts and omissions set forth previously in this petition, that is:

1. Appellate Counsel failed to raise as a point on appeal the Constitutional bar to the involuntary removal of defendant from the courtroom during a part of the penalty phase even though such action was fundamental error and this Court would have vacated the sentence of death had the point been raised.

The defendant was removed from the courtroom during the sentencing phase of trial after a psychologist began to testify. (R. 901-2). The removal was at the request of the psychologist, (R. 902), and was involuntary. The only record reference to the decision to conduct part of the trial in defendant's absence is the following:

> MR. HUNT: Your Honor, at this time I would like to allow the defendant to wait outside of the courtroom while this witness is testifying. By a prior arrangement, it was agreed he will not be present at the time she is discussing her findings.
>
> THE COURT: At the request of the defendant and his counsel, it will be permitted.
>
> MR. HUNT: We are so requesting.
>
> THE COURT: Mr. Hunt, I will leave it up to you when you wish him to come back in.

[R. 901-02].

The defendant was not present during the entire testimony of the psychologist, including cross examination [901-25]. There is no express knowing and intelligent waiver by defendant of his right to be present in the record. There was no objection; the issue was not raised on appeal.

The most direct way of showing the denial suffered by petitioner is to address first the effect of appellate counsel's failure to raise this issue. In a case decided during the same period this one was pending, this Court reversed a capital conviction when a defendant was absent from jury challenges. Francis v. State, 413 So.2d 1175 (Fla. 1982).

Relying both on Fla. R. Crim. P. 3.180 and the Fourteenth Amendment, the Court found defendants have a constitutional right to be present during jury challenges, as well as a right created by Florida Rule of Criminal Procedure 3.180 (a) (4). Such a right must be knowingly and intelligently waived on the record before the defendant can be removed from the courtroom. Reversing the conviction in Francis, the Court held:

> Francis was not questioned as to his understanding of his right to be present during his counsel's exercise of his peremptory challenges. The record does not affirmatively demonstrate that Francis knowingly waived this right or that he acquiesced in his counsel's actions after counsel and judge returned to the courtroom upon selecting a jury. His silence, when his counsel and others retired to the jury room or when they returned after the selection process, did not constitute a waiver of his right. The State has failed to show that Francis made a knowing and intelligent waiver of his right to be present. See Schneckloth v. Bustamonte, 412 U.S. 218, 83 S.Ct. 2041, 36 L.Ed.2d 854 (1973); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

Francis, 413 So.2d Ct. 1178.

Francis is one of a long line of cases which hold a defendant has a Sixth and Fourteenth Amendment right to be present at any critical stage of trial. Illinois v. Allen,

397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 578 (1884); Hall v. Wainwright, 733 F.2d 766 (11th Cir.1984); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir.1982). That the taking of testimony during the penalty phase of trial is a critical stage is beyond question. F.R.Crim.P 3.180 (c) (4) defines such a proceeding as a critical stage, providing:

> Presence of Defendant. In all prosecutions for crime the defendant shall be present:
> * * *
> (5) At all proceedings before the Court when the jury is present.

Similarly, the Eleventh Circuit has found the penalty phase to be a critical stage in Proffitt, 685 F.2d Ct. 1257; Cf. Gardner v. Florida, 430 U.S. 349, 358 (1977). Sentencing is "critical state" of capital trial.

This court would have undoubtedly vacated the sentence in this case under the reasoning of Francis had the issue been raised. Like Francis, there was no objection to the removal of this petitioner at trial, and in fact, counsel concurred in the decision. More importantly, here, as in Francis, there is no knowing and intelligent waiver by defendant on the record; there is only the bare statement by defendant's counsel that he and the defendant agree to the removal. (R.901-02). The petitioner here was tried in his absence while a critical witness offered testimony which would contribute to the decision whether he lived or died. Could there be any clearer denial of a substantial constitutional right?

