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JUN 3 1985

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IN THE SUPREME COURT OF FLORIDA

IAN DECO LIGHTBOURNE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO.

67100

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

APPELLEE'S BRIEF IN SUPPORT OF
DENIAL OF MOTION FOR STAY OF
EXECUTION AND MOTION FOR
POST-CONVICTION RELIEF

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STATEMENT OF THE CASE AND FACTS

The appellant is scheduled to be executed on Tuesday, June 4, 1985, at 7:00 a.m. On Friday, May 31, 1985, at 12:15 p.m. (less than four days prior to the scheduled execution) an emergency application for stay of execution to permit filing of motion for post-conviction relief was filed in the circuit court seeking a stay of execution so as to allow Lightbourne time to file a "final" motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850 (R 5-8) (TR 7-9).

A hearing, previously scheduled in anticipation of the appellant's eleventh hour motion for stay of execution, was held within one hour of the filing of the motion (TR 1-14). Circuit Court Judge William T. Swigert, who had presided over Lightbourne's original capital trial and sentencing, considered the arguments of counsel and the specifics of the motion for stay of execution in light of his recall of the circumstances surrounding the appellant's trial (which he indicated he remembered "quite well") and after deliberation denied the appellant's request for a stay of execution to permit the filing of a subsequent post-conviction motion (R 13). In addition, the lower court denied Lightbourne's emergency pleading as inadequate to justify post-conviction relief under Florida Rule of Criminal Procedure 3.850, finding specifically that there were "no bases

¹(R) refers to the record on appeal arising from this post-conviction proceeding; (TR) refers to the transcript of the emergency motion for stay of execution heard May 31, 1985.

in fact or law" to grant the motion (TR 12-14) (R 395).

The appellant immediately filed a notice of appeal seeking review of that order (R 396-397).

SUMMARY OF ARGUMENT

The lower court properly denied the appellant's motion for stay of execution/motion for post-conviction relief inasmuch as said motion failed to satisfy the prerequisites and standards for relief under Florida Rule of Criminal Procedure 3.850. The lower court's ruling that said motion presented "no bases in fact or law" is supported by a review of the appellant's motion which contains certain arguments readily rejected under a Rule 3.850 analysis because they were, could or should have been raised on direct appeal, as well as ineffectiveness claims properly rejected by the lower court as insufficient to support a claim of relief as alleged and given the circumstances in this case.

POINT I

THE LOWER COURT DID NOT ABUSE ITS
DISCRETION IN DENYING APPELLANT'S
EMERGENCY MOTION FOR STAY OF EXE-
CUTION.

The appellant's argument before the lower court in seeking the eleventh hour stay of execution for leave to file a "final" motion for post-conviction relief was founded upon this court's previous denial of prohibition in State v. Beach, No. 66,725 (Fla. March 18, 1985), and the granting of the state's motion for suggestion of prohibition in the case of State v. Schaeffer, No. 66,848 (Fla. April 10, 1985) (R 7-8, 126-193) (TR 7). In State v. Beach, this court rejected the state's effort to prohibit the lower court judge from staying the execution of Robert Waterhouse finding that the lower court had a valid basis for exercising jurisdiction and the discretion to order a stay because Waterhouse's stay application was sufficient on its face to allow the trial court to consider it as a Rule 3.850 motion subject to amendment. Similarly, this court granted the state's suggestion for writ of prohibition in State v. Schaeffer, because the defendant's stay application was factually insufficient to allow the court to consider the document as a Rule 3.850 motion such that the circuit court had no jurisdiction to exercise its discretion and grant a stay.

In this case the factual scenario is obviously different for the lower court after considering the eleventh hour stay of execution motion exercised its discretion adversely to

the appellant and determined that inasmuch as there were "no bases in fact or law" for granting the relief under the motion even if it were considered as a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850, there was therefore no basis for granting the stay.

POINT II

THE LOWER COURT DID NOT ERR IN
DENYING THE APPELLANT'S MOTION
FOR POST-CONVICTION RELIEF.

In rejecting the appellant's eleventh hour motion for stay of execution, the lower court also denied relief under the pleading as a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. This denial was appropriate in that the motion did not completely satisfy the facial prerequisites for a Rule 3.850 pleading and because the various allegations included in the motion were insufficient to state a claim justifying relief as determined by the lower court.

