IN THE SUPREME COURT OF FLORIDA

OSCAR MASON,

Appellant,

v. Case No. 67101

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
FOR HILLSBOROUGH COUNTY, FLORIDA

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Oscar Mason, defendant in the trial court, will be referred to as the "Appellant" in this brief. The State of Florida will be referred to as the "Appellee".

STATEMENT OF THE CASE

Oscar Mason, Jr, Petitioner herein, was charged by indictment with murder in the first degree on September 3, 1980. After trial by jury he was found guilty, and the jury further advised that he be given a sentence of death. The trial court entered an order imposing death. An appeal was taken to the Florida Supreme Court raising the following issues:

I. THE TRIAL JUDGE ERRED IN ADMITTING EVIDENCE OF THE COLLATERAL UNRELATED CRIME UNDER THE WILLIAMS RULE WHEN THE FACTS OF THE INSTANT CRIME AND THE COLLATERAL CRIME HAD MATERIALED DISTINCTIONS AND WERE NOT SO UNUSUAL AS TO POINT ONLY TO THE APPELLANT, BUT RATHER SERVE TO PROVE ONLY TWO THINGS -- PROPENSITY AND BAD CHARACTER.

II. THE PROSECUTOR'S COMMENTS DURING THE CLOSING ARGUMENTS BOTH THE GUILT AND PENALTY PHASE CONSTITUTED FUNDAMENTAL ERROR WHEN SUCH COMMENTS WERE TO THE EFFECT THAT APPELLANT WOULD REPEAT HIS CRIMINAL CONDUCT IF ACQUITTED AND/OR NOT PUT TO DEATH SINCE HE COULD NOT BE REHABILITATED.

III. THE TRIAL JUDGE ERRED IN DENYING THE APPELLANT MOTION FOR JUDGMENT OF ACQUITTAL SINCE THE EVIDENCE OF IDENTIFICATION WAS INSUFFICIENT.

IV THE TRIAL JUDGE ERRED IN FINDING THAT APPELLANT'S PRIOR CONVICTIONS OF ARSON, BURGLARY AND MISDEMEANOR BATTERY CONSTITUTED "PRIOR FELONIES INVOLVING THE USE OR THREAT OF VIOLENCE."

V. THE TRIAL JUDGE ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

VI. THE TRIAL JUDGE ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE KILLING WAS "ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL."

VII. THE TRIAL JUDGE ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE KILLING WAS "COLD, CALCULATED AND PREMEDITATED, WITHOUT ANY PRETENSE OF MORAL OR ILLEGAL JUSTIFICATION," SINCE THE EVIDENCE WAS INSUFFICIENT THEREOF AND IT IS MERELY "DOUBLE-UP" OF THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE.

VIII. THE TRIAL JUDGE ERRED IN FAILING TO FIND A STATUTORY MITIGATING CIRCUMSTANCES.

IX. THE TRIAL JUDGE ERRED IN FAILING TO CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES, AND IN FAILING TO INSTRUCT THE JURY ON THE EXISTENCE OF SUCH FACTORS.

The Florida Supreme Court affirmed the judgment and sentence. Mason v. State, 438 So.2d 374 (Fla. 1983).

A petition for writ of certiorari was filed in the United States Supreme Court alledging:

> WHETHER THE SUPREME COURT OF FLORIDA HAS ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF SECTION 932.141(5)(i), FLORIDA STATUTES, WHICH PROVIDES FOR AN AGGRAVATING CIRCUMSTANCE IF THE CAPITAL MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, AS TO VIOLATE THE Eighth AND Fourteenth AMENDEMENTS?

The petition for writ of certiorari was denied by the United States Supreme Court. Mason v. Florida, ___U.S.___, ___ S.Ct.___ 79 L.Ed.2d 725 (1984).

On May 9, 1985, the Governor of the State of Florida signed a warrant providing for the execution of the death sentence upon petitioner. The warrant is effective from noon, Wednesday, May 29, 1985, until noon, Wednesday, June 5, 1985. Execution is scheduled for 7:00 a.m., Tuesday, June 4, 1985.