The failure to raise the issue fell below the standards expected of effective appellate counsel. While it is true Francis had not been decided by September 21, 1981, the date the initial brief was filed, the applicable standards were well deliniated by that time. The right to be present in the courtroom at critical stages of the proceeding was explicitly recognized in Snyder v. Massachusetts, 291 U.S. 97,105-06 (1934) as a matter of constitutional law, more

recently in Illinois v. Allen, 397 U.S. 337,338 (1970), and possibly as early as the Supreme Court's decision in Hopt v. Utah, 110 U.S. 574,579 (1884). Several early decisions of this Court addressed the issue prior to Francis, including Fails v. State, 60 Fla. 8, 53 So. 612 (1910), Lowman v. State, 80 Fla. 18, 85 So. 166 (1920), Mulvey v. State, 41 So.2d 156,158 (Fla.1949) and Lovett v. State, 29 Fla. 356, 11 So.172 (1852). An adverse, but distinguishable decision was rendered by this Court in 1971 in State v. Melendez, 244 So.2d 137 (Fla. 1971). Florida Rule of Criminal Procedure 3.180 addresses the issue explicitly, and has existed since 1967. The analagous error of examining a juror outside the defendant's presence resulted in a reversal by this Court in Schoultz v. State, 108 So.2d 424 (1958). In Cole v. State, 181 So.2d. 698 (Fla. 3d DCA 1966), the Court recognized the legal principle that fundamental error could have occurred where defendant was removed from the courtroom during a doctor's testimony.

There was no tactical reason for appellate counsel's failure to raise this issue, as he attests in the attached affidavit. Failure to raise it resulted in the affirmance of petitioner's sentence when it was rendered as a result of a fundamentally unfair proceeding.

2. In addition, petitioner claims that appellate counsel failed to raise as a point on appeal the constitutional bar to the removal of defendant from the courtroom during a portion of the penalty phase when the right to be present during critical stages of a capital trial cannot be waived.

This Court has long recognized the viability of the principle that a defendant cannot waive his right to be present at his capital trial, reserving the issue most recently in Francis v. State, 413 So.2d 1174, 1178 (Fla.1982), and Herzog v. State, 439 So. 1372, 1376

(Fla.1983). Early cases decided by the United States Supreme Court hold the right to be present is so fundamental that it cannot be waived in a capital case. Diaz v. United States, 223 U.S. 442, 455 (1915); Hopt v. Utah, 110 U.S. 574, 579 (1884). The prejudice in the failure to raise the issue is patent--the United States Court of Appeals for the Eleventh Circuit has recently held the right to be present is nonwaivable in a capital case, in Hall v. Wainwright, 733 F.2d 766 (11th Cir.1984) and Proffitt v. Wainwright, 685 F.2d 1227, 1257-8 (1th Cir. 1982).

There is thus no question that the failure of appellate counsel to raise this reasonably apparent issue has resulted in a death sentence being imposed on petitioner in a fundamentally unconstitutional manner.

3. Even though there was a timely objection at trial to the excusal of Witherspooned jurors for cause, the issue was not raised on appeal. Under the case law in existence at the time of appeal, the excusals were clearly error and should have been raised as such.

Witherspoon v. Illinois, 391 U.S. 510 (1968), holds that the state may only excuse for cause a juror who first "ma[kes] unmistakably clear" that he or she "would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed . . ." 391 U.S. at 522 n.21 (emphasis in original). A defendant is entitled to jurors "who harbor doubts about the wisdom of capital punishment . . . ," 391 U.S. at 520, so long as those jurors are not "irrevocably committed, before the trial has begun, to vote against the penalty of death . . ." Id at 522 n.21. Improper excusal of only one juror vitiates a sentence of death. Adams v. Texas, 448 U.S. 38 (1980).