Procedurally, the state notes that the motion did not comply with all of the requirements of Florida Rule of Criminal Procedure 3.850 in that it failed to contain an allegation as to whether any previous post-conviction motion under that rule had been filed and if so how many. Fla. R. Crim. P. 3.850(c).

Alternatively, the state submits that the appellant's motion was properly rejected as insufficient on its face in that the issues raised were insufficient to state a claim justifying relief such that as determined by the lower court the motion was without "bases in fact or law." (R 395)

Lightbourne urged seven issues in his motion for stay/motion for post-conviction relief:

- (1) Trial counsel's failure to

request appointment of expert witnesses;

(2) Prosecutor's use of preemptory challenges in eliminating two black jurors;

(3) The failure of trial counsel to discover and present mitigation evidence at sentencing;

(4) The failure of trial counsel to impeach or rebut the trial testimony of certain jailhouse informants;

(5) Trial counsel's failure to deal with an alleged conflict in previous representation of one of the jailhouse informants by the office of the public defender;

(6) The trial court's consideration of a presentence investigation and trial counsel's failure to challenge the use of certain allegedly prejudicial hearsay contained therein;

(7) The sufficiency of the evidence to support the appellant's conviction and sentence.

Initially, the state submits that issues number two (alleged black juror exclusion), six (use of the presentence investigation by the trial court) and seven (sufficiency of the evidence presented at the guilt and penalty proceedings), are all matters that were or could have been raised on direct appeal such that relief under Rule 3.850 was properly rejected by the lower court. Raulerson v. State, 462 So.2d 1085 (Fla. 1985); Jones v. State, 446 So.2d 1059 (Fla. 1984); Fla. R. Crim. P. 3.850.

Any argument that the appellant might have wished to raise with reference to the prosecutors' use of preemptory

jury challenges could have been presented on direct appeal for the trial transcript referred to by the appellant clearly reveals that defense counsel at trial raised the juror exclusion issue. Indeed, in response to the challenge by appellant's trial counsel the prosecutor stated of record that he had reasons other than race for excluding the jurors at issue. (TTR 507). Furthermore, even if the appellant's failure to raise this issue on direct appeal did not preclude review there is nevertheless no basis for a finding of systematic exclusion of black jurors justifying reversal. The trial in this case was well before this court's pronouncement in State v. Neil, 457 So.2d 481 (Fla. 1984), and given this court's determination that the Neil decision would not be applied retroactively and the fact that the applicable federal constitutional standard (still extant) at the time of trial was that announced under Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), no basis for reversal on that issue has been demonstrated.

Similarly, appellant's challenge to the sufficiency of the evidence adduced in this case as well as his challenge to the trial court's consideration of the PSI report were properly rejected as inappropriate given this court's previous opinion upholding the judgment and sentence in this cause and the fact that any such arguments should have been raised on direct appeal.

The allegations of ineffective assistance at trial counsel were insufficient to state a prima facie case justifying relief.

In Downs v. State, 453 So.2d 1102 (Fla. 1984), this court explained the standards as outlined in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), for consideration of a claim of ineffective assistance of counsel. This court noted that under the Strickland standard effectiveness of counsel is to be judged by the reasonableness of the challenged conduct given the facts and circumstances of the case viewed as of the time of that conduct. Counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of a reasonable professional judgment with a heavy measure of deference in favor of those judgments such that the defendant must overcome this presumption of sound strategical trial decisions in order to state a claim for relief. 453 So.2d at 1108. This court further noted the "proliferation of ineffectiveness claims" after unsuccessful trial defenses most of which result in defense counsels being "unjustly subjected to unfounded attacks upon their professional competence." Id. at 1107. It further opined that an ineffectiveness claim is an extraordinary one, not appropriate in every case, and to be considered "the exception rather than the rule." Id.

As noted in Strickland and Downs, in order for a defendant to succeed on a claim of ineffectiveness of counsel so as to obtain a reversal of a conviction or death sentence, he must first show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. Furthermore, in evaluating the ineffectiveness claim, even if

it can be said that counsel's performance was so deficient in some specific manner as to have been outside the wide range of professionally competent assistance the judgment will not be set aside unless the defendant first then demonstrates an actual adverse effect to his defense to the extent that there is a reasonable probability (sufficient to undermine confidence in the outcome) that but for the error the result of the proceeding would have been different. In determining whether the defendant has met his burden of proving prejudice a further presumption that the judge or jury acted properly and according to the law is applied. Finally, if either one of the two component elements which must be alleged and proven by the defendant (i.e., deficient performance and actual prejudice) is insufficiently demonstrated the claim must fail.

