IN THE SUPREME COURT OF FLORIDA

SAM WILSON, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 67
	)	
LOUIE L. WAINWRIGHT, Secretary Department of Corrections, State of Florida, and RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida,	)	CAPITAL CASE Execution is Imminent, Scheduled for Monday, June 24, 1985, 7:00 a.m.
	)	
Respondents.	)	

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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IN THE SUPREME COURT OF FLORIDA

SAM WILSON, JR., Petitioner, vs. LOUIE L. WAINWRIGHT, Secretary Department of Corrections, State of Florida, and RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida, Respondents.	)	CASE NO. 67,190

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Respondents, through their undersigned counsel, respond to the Petition for Writ of Habeas Corpus filed by the Petitioner, Sam Wilson, Jr., and state:

I

JURISDICTION

The Petitioner's petition for writ of habeas corpus is based on the claim that he did not receive the effective assistance of appellate counsel in his direct appeal before this Court. The claim is properly presented in this Court, Knight v. State, 394 So.2d 997, 999 (Fla. 1981), but the Respondents maintain the Petitioner is not entitled to relief.

II

FACTS

Introduction

The Petitioner has gone to great lengths to assert appellate counsel's omissions, but has overlooked what the attorney did in the appeal. Mr. Conner's initial brief (Petitioner's Appendix B) raised five issues, four of which challenged the guilt phase, and, if successful, would have

resulted in a new trial. The fifth issue concerned the trial judge's refusal to poll the jury as to its sentencing recommendation. If successful, this argument would have entitled the Petitioner to resentencing. After the State filed its brief, Mr. Conner filed an answer brief responding to the State's arguments (Appendix E). Subsequently, Mr. Conner filed a supplemental brief, arguing the crimes were not heinous, atrocious and cruel so there was only one valid aggravating circumstance, the prior conviction of a violent felony.

In this Court's opinion affirming the convictions, it discussed each of the points raised by the Appellant. Wilson v. State, 436 So.2d 908 (Fla. 1983). Mr. Conner filed a motion for rehearing (Petitioner's Appendix M), which was denied (Petitioner's Appendix O).

A. Facts underlying conviction and sentence.

The Petitioner's statement of the facts overlooks or ignores several important facts which should be kept in mind when considering the question of whether counsel should have briefed the issue of sufficiency of the evidence. The following additions are necessary:

Jimmie Wilson testified that when the Petitioner arrived at his house at about 2:00 a.m., his appearance was bloody (R 350). The Petitioner washed off the blood, changed into clean clothes, and left (R 351).

About 2:30 a.m., the Petitioner's brother summoned the police to the Wilson home (R 311, 322). The Petitioner was present and he told the police an unknown black male had fired shots and left (R 318). He claimed he had just arrived at the house, found the front door open, and the scene as it was (R 335). The police found Earline Wilson, still alive, hiding in a utility room (R 318). She told the police the Petitioner caused the injuries (R 320).

After his arrest the Appellant made two statements.

In the first, he admitted he had hit Earline Wilson with a hammer which started the altercation (R 475). In the first statement, he denied shooting Earline Wilson. The Appellant's second statement was given the next day (R 491). He admitted Earline Wilson had hidden in a bedroom closet, locking the door (R 495). He climbed in the window and fired shots at her in the closet (R 503-504).

Dr. Gore, the pathologist who autopsied Sam Wilson, Sr., and Jerome Hugley, testified Jerome died from a single stab wound in the middle of his chest (R 530-531). Sam Wilson, Sr. died from a gunshot wound to the head; there were no powder burns so the gun was more than three feet away when it was fired (R 537, 548-559). In addition to the gunshot wound, Mr. Wilson had abrasions on his head which were not consistent with injuries inflicted with a fist but would be consistent with blows from a hammer (R 540). There were also abrasions on his body and lacerations on his scalp (R 540, 541), and numerous injuries on his right hand which indicate defensive wounds (R 546).