On May 31, 1985, Appellant filed a motion to vacate judgment and sentence and a motion and memorandum in support of defendant's motion for stay of execution. The same date, a hearing was held before the Honorable M. William Graybill, Circuit Judge, Thirteenth Judicial Circuit in and for Hillsborough County, Florida. Counsel for both parties presented argument after which Judge Graybill denied appellant's motion to vacate judgment and sentence and motion for stay of execution. A notice of appeal was immediately filed and that appeal follows.

STATEMENT OF THE FACTS

The following facts were taken from the opinion of this Honorable Court:

In the early morning hours of March 19, 1980, eleven year old Missy Chapman woke her two brothers, telling them that something was the matter with their mother, Linda Sue Chapman, who lay in bed making choking sounds. Mrs. Chapman, who had been stabbed, died before the police and ambulance arrived. None of the children reported having seen or heard anyone in their home the night of the killing.

A few days after the killing, Missy contacted a detective working on the case and told them that she had seen her mother being stabbed and had acted asleep until the man left the house. Fear that the killer would return had kept her from disclosing what she saw, claimed Missy. She described the assailant as a skinny black male, seventeen to nineteen years old, with short, dark hair. At a later deposition, however, Missy stated that she could not "actually see what [the killer] looked like." She was also unable, at a line-up or from photographs, to identify petitioner or anyone else as the killer. At trial, nevertheless, Missy pointed out Mason, stating that she was "sure" he was her mothers murderer.

Two of Mason's fingerprints were found on the siding of the Chapman home, but none were found inside. A State's witness also testified that in his opinion, hairs found at the scene were Mason's.

At trial, the judge held admissible evidence concerning petitioners conviction for a rape and robbery committed two days after the Chapman murder. The collateral crime evidence was found relevant to the issue of identity on the basis of the similarity of the modus operandi used in each instance.

After a finding of guilt by the jury, the jury recommended a sentence of death. The judge followed the recommendation and imposed a sentence of death finding the following aggravating circumstances:

1. The defendant was previously convicted of another felony involving the use or threat of violence to the person.

2. The defendant knowingly created a great risk of death to many persons.

3. The capital felony was committed while the defendant was engaged in a burglary.

4. The capital felony was especially heinous, atrocious or curel.

5. The capital felony was committed in a cold, calculated and premeditated manner.

The court did not find any mitigating circumstances.

SUMMARY OF THE ARGUMENT

It is well-settled law in Florida that a motion for post-conviction relief pursuant to Rule 3.850, Fla. R. Crim. P. may be summarily denied, without an evidentiary hearing, when the record conclusively shows the petitioner is not entitled to relief. Scott v. State, 423 So.2d 978 (Fla. 1st DCA 1982). This principle holds true even in cases such as this one where a sentence of death is involved. Muhammed v. State, 426 So.2d 533 (Fla. 1982); Foster v. State, infra and Meeks v. State, infra.

On the ineffective assistance of counsel claim petitioner has not alleged any conduct by counsel which was reasonably below what is required of competent counsel. There is also no likelihood that the results of petitioner's trial would have been different but for any alleged errors of counsel. See Strickland v. Washington, infra.

Post-conviction relief is available primarily to inquire into constitutional errors or to review a conviction where there has been a major change of law. McCrae v. State, 437 So.2d 1388 (Fla. 1983) and Witt v. State, 387 So.2d 922 (Fla. 1980). This procedure cannot and should not be used as a vehicle to allow expert witnesses to engage in contents of who has the best credentials and testing methods.

Any issues which were raised could have been or should have been rasied on direct appeal and are not cognizable on 3.850. Jones v. State, 446 So.2d 1059 (Fla. 1984). Any question of petitioner's present sanity must be presented to the Governor pursuant to §922.07, Florida Statutes. See Goode v. Wainwright, infra.

ARGUMENT

At the outset, your Appellee notes that the trial court summarily denied Appellant's motion to vacate sentence. At the hearing, the trial judge placed on the record the fact that he had read and reviewed the entire record and transcript of the instant cause prior to the hearing on the motion to vacate. Although the record on appeal is not attached to the trial court's order denying Appellant's motion to vacate, it is presumed that the record on appeal is currently in the possession of the Clerk of this Honorable Court and, therefore, the record should be read in conjunction with all pleadings and transcripts made a part of the record of Appellant's motion to vacate proceedings.