Here, the state respectfully submits that the trial court properly determined that the various allegations of ineffective assistance sketchily raised by the appellant were properly rejected by the lower court as insufficient to adequately state a claim under the Strickland test such that relief was properly denied.

Failure to request appointment
of expert witnesses.

Review of the trial transcript demonstrates involved and lengthy cross-examination of the state's expert witnesses by defense counsel so as to cast doubt on their findings. Furthermore, as is obvious from the record trial counsel for the defendant in this case did indeed seek appointment of

at least one expert witness to evaluate the competency and sanity of the appellant clearly indicating counsel's knowledge of that avenue of relief (the appointment of experts) and further indicating the tactical nature of his decision to forego appointment of other experts (A 6). The apparent tactical nature of trial counsel's handling of the expert testimony presented provides no basis for reversal as such tactical choices are within the lawyers standard of competency and will not be second guessed in a hindsight ineffectiveness challenge but will be presumed to be an exercise of reasonable professional judgment. See, Magill v. State, 457 So.2d 1367 (Fla. 1984); Strickland v. Washington, supra; Downs v. State, supra.

In addition, no showing of actual prejudice to the appellant beyond the merest of speculation as to what might have been provided by other "experts" has been made so as to justify relief. Indeed, no allegation that any concrete evidence with a reasonable probability of effecting the outcome of Lightbourne's trial would have been presented if defense counsel had chosen to seek out other experts rather than conduct a detailed cross-examination of state experts for the jury's edification has been presented. Indeed, given the overwhelming circumstantial evidence of Lightbourne's guilt provided and recognized by this court's affirmance of his conviction, as well as Lightbourne's own admissions of guilt, no actual prejudice beyond the wildest speculation as to what might have been has been made. The obvious guesswork involved in this expert witness/ineffectiveness claim is revealed by Lightbourne's admission that it is only

"possible" that other expert testimony would have assisted his defense. This type of baseless speculation is clearly insufficient to justify relief.

Furthermore, the decision in Ake v. Oklahoma, 105 S.Ct. 1087 (1985), relied upon by the appellant is of obviously limited applicability and is of no relevance in this case for defense counsel clearly found it unnecessary in his apparent reasoned professional judgment to seek the assistance of appointed experts now deemed possibly necessary by Lightbourne. See, Clark v. State, 10 F.L.W. 225 (Fla. April 12, 1985).

Allegations of trial counsel
ineffectiveness at sentencing.

Lightbourne claims that his trial counsel was ineffective at sentencing although he is unspecific as to the nature of the deficiencies in preparation of alleged mitigating evidence (i.e., either "no or or grossly inadequate investigation"). Specifically, the appellant recites a litany of character factors allegedly not placed before the sentencing court which he claims resulted in an incomplete portrayal of him and the circumstances of the crime charged. For example, the appellant claims that the trial court should have been made aware of the fact that he was an illegitimate child born "without medical assistance" in an impoverished area of the Bahamas constructed on the site of a "public refuse dump." Lightbourne also asserts that the fact that he was a Catholic altar boy; a good student in grammar school; and that as a youngster he was friendly, helpful, non-

violent, and a "nice guy" all were mitigating factors which were not presented nor considered by the sentencing court, as was the fact that his older brother who "did not return Ian's admiration and respect" would periodically beat him and at one point in his teens upset him to such an extent that he on one occasion visited a psychiatrist (R 13-18).

The state notes that the sentencing judge was in fact apprised of many of these factors including the illegitimate birth; the fact that he was raised in a "lower socioeconomic home environment;" his educational history; his active membership in the Catholic church in the Bahamas, including his participation as an altar boy; and that he was a good boy never giving his mother any trouble as he grew up. (R 320-322, 327). Notwithstanding his knowledge and consideration of these alleged "mitigating factors" the trial judge nevertheless determined that the five statutory aggravating factors demonstrated outweighed the two statutory mitigating factors shown such that death was the appropriate penalty, a decision concurred in by this tribunal which, in fact noted that even the application of a third statutory mitigating factor would have not have affected the propriety of the sentencing decision given the "strength of the aggravating factors." Lightbourne v. State, 438 So.2d 380, 390 (Fla. 1983).

