IN THE SUPREME COURT OF FLORIDA

JOHNNY PAUL WITT,

Appellant,

v.

CASE NO. 66626

STATE OF FLORIDA,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Witt was convicted of murder and sentenced to death eleven years ago. The judgment and sentence were affirmed by this Court in Witt v. State, 342 So.2d 497 (Fla. 1977) cert. denied 434 U.S. 935. Witt filed his first motion for post-conviction relief on November 2, 1979. The motion was denied December 11, 1979 and this Court, after staying Witt's first warrant of execution, affirmed the denial of post-conviction relief. Witt v. State, 387 So.2d 922 (Fla. 1980) cert. denied 449 U.S. 1067.

Witt sought relief in the federal courts. United States District Judge Carr denied Witt's habeas corpus petition on May 14, 1981 and denied his motion to alter or amend judgment on June 17, 1981. The Court of Appeals reversed finding a Witherspoon violation. Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983). The United States Supreme Court reversed the Court of Appeals on January 21, 1985. Wainwright v. Witt, ___U.S.___ 36 Cr.L. 3116.

On February 8, 1985 the governor of the State of Florida signed a second death warrant on Witt. Witt filed his second, successive Motion to Vacate on February 22, 1985.

At the hearing conducted on February 25, 1985, appellant argued that he should be allowed to present a second successive motion to vacate because the ineffective counsel issue was not raised earlier due to the Public Defender's office policy and the change in law on the jury selection issue represented by Grigsby v. Mabry (R 580-581). The state argued that the defense team's

prior awareness of the potential ineffective counsel claim to which it applied to vague office policy constituted a known claim which was deliberately withheld for whatever reason and that the abuse of the procedure doctrine should preclude consideration (R 581-582) Case law was cited requiring the prisoner to be held to the knowledge of the claim by the lawyer (R 583). Further the state argued that Grigsby was not the type of change of law warranting post-conviction relief under the standard announced in Witt v. State, 387 So.2d 922 (R 587).

The court granted the state's motion to dismiss (R 595-596; R 568)

POINT ON APPEAL

WHETHER THE LOWER COURT CORRECTLY DENIED RELIEF WITHOUT AN EVIDENTIARY HEARING.

ARGUMENT

The lower court correctly denied the motion for post-conviction relief and correctly decided that based on the allegations in the pleadings an evidentiary hearing was unnecessary on the reasons for the successive motion.

Neither post-conviction relief nor an evidentiary hearing were required on the Grigsby jury selection issue. Grigsby is in consistent with the Supreme Court decision in Wainwright v. Witt, ___U.S.___ (Case No. 83-1427, January 21, 1985). Grigsby, relied in part on statistics available in earlier challenges which have been rejected in other federal courts. Keeton v. Garrison, 742 F.2d 129 (4th Cir. 1984); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) cert. denied 440 U.S. 976 (1979); Smith v.

Balkcom, 660 F.2d 573 (5th Cir. Unit B 1980) cert. denied 459 U.S. 882 (1982); McCleskey v. Kemp, ___F.2d___ (11th Cir. Case No. 84-8176, January 29, 1985). This court has recently rejected the Grigsby concept. Caruthers v. State, ___So.2d___ 10 F.L.W. 114.

Finally Grigsby is not a change in law emanating from the United States Supreme Court or this Court. Witt v. State, 387 So.2d 922 (Fla. 1980); State v. Washington, 453 So.2d 389 (Fla. 1984).

As to the ineffective counsel claim it is manifest that the Witt defense team knew in 1979 and 1980 that a claim of ineffective assistance of counsel was a viable one because, as Witt's counsel now urge, it was not raised earlier because of the Public Defender's office policy, prohibiting such issues (R 210). That is unacceptable for as the Fifth Circuit held en banc in Jones v. Estelle, 722 F.2d 159, 167 (5th Cir. 1983):

> "When a petitioner was represented by competent counsel in a fully prosecuted writ he cannot by testimony of personal ignorance justify the omission of claims when awareness of those claim's is chargeable to his competent counsel."

See also Murch v. Mottram, 409 U.S. 41, 34 L.Ed.2d 194 (1972) rejecting an acceptance of the petitioner's declaration of his subjective intent that he did not intend to waive a claim; see also Schneckloth v. Bustamonte, 412 U.S. 218, 36 L.Ed.2d 854 (1972) (one need not understand the consequences of a consent to search)

As the federal courts do not hesitate to enforce the abuse of the writ doctrine - see Woodard v. Hutchins, ___U.S.___, 78 L.Ed.2d 541 (1984); Antone v. Dugger, 79 L.Ed.2d 147 (1984); In re Shriner, 735 F.2d 1236 (11th Cir. 1984) application for stay denied ___U.S.___, 35 Cr.L. 4083; Goode v. Wainwright, 731 F.2d 1482 (11th Cir. 1984) so also this court need not tolerate it. See The Florida Bar, Re: Amendments to Rules of Criminal Procedure (Rule 3.850) 10 F.L.W. 22; Smith v. State, 453 So.2d 388 (Fla. 1984).