Dr. Garvin, a pathologist who performed an autopsy on Earline Wilson following her death from cancer and pneumonia (R 432), testified she had a depressed area on her left forehead from a skull fracture and had sustained at least three blows from a blunt object, consistent with a hammer (R 437). She had been shot five or six times, at least five (R 439).

Thus, the evidence showed the three victims all sustained severe blows from deadly weapons and the two adults both were shot. The Petitioner, who was unharmed, tried to conceal his responsibility by summoning the police after he had washed the blood off himself and changed clothes, and then telling the police an unknown intruder had committed the crimes. He did nothing to aid the injured victims and in fact pursued Earline Wilson to a closet where she had attempted to hide and shot at her, emptying his gun.

B. Facts Pertaining to Appellate Counsel's Actions.

The Petitioner has alleged a series of errors purportedly committed by appellate counsel. These include (1) insufficient communication with the Petitioner; (2) failure to raise meritorious issues in the brief (3) poor presentation of oral argument; (4) poor quality of supplemental brief; and (5) filing a motion for rehearing containing a new argument. Petitioner has also alleged that Mr. Conner was ineffective in his appellate representation of Chester Maxwell, a capital case which is totally unrelated to his. Although these errors were alleged, the Petitioner's argument section of his pleading relies on only two identified areas: failure to challenge the sufficiency of the evidence and failure to adequately address the capital sentencing issues.

In order to prevail on a claim of ineffective counsel, a petitioner must show not only deficient performance but actual prejudice. Downs v. State, 453 So.2d 1102 (Fla. 1984); Strickland v. Washington, ___U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, Respondents will address these alleged deficiencies to the extent that the Petitioner has argued them in the petition.

III

NATURE OF RELIEF SOUGHT

Respondents request that this Court DENY the Petition for Writ of Habeas Corpus, for the Petitioner has failed to show he received ineffective assistance of counsel on direct appeal.

IV

BASIS FOR DENIAL OF THE PETITION

A. Standard for Determining Effective Assistance on Appeal.

This Court, in its recent decision in Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985), applied the standard set by the United States Supreme Court in Strickland v. Washington, ___U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), for gauging the effectiveness of counsel generally, to a claim of ineffective appellate counsel. Accordingly:

> A person convicted of a crime, whose conviction has been affirmed on appeal and who seeks relief from the conviction or sentence on the ground of ineffectiveness of counsel on appeal must show, first, that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and second, that the failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome under the governing standards of decision.

Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985). In considering a claim of ineffectiveness for failure to raise an issue on appeal the court does not reach the merits of the issue, but decides whether counsel's failure to raise it was a serious deviation from professional norms, and, if so, whether the defect undermines confidence in the outcome of the appellate process. Johnson v. Wainwright, supra, at 211. Counsel need not raise every conceivable claim. Ruffin v. Wainwright, 461 So.2d 109, 111 (Fla. 1984); Gillihan v. Rodriguez, 551 F.2d 1182, 1189 (10th Cir. 1977); Harshaw v. United States, 542 F.2d 455, 457 (8th Cir. 1976).

The present case is unlike Barclay v. State, 444 So.2d 956 (Fla. 1984), where appellate counsel's conflict of interest prevented him from adequately representing his client. Here, Mr. Conner had no conflict, he filed briefs and he raised claims of sufficient significance so that the court addressed each one in its opinion. His tactical decision not to challenge the sufficiency of the evidence, and his manner of addressing the sentencing issues, provided the Petitioner with reasonably effective assistance.

B. The Sufficiency of the Evidence.

The Petitioner alleges counsel was ineffective for failing to argue the murder of Sam Wilson, Sr., was not committed with a premeditated intent. Had this been argued, he asserts both first degree murder convictions would have been vacated since the State's case as to the murder of Jerome Hugley was based on transferred intent (R 570). Lee v. State, 141 So.2d 257 (Fla. 1962).

