IN THE SUPREME COURT OF FLORIDA

CASE NO. 66629

WILLIAM MIDDLETON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

* *

BRIEF OF APPELLEE

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INTRODUCTION

The Appellant, William Middleton, was the defendant in the trial court. The Appellant, the State of Florida, was the prosecution below. The parties will be referred to as they stood in the lower court. The symbol "A" will be used to designate the appendix to this brief. The symbol "T" will be used to designate the transcript of the original trial which transcript was attached to the order denying relief. The symbol "H" will be used to designate the transcript of the hearing on the Motion to Vacate. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE

The Defendant was convicted of first degree murder, grand theft and unlawful use of a firearm in the commission of a felony. The Defendant was sentenced to death for the crime of first-degree murder. This court affirmed the conviction and the sentence of death. Middleton v. State, 426 So.2d 548 (Fla. 1982).

Thereafter, Defendant filed a Petition for Writ of Certiorari to the United States Supreme Court contending that this Court's practice of upholding the sentence of death after disapproving of an aggravating factor violated the Eighth Amendment's requirement of rational

appellate review in capital sentencing decisions. The petition was denied. Middleton v. Florida, 103 S.Ct. 3573 (1983).

A Petition for Clemency was filed and was denied.

On March 19, 1984, Defendant filed his first Rule 3.850 Motion. A memorandum of law in support thereof was filed on June 18, 1984. On August 8, 1984, an Amended Motion to Vacate was filed.

Defendant set the matter for hearing for July 12, 1984, however Defense counsel failed to appear. The matter was reset for July 11, 1984 and at that time, Defense counsel failed to appear. The matter was taken off calendar to be reset by Defense Counsel.

On February 8, 1985, a death warrant was issued. On the same date, Defendant filed a Motion for Stay of Execution. Defendant scheduled for hearing his Motion for Stay for February 19, 1985.[1] At the hearing, the trial court summarily denied the Motions since Defense Counsel failed to appear. Rehearing on the matter was scheduled

[1]By scheduling the Motion for Stay, Defendant also scheduled his Motion to Vacate, inasmuch as a Motion for Stay is considered only after a determination is made on the pleading attacking the underlying judgment. See Baker v. State, 150 Fla. 457, 7 So.2d 796 (1942).

for February 26, 1985 and at that time, the cause was transferred to the original trial judge and all previous orders were vacated. Defendant filed amended pleadings. The trial court then summarily denied all claims. (A.1-17).

STATEMENT OF THE FACTS

This Court in its opinion affirming the Defendant's conviction and sentence set forth a statement of the facts, which the State adopts as an appropriate Statement of the Facts:

> On February 16, 1980, a citizen called the police and reported that her friend Gladys Johnson had not been seen for two days, that her car was missing and her house was completely closed and locked. Police officers broke into the house and found the body of Gladys Johnson. She had been shot in the back of the head with a shotgun. The murder weapon was found in the house.
>
> On February 17, appellant William Middleton was arrested in New York City on suspicion of "jostling," that is, being a pickpocket. The main evidence of appellant's guilt was a confession he made in New York to an assistant district attorney of that state. The attorney who conducted the interview and the stenographer who wrote down appellant's statement testified at the trial.

> Gladys Johnson was the mother of a man whom appellant had met in prison. When appellant was released on parole on December 28, 1979, he went to live with Gladys Johnson in the Miami area. Mrs. Johnson offered appellant a home because he had nowhere else to go. On February 14, 1980, they had an argument because Mrs. Johnson would not allow appellant to use her car. That evening, when she went to sleep on the living room sofa, he took her shotgun and sat with it across his lap for about an hour, contemplating killing her. When she awoke, he shot her in the back of the head. He locked the house and left in her car. That night, he drove to Tampa. The next day he returned to Miami, left the car at a bus station, and boarded a bus for New York City, taking Mrs. Johnson's two pistols with him. He sold the guns in New York.
>
> The manager of the Greyhound Bus station in North Miami Beach testified that he reported the presence of a car that apparently had been abandoned on his lot. This car was identified as belonging to Gladys Johnson. The keys to the locks on the front door of her house were found in the car.
>
> 426 So.2d at 549-50.