Accordingly, the trial court's rejection of this ineffectiveness claim is easily supported as a determination that no actual prejudice sufficient to demonstrate a reasonable probability of a change in the outcome in the sentencing pro-

ceeding was made given the strength of the aggravating factors established and accepted by both the lower court and this tribunal. Indeed, the laudable nature of the appellant's youth and teenage character traits, the medically unassisted nature of his birth, as well as the unfortunate nature of his upbringing and his alleged psychological difficulties could certainly be properly rejected by the lower court as of little significance given the brutal nature of the appellant's conduct in the sexual battery and murder of a defenseless victim in this case and the determination immediately prior to trial of Lightbourne's sanity and competency to stand trial (R 325). As noted recently by the Eleventh Circuit Court of Appeals in its denial of a motion for stay of execution in Francois v. Wainwright, 11th Cir. No. 85-5430 (May 28, 1985), the fact that the defendant was the product of a "sorted and impoverished childhood environment" who was beaten by his father and who grew up as a "child of the street" was insufficient to justify the granting of a stay despite the fact that such nonstatutory mitigating evidence was not presented at sentencing because such evidence had no chance of changing the sentencing outcome in that case. That same determination is certainly appropriate as apparently determined by the lower court, given the circumstances in this cause.

Trial counsel's failure to object to trial court's consideration of presentence investigation report.

Also with reference to the sentencing proceeding, Lightbourne asserts that his trial counsel was ineffective

because he did not object to the trial courts consideration of the presentence investigation report ordered by the judge pursuant to section 921.231(1), Florida Statutes (1983). As with the previous sentencing error alleged the state submits that the lower court could properly reject this claim upon a determination that the error asserted was not demonstrated to have prejudiced the appellant inasmuch as removing the limited and particular statements at issue would not have affected the outcome of the trial court's decision to sentence the appellant to death especially given the previously mentioned strength of the statutory aggravating factors vis-a-vis the mitigating factors established. Indeed, as noted by the court in Strickland in deciding whether a defendant has demonstrated prejudice a court must presume that the judge or jury acted according to the law, i.e., in this case it must be presumed that the trial judge's death penalty decision was based upon his stated determination that the mitigating circumstances as established were insufficient to outweigh the statutory aggravating circumstances proven such that the death penalty was appropriate. Furthermore, the "unsworn hearsay statements" referred to by the appellant as present in the PSI report cut both ways for also included in that report were certain statements from the appellant's sister Florine Maultsby concerning the appellant's character and socioeconomic background which the appellant now asserts presented substantial mitigating evidence in his behalf. Accordingly, the apparent decision by the appellant's trial counsel to allow that "mitigating" evidence to be presented in

the form of the hearsay statements of the appellant's sister presented in the PSI investigation with the resulting effect that all such other statements where admitted must be considered tactical such that a heavy measure of deference to counsel's judgment must be afforded. Strickland v. Washington, supra; Downs v. State, supra. Simply put, the trial court could clearly determine that the inclusion of certain isolated hearsay statements by members of the victim's family along with those by members of the defendant's family in the presentence investigation report did not constitute ineffective assistance of counsel given the surrounding circumstances of this case and the obvious lack of prejudice to the appellant.

Whether trial counsel was ineffective in his chosen manner of attack and the credibility of the testimony provided by the jail house informants, Theodore Chavers, and Theophilus Carson.

The appellant argues that his trial counsel was ineffective because he did not do enough to challenge the credibility of the testimony of two jailhouse informants - Chavers and Carson - at trial. A more clear case of trial strategy is hard to imagine for in this case the credibility of both Chavers and Carson was specifically attacked by defense counsel on cross-examination and by pretrial motion, and in each case the cross-examination focused on the circumstances surrounding appellant's admissions to the informants; the informants' previous criminal records, and the reward or rewards offered to

or expected by the informants for their testimony, all of which clearly served to attack and impeach the credibility of each informant. The lower court judge, having indicated his familiarity and recollection of the trial was clearly well aware of defense counsel's vigorous efforts to attack the credibility of each informant, both on cross-examination and in closing argument. Defense counsel's apparent decision to forego the testimony of another inmate - Willie Jones Baker - as a further challenge in light of his cross-examination and impeachment of the two informants was clearly a strategical decision and one which afforded him initial and final closing argument with which to attack the state's case.

