66,652

IN THE SUPREME COURT OF FLORIDA

CASE NO.

WILLIAM MIDDLETON,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,

Respondent

_____/

RESPONSE IN OPPOSITION TO
PETITION FOR WRIT OF HABEAS CORPUS

Comes Now the Respondent, Louie L. Wainwright, by and through undersigned counsel and files this Response in Opposition to the Petition for Writ of Habeas Corpus and states that the relief requested should be denied on the following grounds:

Petitioner contends that his appellate counsel was ineffective for failing to raise issues which could have been or should have been raised on direct appeal. The Respondent submits that the mere fact that issues could have been brought on direct appeal is not the proper standard of review to determine the effectiveness of appellate counsel. Rather, this Court need only consider whether appellate counsel's omission to raise it on appeal was a serious deviation from professional norms and, if so, whether the defect undermines confidence in the outcome of the appellate process. If the answer to the second question can be clearly arrived at, the first question can be dispensed with. Strickland v. Washington, 104 S.Ct. 2052 (1984); Johnson v. State, 10 F.L.W. 85 (Fla. Jan. 28, 1985).

I

WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE FLIGHT INSTRUCTION.

Petitioner contends that appellate counsel was ineffective for failing to raise the issue of the flight instruction on his direct appeal. He contends this is error even though no specific objection was ever made. (T.440).

Rule 3.390(d) Fla.R.Crim.P., only permits an issue concerning jury instructions to be raised on direct appeal if an objection is made thereto and said objection must distinctly state the matter to which he objects. See Spurlock v. State, 420 So.2d 875 (Fla. 1975)(Rule 3.390(d) requires that counsel inform trial court of basis of objection and failure to so do fails to preserve the issue). Therefore, since this issue was not properly preserved; no omission occurred by failing to raise it.

Assuming arguendo, the issue had been preserved, no omission occurred anyway. The Petitioner contends that said instruction shifts the burden of proof of him. This contention has been previously rejected by this Court. In Daniels v. State, 108 So.2d 760 (Fla. 1959), the Court discussed whether this instruction shifted the burden of proof and held that evidence of flight from a crime does not raise presumption of guilt. It is only a circumstance which the jury may rightfully consider together with all other circumstances, and in light of such circumstances may give thereto such weight as it, the jury, shall determine.

Further, this Court has approved the giving of the flight instruction in capital cases as long as there is evidence to support the flight. Bundy v. State, 455 So.2d 330 (Fla. 1984). In the instant case, the Petitioner admitted

flight (T.358), so no error occurred by giving the flight instruction. Therefore appellate counsel could not be ineffective for failing to raise the issue.

II

WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE ISSUE OF THE ADMISSION OF COLLATERAL CRIMES EVIDENCE.

Once again, Petitioner alleges that appellate counsel was ineffective for failing to raise an issue that was not preserved and not fundamental error. Platt v. State, 124 Fla. 465, 168 So. 804 (Fla. 1936). Since it is clear that the failure to preserve a Williams rule issue, does not permit it being considered by an appellate court, appellate counsel could not be ineffective for failing to raise this issue.

Assuming arguendo, that this issue was properly preserved in the trial court, appellate counsel was still not ineffective for failing to raise it on direct appeal. The reason therefore is that generally, admitting evidence of collateral crimes independent of and unconnected with the crime for which the defendant is on trial constitutes harmful error. However, the exception thereto is when the evidence is necessary to connect the crimes as a part of the transaction or where related crimes explain or define the character of the act charged. Shargaa v. State, 102 So.2d 814 (Fla. 1958), cert. denied, 79 S.Ct. 114.

The exception applies in the case sub judice inasmuch as in order to explain the crime in its proper prospective, the jury had to be informed that Petitioner was on parole and that was the reason he was living with the victim. Further, the Petitioner took full advantage of the fact that he was on parole and that the victim was his meal ticket so why

would he kill her. Finally, every effort was made by the State to delete from the confession the specific nature of the previous crimes he was convicted of. Therefore no error occurred in the admission of this evidence and therefore appellate counsel could not be ineffective for failing to raise the issue.

III

WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF PETITIONER'S ABSENCE FROM THE COURTROOM.

Petitioner contends that since he did not expressly waive his absence from the courtroom, Frances v. State, 403 So.2d 117 (Fla. 1982) required appellate counsel to raise the issue on appeal. He further contends that this is fundamental error.