The Respondents maintain the decision not to argue this issue was reasonable, for if there is no chance of convincingly arguing a particular issue, then failure to raise it is not a substantial and serious deficiency. Ruffin v. Wainwright, 461 So.2d 109, 111 (Fla. 1984); Jones v. Barnes, 463 U.S. 745 (1983), and there certainly can be no prejudice.

The federal constitutional standard for determining sufficiency of evidence is whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324 (1979). In Florida, it is well-established that an appellate court should not reverse a verdict returned by a jury where there is competent, substantial evidence to support it. Rose v. State, 425 So.2d 521, 523 (Fla. 1982); Herzog v. State, 439 So.2d 1372, 1378 (Fla. 1983). Premeditation can be shown by circumstantial evidence. Sireci v. State, 399 So.2d 964 (Fla. 1981). It is a fully-formed conscious purpose to kill which exists in the mind of the perpetrator for a sufficient length of time to permit reflection and in pursuance of which an act of killing ensues. Id. The circumstances here supported the charge of premeditated murder and negated the Petitioner's claim of "accident".

The evidence was clear that the Petitioner instigated the entire criminal episode by attacking Earline Wilson with a hammer because she told him not to take any food from the refrigerator. Sam Wilson, Sr., came to her aid after she called for help. The Petitioner's vicious attack escalated as he used a knife, scissors, and a gun in addition to the hammer to murder

(or, in Earline Wilson's case, injure) the victims. The State's case included testimony that the fatal wound in Sam Wilson, Sr., was fired from a distance of at least three feet because there were no powder burns (R 537, 548, 559). Further, Mr. Wilson had defensive wounds on his hand. The Petitioner's murderous intentions were apparent from the fact that he pursued Earline Wilson to a closet and shot her after his father was dispatched (R 501-504). The Petitioner escaped uninjured from the bloody scene, and prior to getting aid for the victims, attempted to cover up the fact that he was responsible for their condition by washing, changing clothes, and telling the police there was an unknown intruder.

In cases factually similar to this one, first degree murder convictions have been upheld. In Buford v. State, 403 So.2d 943 (Fla. 1981), the defendant dropped a concrete block on the head of a child, killing her. The court affirmed, holding that where a person strikes another with a deadly weapon and inflicts a mortal wound, the act of striking is sufficient to warrant a jury in finding the person intended the result which followed. Likewise, in Washington v. State, 432 So.2d 44 (Fla. 1983), the defendant struggled with a police officer and shot him four times. The court held that where the eyewitnesses agreed the defendant's arm and hand were free when he fired the shots, this was sufficient to show the shooting was intentional and to support the conclusion that the murder was premeditated. Similarly, in Thomas v. State, 13 So.2d 148, 152 (Fla. 756 (1973), the court dealt with a contention like that raised here as follows:

> Appellant contends that this state of facts does not show malice and intent on the part of appellant to kill the deceased. Under the state of facts detailed, that question was for the jury to settle and we are pointed to no reason why the court should invade their province. When a man deliberately takes up an ice pick and pursues one with whom he has had a dispute and is unarmed and stabs him to death, that would certainly be sufficient predicate for a jury to base malice and intent. No manual weapon is more deadly than

> an ice pick and the very act of stabbing a victim with one imports cruelty and inhumanity.

Id., 13 So.2d at 149.

Thus, in the instant case, the evidence supports the first degree murder convictions and appellate counsel was not ineffective for deciding not to raise the sufficiency issue on appeal. This case is distinguishable from Forehand v. State, 171 So. 141 (Fla. 1936) and Tien Wang v. State, 426 So.2d 1004 (3DCA Fla. 1983), cited by the Petitioner. Of course, as this Court observed in McArthur v. State, 351 So.2d 972, 976 (Fla. 1977), the nature and quality of the evidence is unique in each case. In Forehand the court reviewed the evidence and found that the accused had become enraged from an earlier quarrel, to the point that he fired at two persons in the ground, one of whom was his own brother, and there was no evidence of any ill will towards his brother. Here, there was a protracted struggle and the Petitioner attacked his family members, not in a single instant, but with different weapons and he ultimately fired a shot from a distance of more than three feet at his father's head.