ISSUE

WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO VACATE JUDGMENT AND SENTENCE AND MOTION FOR STAY OF EXECUTION WITHOUT CONDUCTING AN EVIDENTIARY HEARING.

Florida Rule of Criminal Procedure 3.850 provides in pertinent part:

> . . . If the motion and the files in the record in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. . .

See also Foster v. State, 400 So.2d 1 (Fla. 1981); Meeks v. State, 382 So.2d 683 (Fla. 1980). Sub judice, the motion to vacate judgment and sentence was correctly denied by the trial court without a hearing pursuant to the above quoted portion of Florida Rule of Criminal Procedure 3.850.

The first claim raised in Appellant's motion to vacate

judgment and sentence dealt with the competency of prior psychiatric evaluations. Such claim is absolutely insufficient as a matter of law. Such a claim fails to present a justiciable issue which would be cognizable in a Rule 3.850 motion to vacate. In other words, your Appellee asserts that it is not the function of the judicial system to determine whether or not a medical professional is competent or provides "effective psychiatric or psychological evaluation." What Appellant attempted to do was create a situation where there would be a swearing match between experts called by the defense and experts called by the state as to the competency of those psychiatrists who had previously examined Appellant. Such a result cannot obtain.

As his seond claim, Appellant claimed that his trial counsel was ineffective. A claim of ineffective assistance of counsel, although cognizable on a Rule 3.850 motion to vacate, can be summarily denied without an evidentiary hearing. Strickland v. Washington, ___ U. S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674, 701-702 (1984). A claim of ineffective assistance of counsel must be viewed in light of the United States Supreme Court's recent decision in Strickland. The Supreme Court has now set forth a two-prong test: (1) the burden is upon the defendant to show that counsel's performance was deficient (i.e. counsel made errors so serious that counsel did not function as "counsel" within the meaning of the Sixth Amendment); and (2) the defendant must show that the deficient performance prejudiced the defense insofar as there was a high probability that the outcome of the

proceeding would be different but for the action of defense counsel. In applying this two-prong test, a reviewing court must indulge in a strong presumption that counsel's representation was effective. This Honorable Court has determined that the test set forth in Strickland does not "differ significantly" with the test espoused by the Florida Supreme Court in Knight v. State, 394 So.2d 997 (Fla. 1981). Jackson v. State, 452 So.2d 533 (Fla. 1984); Down v. State, 453 So.2d 1002 (Fla. 1984); Mikenas v. State, 460 So.2d 359 (Fla. 1984).

Appellant first claimed that trial counsel was ineffective because of trial counsel's purported failure to investigate more fully Appellant's psychiatric condition. This claim is wholly without merit. Appellant's motion sets forth the factual premise that an investigator who interviewed Appellant reported to defense counsel, Richard Edwards, that Mason appeared to be "feeble minded". Based upon this information, defense counsel obtained the reports previously compiled at St. Joseph's Hospital which indicated that there may be a question as to Mason's mental capacity. Thereupon, defense counsel requested the court to appoint psychiatrists to determine whether Appellant was mentally competent to stand trial and whether he was competent at the time of the offense. The reports received as a result of the court appointments were consistent in finding that Appellant was competent to stand trial and was competent at the time of the offense. Additionally, defense counsel had in his possession a report rendered by Dr. Gardner which was fairly extensive as to

Appellant's prior psychiatric background. Therefore, it is absolutely clear that defense counsel acted in a manner consistent with reasonable trial counsel in that he took all reasonable measures in determining his client's mental state. The results of the examinations did not indicate any further investigation was warranted. Thus, defense counsel acted in a reasonably effective manner with respect to the question of Appellant's mental competency.

Appellant's major attack as to ineffectiveness of trial counsel is as outlined above, that is, that defense counsel failed to adequately investigate Appellant's psychiatric background. He raises other reasons as to why trial counsel was purportedly ineffective but none of these reasons, taken individually or collectively, would have changed the outcome of the trial proceedings. See Strickland, supra. In particular your Appellee would like to address the claim made by Appellant in his motion to vacate that trial counsel was ineffective because of a "conflict of interest". Such a claim is patently without merit. The mere fact that one member of the Public Defender's Office gives advice to a suspect during police questioning does not constitute "actual representation" so as to invoke the conflict of interest doctrine.