In Johnson v. State, supra, this Court was faced with the exact same situation, where it did not rule on the issue of fundamental error. Rather, this Court reviewed the record and determined that counsel was correct in not raising the issue since the record revealed that said absence was not involuntary.

The case sub judice falls within the foregoing rule. It is clear from the record that at no time was Petitioner involuntarily removed from the courtroom. In fact, he expressly ratified his desire to leave the courtroom. (T.442). Further, the trial court at the Motion to Vacate expressly recollected that Petitioner consistently expressed a preference to remain in the holding cell, rather than in the courtroom when legal matters were dealt with. (A-15). Therefore, since there was a waiver and lack of prejudice to the defense, appellate counsel could have reasonably decided that the issue was not promising. Accordingly, said issue

is not a basis for finding a substantial and serious deficiency outside the wide range of professionally competent assistance.

IV

WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE LOCKETT ISSUE.

Petitioner contends that, even though the trial court read the aggravating and mitigating circumstances as they were written in the statute, said reading violated Lockett by limiting the number of matters in mitigation as to those listed in the statute. This position is totally frivolous inasmuch as the Supreme Court of United States has recognized that the Florida Statutes do not limit a jury's consideration of mitigating circumstances to those listed in the statute. Proffitt v. Florida, 96 S.Ct. 2960, 2965 n.8 (1976). Further, the Eleventh Circuit has held on numerous occasions that the reading of the statute does not limit the jury's consideration of mitigating factors to those listed in the Statute. See Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983). Therefore, regardless of the fact that this issue was not preserved, no error occurred by the trial court and therefore counsel was not ineffective. Booker v. Wainwright, 703 F.2d 1251 (11th Cir. 1983).

V

WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE DISPARAGING COMMENTS REGARDING THE SIGNIFICANCE OF THE ADVISORY SENTENCE.

Once again, Petitioner is contending that his counsel was ineffective for failing to raise unpreserved issues. However, even if the issue was preserved, the trial court committed no error and therefore counsel could not be ineffective for failing to raise the issue.

First, he complains of remarks made by the prosecutor. Since remarks of the prosecutor do not constitute evidence or statement of the law, no error occurred. See Whitted v. State, 362 So.2d 668 (Fla. 1978)(Remarks of counsel do not constitute evidences) and Overstreet v. State, 143 Fla. 794, 197 So. 516 (1940)(The jury is required to accept the law controlling the facts as given by the trial court, but is not required to treat as conclusive the argument of counsel based upon the facts addressed or adopt the opinion of counsel as to the law).

He further contends that the trial court's comments also disparaged the significance of the advisory sentence. This point is meritless since the jury was instructed as to the proper law. (T.659-665). Therefore, no error occurred at trial and it was not error for appellate counsel to fail to raise the issue.

VI

WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE ISSUE OF THE VOLUNTARINESS OF THE CONFESSION.

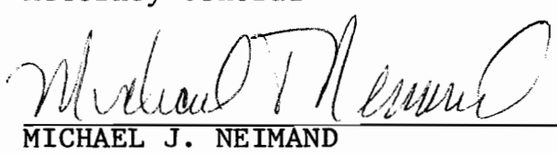
Finally, Petitioner has raised a point which was preserved in the lower court. As evidenced by the hearing on the motion to suppress, the issue of the propriety of New York law was addressed. However, the trial court found, based on the evidence presented, that no matter which law was applied, the Petitioner had waived his right to silence and his right to counsel. (T.52-63, 92-95). Therefore, since the trial court found the confession to be freely and voluntarily given, regardless of which law was applied, no error occurred by counsel's refusal, based upon his professional judgment, to raise this factual issue. See Griffen v. State, 447 So.2d 875 (Fla. 1984); Townsend v. Sain, 83 S.Ct. 745 (1963).

CONCLUSION

It is evident that none of the errors complained of were in fact errors. Therefore, Petitioner has not met the Strickland standards and all requested relief should be denied.

Respectfully submitted,

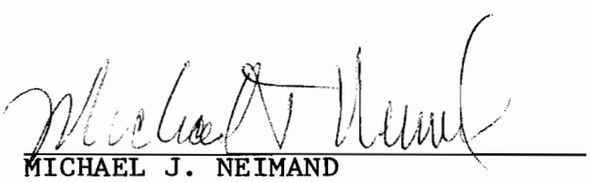
JIM SMITH
Attorney General



MICHAEL J. NEIMAND
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

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 4th day of March, 1985.



MICHAEL J. NEIMAND
Assistant Attorney General

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