As this court noted in Magill v. State, supra, counsel's decisions to interview, depose, examine or cross-examine certain witnesses or potential witnesses is clearly a matter of tactical choice presumed to have been made in the exercise of reasonable professional judgment with a heavy measure of deference in favor of that judgment. Strickland v. Washington, supra; Downs v. State, supra.

Certainly, even if Baker had been placed on the stand by defense counsel his testimony would have not have affected that of the informant Carson, nor could it have changed the great weight of the circumstantial evidence against the appellant. Accordingly, the lower court could properly have determined that no actual prejudice befell the appellant sufficient to have affected the outcome of his trial as a result of his defense

counsel's tactical decisions vis-a-vis the testimony of the jail house informants; indeed, defense counsel through his opening statement, cross-examination, and closing argument was clearly able to place before the jury his challenges to the credibility of the two informants such that his decision to forego the contradictory testimony of another inmate in this case cannot be deemed ineffective or prejudicial.

Similarly, the appellant has demonstrated no prejudice upon his allegation that trial counsel failed to adequately investigate Carson prior to his testimony. Indeed, as previously noted, the cross-examination of Carson by defense counsel as well as his argument to the jury clearly communicated to them his assertion upon the factual scenario presented and the time frames involved that Carson had cut a deal with law enforcement officials to obtain an early release. Accordingly, the lower court's rejection of Lightbourne's ineffectiveness claim is supported as a determination of a lack of an adequate showing of prejudice likely to have affected the outcome of this case - a decision further supported by the circumstantial evidence adduced at trial.

Similarly, the appellant's allegation of a conflict of interest because Carson, who was represented by the Public Defender's Office, chose on his own to seek out state officials and inform them of statements given to him by Lightbourne presents no basis for an ineffectiveness claim. One need only review the trial transcript and the effective attack by defense counsel upon Carson's credibility to reject any assertion that

the fact that Carson was represented by another public defender for a matter of days after talking with police officials should serve as a basis for a determination of ineffective assistance. Indeed, despite the apparent assertions of the appellant to the contrary his trial counsel did zealously attack Carson's credibility at trial and adequately demonstrated the factual bases and time frames at issue in making his argument to the jury that Carson had created the story of Lightbourne's admissions in order to cut himself a better deal. No showing has therefore been made sufficient to demonstrate a probability that a different attack on Carson's credibility would have affected the outcome of this case.

Whether counsel was ineffective in not seeking jury sequestration.

The appellant's last ditch effort at demonstrating ineffectiveness involves his claim that his defense counsel was ineffective in failing to ask the court to sequester the jury during the guilt and penalty phase of the trial (R 39-40). The lower court's rejection of this argument is certainly supported by the trial transcript which reveals his admonitions to the jury that they were not to read, listen to or watch news reports of this trial, nor were they to discuss the case or visit the scene of the alleged crime. Indeed, as is to be expected given the speculative nature of this ineffectiveness claim, the appellant is unable to make any concrete allegation of prejudice or to point to any evidence that the jury was in fact tainted by any outside influence because of a lack of

sequestration. Rather, Lightbourne can do nothing more than ask permission to years later question each of the jurors as to whether they might have been subject to outside influences. Clearly, this type of allegation is insufficient to demonstrate the elevated prejudice standard applied by the court in Strickland and given the presumption that the jury acted in accordance with the law and with the instructions given them by the trial court judge, the lower court's rejection of this argument is well supported. Downs v. State, supra.

CONCLUSION

The appellee respectfully submits that the lower court properly denied the appellant's eleventh hour quasi-motion for post-conviction relief and for stay of execution upon his determination that the allegations contained therein were insufficient to justify relief under Florida Rule of Criminal Procedure 3.850. The appellant's efforts to guarantee himself a stay of execution by filing an incomplete motion for post-conviction relief with the promise that more and better arguments are yet to come was properly rejected by the lower tribunal and the pleading itself correctly rejected as insufficient to justify further review under the prerequisites and standards for post-conviction relief under Rule 3.850.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and fore-
going Brief has been hand delivered to James D. Crawford,
counsel for appellant, this 3rd day of June, 1985.



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