In Tien Wang, the homicide came after the defendant had made frantic efforts for a full day to persuade his wife to return to him, an effort which was frustrated by the victim, her stepfather. The court found the defendant's mental state was such that he did not have the premeditation required for first degree murder, though he did have the intent to kill necessary to establish second degree murder. By contrast, in the present case the Petitioner instigated and carried out the murder of his family in the absence of any provocation.

Therefore, appellate counsel's decision not to challenge the sufficiency of the evidence supporting the convictions was a reasoned tactical choice, and there has not been an adequate showing of prejudice.

C. Sentencing Issues.

The Petitioner's discussion of Anders v. California, 386 U.S. 738 (1967), is not germane to the issue of ineffectiveness because in fact the Petitioner's appellate counsel did not decline to raise sentencing issues on appeal. Although he did not address the matter in his initial and reply briefs, he filed a supplemental brief at the direction of this Court in which the point raised was that the trial court erred in sentencing the petitioner to death. The brief is seventeen pages in length and contains citations to twenty-seven decisions. (See Petitioner's Appendix I). As an examination of this Court's opinion on appeal reveals, counsel was able to successfully argue that the aggravating circumstances should be reduced from three to two as to the death of Sam Wilson, Sr., and from three to one with regard to the death of Jerome Hugley. Wilson v. State, 436 So.2d 908, 912 (Fla. 1983). Counsel also made the argument that a statutory mitigating circumstance applied, although that argument was rejected. Wilson v. State, supra. Therefore, appellate counsel did represent the Petitioner with regard to the sentencing issues.

The Petitioner next asserts that his counsel was ineffective because he did not discuss non-statutory mitigating circumstances, which are allegedly apparent in the record and enumerated at page 34 of the petition. As to each of these alleged mitigating circumstances, reasonable persons could differ as to whether they exist. For example, the fact that the defendant had his brother call the police after the incident may be true, but this call wasn't made until after the Petitioner made efforts to conceal his role in the homicides. The Petitioner did not cooperate with the police and admit his responsibility until after Earline Wilson identified him. The Petitioner's alleged effort to help his cousin is based on a self-serving statement made by the Petitioner; the evidence is to the contrary. It was clear there were no underlying felonies, but this serves to negate an aggravating factor and does not amount to a mitigating factor.

Again, it bears repeating that not every conceivable claim need be raised on appeal for counsel to be effective. Ruffin v. Wainwright, supra. Counsel did argue the existence of a mitigating factor, and his decision not to assert others which are of questionable value was a reasonable tactical choice.

Turning to the Petitioner's next contention, he asserts the appellate counsel should have challenged the instructions to the jury which allegedly limited their consideration of the evidence in mitigation. Respondents maintain first, that since no objection was made at the trial level, this issue was not preserved for appeal. Fla.R.Crim.P. 3.390(d). Vaught v. State, 410 So.2d 147 (Fla. 1982). Counsel cannot be deemed ineffective for deciding not to raise it. Jones v. Wainwright, ___So.2d ___, Fla. S.Ct. No. 66,505 (Op. filed June 13, 1985). Second, the defense counsel at trial presented non-statutory mitigating circumstances (R 693-703), so there was no reason for appellate counsel to conclude this evidence was not considered. Third, the instructions given were correct and did not limit the mitigating factors. Jones v. Wainwright, supra; Alvord v. Wainwright, 725 F.2d 1282, 1299 (11th Cir.), cert. denied, ___U.S. ___, 83 L.Ed.2d 291 (1984). Thus, there has been no showing of prejudice.