At trial, the Defendant adopted the majority of his confession, but testified that he falsely confessed because he was led to believe this was the only way he would avoid the death penalty. (T.364).

PREFACE

The Defendant raised numerous grounds in his Rule 3.850. The trial court denied all of the claims. On this appeal, Defendant only raises the issues of ineffective assistance of counsel for failing to present mitigating evidence and the introduction of evidence of collateral crimes. As such, the State will respond on the merits to only those claims presented to this Court. By failing to present the after claims to this Court, Defendant in accordance with the Rules of Appellate Procedure, has abandoned them.

SUMMARY OF THE ARGUMENT

The Defendant contends that he was denied effective assistance of counsel at trial because of trial counsel's failure, during the penalty phase, to present evidence to the jury of Defendant's emotional state. Regardless of the truth of said allegation, the trial court did not err in denying, without an evidentiary hearing, said claim inasmuch as a review of the entire record clearly evidences that this was a trial tactic by defense counsel. The defense at trial was one of innocence. The Defendant testified that although he confessed, the confession was false since he confessed only to escape the death penalty. Defense counsel's opening and closing argument during the guilt and innocence phase also presented innocence as the defense. After the Defendant was found guilty of first degree murder, Defense Counsel, at the sentencing phase maintained the Defendant's innocence. After the jury returned its recommendation of death, Defense Counsel, prior to the imposition of sentence, presented evidence of Defendant's emotional state to the trial court.

In accordance with the foregoing, it is clear that defense counsel knew of defendant's background and determined that based on the trial strategy of maintaining innocence, it would not have been beneficial to bring this information to the attention of the sentencing jury. This

decision was clearly trial strategy and therefore cannot form the basis for claims of ineffective assistance of counsel.

Assuming arguendo, that it was not trial strategy, it was still not ineffective assistance of counsel. The reason therefor is that defense counsel presented evidence concerning the Defendant's emotional state to the trial court and this Court previously found that the basis of the claim, regardless of the amount of evidence presented, was insufficient even to rise to the level of a non-statutory mitigating factor.

Defendant further contends that counsel was ineffective for failing to present evidence that during the two day period that Defendant alleged he was in Tampa, neighbors called the victim's home and the calls were answered by two males, one of which was identified as the Defendant. It is clear that the reason this evidence was not presented was one of trial strategy. The Defendant testified that after he found the victim, he padlocked the house took the keys and left. If this evidence was presented it would have been totally contradictory to the defense of innocence.

Finally, all other claims raised by Defendant were correctly denied, since they could have or should have been presented on direct appeal.

POINTS INVOLVED ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN DENYING WITHOUT AN EVIDENTIARY HEARING THE DEFENDANT'S CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL WHERE THE CLAIMED INEFFECTIVENESS OF COUNSEL WAS TRIAL STRATEGY WHICH WAS REASONABLY EFFECTIVE BASED ON THE TOTALITY OF THE CIRCUMSTANCES.

II

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING DEFENDANT'S OTHER CLAIMS WHERE SAID CLAIMS COULD HAVE OR SHOULD HAVE BEEN RAISED ON DIRECT APPEAL.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN DENYING, WITHOUT AN EVIDENTIARY HEARING THE DEFENDANT'S CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHERE THE CLAIMED INEFFECTIVENESS OF COUNSEL WAS TRIAL STRATEGY WHICH WAS REASONABLY EFFECTIVE UNDER THE CIRCUMSTANCES.

The Defendant contends that his trial counsel was ineffective at the penalty stage of his trial when he failed to present evidence to the jury of Defendant's emotional state at the time of the crime. As evidence thereof, he states that trial counsel failed to present a six year old psychiatric report; evidence that Defendant was an abused child; and that Defendant's mother died when he was young. Defendant contends that the reason the foregoing was not presented to the sentencing jury was because trial counsel failed to investigate for mitigating evidence.