A potential juror who simply "does not think" or "does not know" whether he/she could vote for death may not

be excluded for cause under Witherspoon. See Granviel v. Estelle, 655 F.2d 673, 677 & n.7 (5th Cir.1981); Burns v. Estelle, 626 F. 2d 398 (5th Cir.1980) (en banc). Two such equivocal jurors were excused in Petitioner's case. First, potential juror Stephenson was excused after she responded, "I don't know. I don't think I could" to a question regarding her ability to set aside her belief and follow the judge's instruction on the law in the case. Additionally, potential juror Bellamy was illegally excused after completely irrelevant "Witherspoon" inquiries. She was asked: "Are those reservations such that you don't think you could ever vote to impose the death penalty or to recommend that it be imposed?" and her response was, "Right." [R. 197-200]. (emphasis added). Based on this equivocal response, excusal for cause was allowed.

These excusals violated Petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments to Due Process, fair and impartial trial, and reliable guilt/innocence and sentencing decisions. Such "I don't know" or "I don't think so" challenges have been held improper in Burns v. Estelle, 626 F.2d 398 (5th Cir.1980) (en banc) and Granviel v. Estelle, 655 F.2d 673, 677 & n.7, inasmuch as such answers make nothing "unmistakably clear," and are far short of "irrevocabl[e]" and "automatic[.]" opposition to "ever" imposing a death sentence. 391 U.S. at 420, 522 N.21. Timely objection to excusing the jurors was made at trial in this case.

There are a number of cases which have been decided both before and after this appeal was decided establishing the principle that equivocal Witherspoon responses are insufficient to exclude jurors for cause. These cases establish the Petitioner would have been successful had the claim been raised on appeal: Darden v. Wainwright, 725 F.2d 1526 (11th Cir.1984) (en banc); Hance v. Zant, 696 F.2d 940,

955 (11th Cir.1983); Granviel v. Estelle, 655 F.2d 673, 677 &n.7 (5th Cir.1981); Burns v. Estelle, 626 F.2d 398 (5th Cir.1980) (en banc); People v. Lanphear, 608 F.2d 689, 703-04 (Cal.1980), vacated on other grounds, 499 U.S. 810 (1980).

This issue is also currently pending in the United States Supreme Court, Witt v. Wainwright, 714 F.2d 1069, 1082-83 (11th Cir.1983), rehearing denied, 723 F.2d 767 (1984), cert. granted ___ U.S. ___, 80 L.Ed.2d 551 (1984).

CONCLUSION

The questions referenced above could have undoubtedly been raised in the appeal even absent the objection of trial counsel. The courts of this state have consistently held fundamental error committed at trial may be raised on appeal notwithstanding trial counsel's failure to preserve the issue. E.g. Rhay v. State, 403 So.2d 956 (Fla.1981); Morgan v. State, 392 So.2d 1315 (Fla.1981); Custer v. State, 34 So.2d 100 (Fla.1947).

Appellate counsel failed to present critical issues which would have resulted in reversal. Failure of appellate counsel to do so in petitioner's direct appeal deprived him of a meaningful direct appeal and contravention of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and of effective assistance of counsel under those provisions.

WHEREFORE, Petitioner request this court issue its writ of habeas corpus and direct petitioner receive a new trial; alternatively this court allow full briefing of the issues presented and grant Petitioner belated appellate review of this conviction.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

By Baya Harrison
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VERIFICATION

STATE OF FLORIDA)
) ss.
COUNTY OF BRADFORD)

Before me, the undersigned authority, this day personally appeared LARRY J. JOHNSON, who, being first duly sworn, says that he is the Petitioner in the above styled cause, that he has read the foregoing Petition for Writ of Habeas Corpus and has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct.

Larry J Johnson
LARRY J. JOHNSON

Sworn to and subscribed to before me this 21 day of January, 1985.

Linda Carey.
NOTARY PUBLIC

My Commission Expires:

Notary Public, State Of Florida At Large
My Commission Expires April 17, 1987
Bonded By SAFECO Insurance Company of America

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand/mail to MARK MENSOR, Assistant Attorney General, State of Florida, Elliot Building, 401 South Monroe Street, Tallahassee, Florida 32301 this 22d day of January. 1985.

ATTORNEY