Next, Petitioner alleges the trial court erroneously limited himself to consideration of the non-statutory circumstances and appellate counsel should have briefed this issue. The record fails to substantiate this position. The case of Lockett v. Ohio, 438 U.S. 586 (1978) was decided three years before the Petitioner's trial and it can reasonably be concluded the trial court followed its mandate. The judge did not restrict the evidence presented in mitigation. Trial defense counsel, in his argument prior to sentencing, pointed out the court was not restricted to statutory mitigating circumstances (R 743-745). The judge's oral pronouncement and written order make no limiting reference concerning mitigating factors (R 749, 1266). The decision in Herzog v. State, 439 So.2d 1372 (Fla. 1983), cited by the Petitioner, is review of a jury override and does

not support the argument made in the instant case. Since there is no merit to the Petitioner's claim that the trial court limited his consideration of the mitigating factors, it is clear appellate counsel was not ineffectice for not raising this matter on appeal.

The Petitioner asserts appellate counsel's challenge to the aggravating circumstances, while made, was ineffective. First, Respondents would point out that the excerpt from the oral argument transcript quoted by the Petitioner is immaterial because his counsel subsequently filed a supplemental brief addressing the issue. The trial court had found three aggravating factors applicable to both murders: heinous, atrocious and cruel; prior conviction of a felony involving violence, and cold, calculated and premeditated. This Court eliminated as to both murders the factor of cold, calculated and premeditated, and also eliminated the heinous, atrocious and cruel factor as to the death of Jerome Hugley. Thus, it is clear these issues were argued and counsel was partially successful. Petitioner attempts to reargue here that the death of Sam Wilson, Sr. was also not heinous, atrocious and cruel, which is an issue appellate counsel argued in his supplemental brief. (Petitioner's Exhibit I). As in Harris v. Wainwright, ___So.2d ___, Fla. S.Ct. No. 66,523 (Op. filed June 13, 1985), the Petitioner is, under the guise of an ineffective counsel claim, seeking a second review of an issue that was previously raised and expressly addressed in direct appeal. Petitioner is not entitled to use habeas corpus to reargue his legal claim. Harris v. Wainwright, supra; Messer v. State, 439 So.2d 875 (Fla. 1983); United States v. Jones, 614 F.2d 80 (5th Cir.), cert. denied, 446 U.S, 945 (1980). [In the event the court re-examines this issue, Respondent relies on the supplemental answer brief, Petitioner's Appendix J, p. 5, filed on direct appeal].

The remaining aggravating circumstance, prior conviction of a violent felony, was properly found since the Petitioner was, at the time of these murders, on parole

for committing an attempted armed robbery with a knife. There was no basis for appellate counsel to challenge this factor.

Finally, the Petitioner asserts a more effective presentation would have resulted in a reduction of his sentence from death to life. The Respondents maintain, for the reasons discussed, that appellate counsel rendered reasonably effective assistance and his perfomance was not deficient, nor did it prejudice the Petitioner. The fact remains that there are valid aggravating circumstances, and the trial court's finding of no mitigating circumstances was within its province. Daugherty v. State, 419 So.2d 1067 (Fla. 1982); Riley v. State, 413 So.2d 1173 (Fla. 1974); Hall v. Wainwright, 733 F.2d 766, 774-775 (11th Cir. 1984). The death sentences were affirmed, not because of any ineffectiveness of counsel, but because death was the appropriate penalty under the circumstances of this case.

CONCLUSION

WHEREFORE, based upon the foregoing reasons, the Respondents respectfully request that the Petition for Writ of Habeas Corpus be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Writ of Habeas Corpus has been furnished, by hand delivery, to RONALD A. DION, ESQUIRE, Entin, Schwartz, Dion, & Sclafani, ESS Professional Building, 1500 Northeast 162nd Street, North Mimai Beach, Florida 33162, this 18th day of June, 1985.

Of Counsel