The State submits, and the record supports, that trial counsel knew of the foregoing evidence but did not argue such evidence as mitigation to the jury because said evidence, even after the verdict of guilt was fundamentally inconsistent with the only defense, to wit: innocence.

Furthermore, based on the totality of the circumstances, this strategy was reasonably effective and therefore this claim cannot be a basis for claims of ineffective assistance of counsel. Jones v. Estelle, 632 F.2d 490, 492 (5th Cir. 1980), cert. denied, 451 U.S. 916, 101 S.Ct. 1992, 68 L.Ed.2d 307 (1981).

This Court in Straight v. Wainwright, 422 So.2d 827 (Fla. 1982) was presented with exactly the same contention:

> [11, 21] Appellant contends that his trial counsel failed to investigate for the purpose of developing evidence of mitigating circumstances. Appellant asserts that his lawyer could have developed and presented evidence of an unstable mental condition at the time of the crime, and of appellant's feelings of remorse for the murder. The state responds that at the hearing below it was shown that defense counsel did not argue such mitigating circumstances because he believed them to be, even after the verdict of guilt, fundamentally inconsistent with the entire defense. For example, defense counsel could not offer evidence of remorse because appellant, from the beginning of the case right up to and during the sentencing phase, had always maintained his innocence of the murder to defense counsel. One of the purposes of a bifurcated trial and separate sentencing trial is to allow just such an inconsistent presentation on the question of sentence after guilt has been determined. See Model Penal Code, §201.6, Comment, at 74-75 (Tent. Draft No. 9, 1959).

> However, a defendant through counsel may waive the opportunity to make such an inconsistent presentation on the question of sentence after maintaining his innocence at the guilt phase of the trial. For an attorney to take such a position on behalf of his client does not establish that that representation was ineffective. Defense counsel viewed evidence of mitigating circumstances as fundamentally damaging to the integrity of his client's case. Therefore, we find this argument to be without merit.
>
> 422 So.2d at 832.

Accord Funchess v. State, 449 So.2d 1283 (Fla. 1984)(Trial counsel not ineffective where he knew of the defendant's medical history, family problems, and use of drugs and determined that, based on their trial strategy of maintaining his innocence, it would not be beneficial to bring this information to the attention of the sentencing jury). Songer v. State, 419 So.2d 1044 (Fla. 1982). See also: Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1984), cert. denied, 105 S.Ct. 817 (1985)(Trial counsel not ineffective in failing to offer character evidence in mitigation, where counsel knew of the evidence but chose not to use it on strategic grounds).

When the foregoing trial strategy is maintained, and the evidence of quilt is overwhelming, counsel is effective when he argues to the jury at the sentencing phase the

horrible circumstances of execution by electrocution and the fact that a judge can put the defendant in jail for life so that he would not be able to kill again. Alvord v. Wainwright, 725 F.2d 1252, 1290 n.1 (11th Cir. 1984), rehearing denied, 731 F.2d 1486.

The case sub judice is controlled by the foregoing cases and a review of the record clearly evidences that the trial court did not err in denying the claim. The record clearly refutes Defendant's contention that failure of trial counsel to present the evidence was due to his lack of knowledge that it existed. After the jury recommended death, the trial court permitted trial counsel or the defendant to present reasons why the death penalty should not be imposed. (T.675). The Defendant waived his right to speak and instead chose to rely upon trial counsel. (T.685-86). During trial counsel's presentation to the trial court, he presented evidence concerning Defendant's background. (T.676). This evidence included the fact that Defendant's mother died when he was eight years old and that since he was extremely close to his mother, her death came as a shock to Defendant (T.676); that Defendant was then required to live with his father, who abused him and as a result of that abuse, the Defendant was continually trying to run away from home (T.676); that because Defendant had no family and could not live with his father, he was forced to go to State

School (T.677); that he dropped out of school in the eighth grade (T.677); and that Defendant was in jail most of his adult life. (T.682). Therefore, it is undeniable that trial counsel knew of the Defendant's background.