Furthermore, an examination of Witt's ineffective counsel allegations reveals that Will would not be entitled to relief under the Washington v. Strickland standard.

After summarizing the evidence adduced at trial, Witt alleges that on February 20, 1985, he was examined by a psychologist, Harry Krop. According to Witt, Krop found him to be suffering from Organic Brain Syndrome, to be suffering from a severe personality disorder, he found Witt exhibited some symptoms of schizophrenia, had a history of emotional instability and does not cope well to stress.

Thus, argues Witt, these factors would substantially impair his capacity to act responsibly and to understand the consequences of his acts.

But none of this is new. Witt's military medical records which Witt's trial counsel Behuniak introduced during the penalty phase describes Petitioner's history of emotional instability. For example, it is reported:

> Emotional instability reaction, chronic, severe; manifested by history of unstable family background and home environment (alcoholic father), difficulties in adapting to figures of authority and school, chronic headaches and feelings of tension and anxiety, and recent impulsive antisocial behavior; pre-disposition, lifelong history of emotional instability under minimal stress; precipitating stress, routine stress of military duty at the present time. Not PR. LD: No, EPTE.

Trial attorney Behuniak testified in his disposition that he would have used Dr. Gonzalez to testify at the penalty phase even if the State had not done so. (pp. 35 - 36). He sought to establish the mitigating evidence of mental or emotional disturbance through the testimony of Dr. Sprehe and Dr. Gonzalez. (p 13).

The trial record reflects that Behuniak did elicit from Dr. Gonzalez that Witt did have a "personality disorder" (R. 1143) and that "he has emotional and mental disturbances", (R. 1143) and that "when he is frustrated in whatever way, he would be under duress and you call it". (R. 1144). Witt received a general discharge from the military because he was unfit for military duty because of a mental or emotional disturbance. (R. 1146).

From. Dr. Sprehe, Behuniak elicited that Witt "does have a personality disorder and I suppose in the broadest sense that can be considered an emotional disturbance". (R. 1182). Witt's personality disorder was "severe". (R. 1184).

All that Witt has done is come up with a more recent psychologist to suggest a disagreement with the doctors who testified at trial. There is nothing to suggest that Behuniak was deficient in failing to seek an alternative to the doctors who had examined Witt throughout the court proceedings and were more familiar with him. There will, in any case, always somewhere be some alleged expert willing to proffer a contrary opinion to that propounded by another expert.

As stated in Booker v. State, 413 So.2d 756 (Fla. 1982):

> No new information was discovered - a doctor has simply been found who draws different conclusions.
>
> If "evidence" such as that offered here is found to warrant a new proceeding, there will be no end to the appeal process. The finality of the judicial process would be nil if a new proceeding was required everytime a party found an expert who reached a conclusion, with regard to information available at the time of trial, that differed from the opinions and conclusions presented at the trial. There must be a point at which the proceeding is concluded and the matter is settled.
>
> (Text at 757)

Counsel for Appellant is not required to pursue every path until it bears fruit or until all conceivable hope withers. Lovett v. State of Florida, 627 F.2d 706, at 708 (5th Cir. 1980. See also Elledge v. State, 432 So.2d 35 (Fla. 1983).

Consequently, Witt has failed in this petition even to meet the requirements of Strickland v. Washington, ___U.S.___, 80 L.Ed.2d 674 (1984) that:

> (1) counsel's performance was deficient i.e. that counsel was not functioning as the counsel guaranteed by the Sixth Amendment, and
> (2) that such errors were so serious as to deprive the defendant of a fair trial, one whose result is reliable.
>
> 80 L.Ed.2d at 693.

This Court can ascertain from a review of the record that there is not a reasonable probability that, absent the asserted error the balance of aggravating and mitigating circumstances did not warrant death. 80 L.Ed.2d at 698.

The trial court's summary denial of relief should be affirmed.

CONCLUSION

Based on the foregoing argument and citations of authority, the Appellee submits that the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to W.C. McLain, Assistant Public Defender, Hall of Justice Building, 455 North Broadway, Bartow, FL 33830-3798 this 27th day of February, 1985.

OF COUNSEL FOR APPELLEE.