Appellant's third claim dealt with the purported unconstitutionality of his prior convictions which were used as aggravating circumstances in rendering a death sentence. Appellant's claims were merely a rehash of his prior claims as

to the competency of the previously done psychiatric evaluations. As discussed above this claim is, again, totally without merit. Any question as to the validity of his prior convictions should have been raised in the direct appeals of those prior convictions or any collateral proceedings connected with the prior convictions.

Appellant's fourth claim in his motion to vacate judgment and sentence is that his scheduled execution is violative of the Eighth and Fourteenth Amendmments because he is presently insane. At the outset, your Appellee would note that the trial court specifically made a finding at the 3.850 hearing that there is no indication that Appellant is presently insane. Nevertheless, the Circuit Court does not have jurisdiction to entertain a claim of present insanity. Florida Statue 922.07 sets forth the proceedings to be followed by the Governor when a peron under sentence of death appears to be insane. This is the exclusive remedy available to an inmate awaiting execution of a death sentence. Aware that previously applications for determinations of sanity to be executed were made to the trial court, the Legislature enacted a statute which decreed this function would be henceforth fulfilled by the Governor. This statute is now the controlling law within its sphere of operation. DeGeorge v. State, 358 So.2d 217 (Fla. 4th DCA 1978). The Governor's authority to determine sanity, with the aid of an appointed commission of three psychiatrists as outlined in §922.07, is entirely appropriate. Solesbee v. Balkcom, 339 U. S. 9 (1950).

Thus, Florida has accepted the legal proposition that an insane person cannot be executed and has provided through §922.07 the means to invoke it.

In Goode v. Wainwright, 448 So.2d 999 (Fla. 1984), this Honorable Court addressed the issue, agreed "that an insane person cannot be executed", (id. at 1001), and held that §922.07 sets forth "the procedure to be followed when a person under sentence of death appears to be insane. The execution of capital punishment is an executive function and the Legislature was authorized to prescribe the procedure to be followed by the Governor in the event someone claims to be insane". Thus, in Goode, the court held under §922.07 the Governor can make the determination; Goode does not stand for the proposition that the issue of sanity to be executed can be raised independently in the state judicial system. See also Ford v. Wainwright, 451 So.2d 471 (Fla. 1984). As your Appellee has discussed, §922.07, Florida Statutes by its terms outlines "the proceedings when [a] person under sentence of death appears to be insane" and provides the exclusive means by which the sanity of a condemned prisoner is to be determined. It does not coexist with any separate right to a judicial determination. The statute, which delegates the function of determining sanity in these circumstances to the Governor, is akin to the clemency power which likewise reposes exclusively in the chief executive. Sullivan v. Askew, 348 So.2d 312 (Fla. 1977); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978),

Appellant's fifth point in his motion to vacate dealt with a child's identification of Appellant at trial. This claim was addressed on direct appeal to this Honorable Court and therefore. is not cognizable in a Rule 3.850 motion. See, e.g. Armstrong v. State, 429 So.2d 287 (Fla. 1983).

Appellant's final claim is one which should have been and could have been raised on direct appeal, and, therefore, is inappropriate for consideration in a Rule 3.850 motion. Mikenas v. State, supra; Thomas v. State, 421 So.2d 160 (Fla. 1982); Raulerson v. State, 420 So.2d 160 (Fla. 1982); Ford v. State, 407 So.2d 907 (Fla. 1981); Hargrove v. State, 396 So.2d 1127 (Fla. 1981). This Honorable Court has held on several occasions that a ground for relief which is known at the conclusion of trial should be raised on direct appeal. If that ground is not raised on direct appeal, motion pursuant to Rule 3.850 is not an appropriate remedy. See Ford, supra, and Hargrove, supra. The fact that the basis for collateral attack is alleged to be of constitutional dimension does not preclude a waiver by failure to assert it on direct appeal. Clark v. State, 363 So.2d 331 (Fla. 1978).

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the order of the trial court denying Appellant's motion to vacate judgment and sentence should be affirmed.

Respectfully submitted,

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CEWRTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to Luis Prats, Esquire this 2nd day of June, 1985.

Of Counsel for Appellee