Since trial counsel knew of Defendant's background, the only reasonable explanation of why said information was not presented to the sentencing jury is that trial counsel determined that based on the trial stragegy of maintaining Defendant's innocence, it would not have been beneficial to bring this information to the attention of the sentencing jury. The trial strategy of maintaining innocence is abundantly clear from the record.

In opening argument, trial counsel established the basis for the defense. It was their position that the victim was the Defendant's meal ticket and that it would not have made sense for him to have killed her. (T.128-30). Trial counsel concluded his opening statement as follows:

> He had a place to stay and a person to take care of him, and I believe that the evidence will show that there is no way in the world tht Bill Middleton would kill Miss Johnson.
>
> He loved her like a mother, just like she loved him like a son, and I believe that the evidence will show that after you have heard all the testimony in this case, that

> Bill Middleton is innocent of murder.
>
> He never killed Ms. Johnson, and I know that your verdict is going to speak the truth and it will be a verdict of not guilty.
>
> (T.130-131).

The clearest evidence of this defense was presented via the Defendant's testimony during the guilt phase of his trial. During his testimony, the Defendant informed the jury of his family background (T.342) as well as his problems with prison life. (T.352-353). As to his innocence, the Defendant admitted that he confessed, but stated that the confession was false and was only made in order for him to avoid the electric chair. (T.364). The Defendant claimed he was not even in the house when the victim was killed and the reason he ran away was that he was in shock. (T.356). He further stated that he ran because he was on parole and the police would not believe that he did not kill the victim. (T.358).

Trial counsel's closing argument continued to reinforce the innocence theory of defense. (T.518-37). Trial counsel argued that Defendant was innocent because he lacked a motive since he would be foolish to kill his meal ticket. (T.532-25). Trial counsel also focused on the

Defendant's confession, once again asserting that the confession was false and the Defendant only gave it to escape the electric chair. (T.536).

Therefore, the State submits, based on the record, it is clear that the reason trial counsel did not present the known evidence concerning defendant background to the sentencing jury is that it was a part of his trial strategy of maintaining innocence. This is further supported by trial counsel's arugment before the sentencing jury, where he once again maintained his client's innocence. (T.645). In accordance with the foregoing trial strategy, trial counsel, in his argument before the sentencing jury, detailed the horrible circumstance of an execution and the fact that the Judge could put the Defendant in jail for life. (T.651-55).

Therefore based on the totality of the circumstances, the trial strategy of maintaining innocence during the penalty phase, was reasonably effective. Therefore it cannot be faulted. Meeks v. State, 382 So.2d 674 (Fla. 1980). The fact that the strategy did not prove successful does not mean that the representation was inadequate. Songer v. State, supra. Therefore, since this was a valid trial strategy, Defendant has failed to identify a specific omission of trial counsel which rendered his assistance ineffective and the Defendant has failed to establish a

necessary factor in order to support his claim. This claim precludes Defendant from showing that this action was deficient and prejudicial. Strickland v. Washington, __ U.S. __, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Downs v. State, 453 So.2d 1102 (Fla. 1984).

On Defendant's direct appeal to this Court, he contended that the trial court erred in finding no mitigating circumstances.

> ...Specifically he argues that the judge should have found and considered the fact that appellant was operating under the influence of extreme emotional disturbance. He says that he was under great stress as the aftermath of his prison experience, that the tension built up, and that he lost his temper and directed his anger towards the victim. The evidence to support this position is not clear enough to enable us to hold that the trial judge erred in declining to find the existence of such mitigating factors. In addition, the jury's recommendation of a sentence of death is a strong indication that it did not find appellant's emotional state particularly compelling as a mitigating circumstance.
>
> 426 So.2d at 553.

The Defendant has construed the above pronouncement as a statement by this Court that had trial counsel presented a more detailed picture of Defendant's emotional state, the mitigating evidence would have been clearer and would have required the trial court to consider the same. This is a total misinterpretation of this Court's pronouncement. The only interpretation that can be given to this finding is that the type of emotional disturbance that was tendered was not, regardless of the amount of evidence presented thereon, of the quality that raise to the level of a non-statutory mitigating circumstance, let alone a statutory mitigating factor.

This interpretation is supported by the trial court's sentencing order, wherein the following findings were made concerning Defendant's emotional state:

> (b) Whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> FINDING:
>
> There is no evidence that William Middleton, Jr. was under the influence of extreme mental or emotional disturbance during the commission of the murder. in fact, the evidence clearly establishes the contrary, particularly as evidenced by the defendant's thorough and detailed statement given to law enforcment officers. From the Court's personal observation of the

> defendant throughout the period of time that this trial has lasted, the Court makes the specific and definite finding of fact that the defendant was able to answer the charges facing him and able to adequately, properly, and fully assist counsel in his defense at the trial. The Court observed the defendant conferring constantly with his attorney throughout the trial. In addition, the Court observed the defendant to be paying particular attention to all of the testimony of all the witnesses throughout the trial.
>
> (T.695-96).

Therefore based on the total record the trial court was justified in not considering this mitigating circumstance as a factor in imposing the sentence. Further amplication of said claim would not have changed the outcome in light of the four aggravating factors which have previously been upheld by this Court. See Quince v. State, 414 So.2d 185 (Fla. 1982), cert. denied, 103 S.Ct. 192 (198)(Where trial judge recognized "substantial impairment" mitigating factor, it was not unreasonable to fail to give great weight to that mitigating factor in light of the three aggravating factors which have been found). See also Medina v. State, 10 F.L.W. 101 (Fla. January 31, 1985).

Defendant further contends that counsel was ineffective for failing to present evidence that during the two day period that Defendant alleged he was in Tampa, neighbors

called the victim's home and the calls were answered by two males, one of which was identified as the Defendant. It is clear that the reasons this evidence was not presented was one of trial strategy. The Defendant testified that after he found the victim, he padlocked the house took the keys and left. If this evidence was presented it would have been totally contradictory to the defense of innocence.

II

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING DEFENDANT'S OTHER CLAIMS WHERE SAID CLAIMS COULD HAVE OR SHOULD HAVE BEEN RAISED ON DIRECT APPEAL.

The trial court summarily denied the remainder of Defendant's claims on the grounds that they could have or should have been presented on direct appeal. McCrae v. State, 437 So.2d 1388 (Fla. 1983). In this appeal, the Defendant only challenges this finding as it relates to the denial of his claim that references to Defendant's prior incarceration and parole were highly prejudicial. This claim was cognizant on direct appeal and therefore is not properly before this Court at this time. Adams v. State, 380 So.2d 423 (Fla. 1980).

The Defendant attempts to circumvent this ruling by contending the alleged error was fundamental, thereby not requiring an objection and permitting it to be raised at anytime.[2] This is just not the case. See, Platt v. State, 124 Fla. 465, 168 So. 804 (1936).

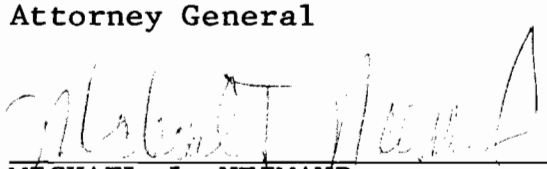
[2]This claim does not even fall into the ineffective assistance of counsel argument since it is clear that reference to Defendant's status was an integral part of the offense in question as well as part of the Defense presented. (A.16). Shargaa v. State, 102 So.2d 814 (Fla. 1958), cert. denied, 79 S.Ct. 114.

CONCLUSION

Based on the foregoing points and citations of authority, the State respectfully submits that the trial court's denial of the Motion to Vacate should clearly be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General



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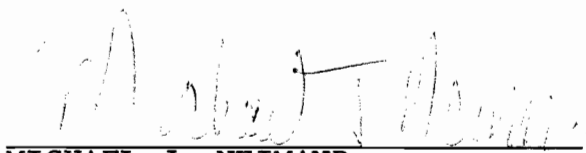
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was hand delivered to N. JOSEPH DURANT, Attorney for Appellant, 1250 N.W. 7th Street, Suites 202-205, Miami, Florida 33125, on this 1st day of March, 1985.



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