IN THE SUPREME COURT OF FLORIDA

CASE NO. 67835

RONNIE LEE JONES,

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

JIM SMITH
Attorney General
Tallahassee, Florida

RICHARD E. DORAN
Assistant Attorney General

RANDI KLAYMAN LAZARUS
Assistant Attorney General
Department of Legal Affairs
Florida Regional Service Center
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

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INTRODUCTION

The appellant was the defendant in the trial court. The appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as the defendant/appellant/petitioner or the State/appellee/respondent. The symbol "R" will be used to designate the record on appeal; the symbol "TR" will be used to designate the transcript of proceedings.

I

STATEMENT OF THE CASE

Ronnie L. Jones is in the lawful custody of the Respondents pursuant to valid judgments and sentences imposed in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, Case No. 80-12103. The judgments and sentences were affirmed by the Florida Supreme Court on direct appeal in Jones v. State, 449 So.2d 253 (Fla. 1984), cert. den., 105 S.Ct. 269, 83 L.Ed.2d 205 (1984).

The defendant petitioned the United States Supreme Court for certiorari review on August 14, 1984. The court denied review on October 9, 1984.

On October 8, 1985, Florida Governor Bob Graham signed a first death warrant against Ronnie Lee Jones. Execution is scheduled for Monday, November 4, 1985, at seven o'clock a.m. The warrant expires Tuesday, November 5, 1985 at noon.

On October 30, 1985, the defendant filed a Motion for Post-Conviction Relief and Motion for Stay of Execution. On October 31, 1985, after hearing argument of counsel, the Honorable Maria Korvick denied both motions. The defendant appeals the denial of these motions to this Honorable Court.

STATEMENT OF THE FACTS

Appellee would refer this Honorable Court to the Statement of the Facts contained in Appellee's initial brief on direct appeal to this Court.

POINTS INVOLVED ON APPEAL

I

WHETHER DEFENDANT HAS FAILED TO PRESENT ANY EVIDENCE TO SUPPORT HIS CONTENTION THAT THE TRIAL COURT ERRED IN FAILING TO SUA SPONTE ORDER A COMPETENCY HEARING.

II

WHETHER THE CLAIMS RAISED IN POINTS V-XI OF THE MOTION TO VACATE WERE PROCEDURALLY BARRED BY FAILURE TO RAISE THEM ON DIRECT APPEAL. FOSTER V. STATE, 400 SO.2D 1, 5 (FLA. 1981).

III

WHETHER THE APPELLANT'S PRIOR EXERCISE OF HIS CONSTITUTIONAL SELF-REPRESENTATION BARS REVIEW OF A COLLATERAL CONSTITUTIONAL RIGHT TO ASSIST HIS NON-EXISTENT ATTORNEY

SUMMARY OF THE ARGUMENT

Judge Korvick correctly denied motions to stay execution and vacate the sentences because no competent evidence was presented in the motion or at the hearing. The case of Hill v. State, 473 So.2d 1253 (Fla. 1985) is not controlling given the dire contrast of fact and law involved below.

Additionally, claims V-XI were procedurally barred. Foster v. State, 400 So.2d 1 (1981) and the Enmund issue is meritless.

Assuming arguendo the court was incorrect in holding the motions legally and/or factually insufficient to require a hearing, the entire issue of a constitutional right to competent assistance of counsel was waived by Appellant's choice of self-representation.

ARGUMENT

I

DEFENDANT HAS FAILED TO PRESENT ANY EVIDENCE TO SUPPORT HIS CONTENTION THAT THE TRIAL COURT ERRED IN FAILING TO SUA SPONTE ORDER A COMPETENCY HEARING.

The gist of the defendant's claims is he was incompetent to stand trial and consequently could not adequately represent himself. The defendant now alleges through his motion for post conviction relief that the trial court should now conduct a hearing to determine whether the defendant was in fact competent to stand trial.

The State's position is that the trial court correctly denied defendant any relief. Fla.R.Cr.P. 3.850 (f), provides in pertinent part:

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

In this case, the Honorable Maria Korvick had a particularly vivid recall of the defendant and the trial, due to the unique nature of the case. She can therefore take into consideration "the files and records," to wit; the trial transcripts and/or her own recollection of the proceedings, in order to make a determination.

Judge Korvick was correct in rejecting the last minute affidavits presented by the post-trial examining psychiatrists. The affidavits in essence address a hypothetical situation, as to whether the defendant is now competent to stand trial. Clearly, these affidavits must not be accepted as scientific, where the doctors have absolutely no personal knowledge of how the defendant conducted himself during his seventeen day trial. In fact, an examination of that transcript would belie any suggestion that the defendant was competent to stand trial. At the hearing on defendant's Motion for Post-Conviction Relief the State requested that defense counsel expound on the doctor's reports and explain the relevance of any alleged mental or physical deficiencies to his performance. The defense did not do so. Therefore, the defendant did not present competent evidence to Judge Korvick, to mandate that an evidentiary hearing be conducted. See Raulerson v. Wainwright, 732 F.2d 803 (11th Cir. 1984).

Defendant claims, however, that this court's ruling in Hill v. State, 473 So.2d 1253 (Fla. 1985) mandates that he receive relief on the competancy issue. Hill, supra, is entirely distinguishable. There, the defendant exhibited repeated outward signs of incompetency. Several examples of this behavior were enumerated. He laughed and conversed with friends in the courtroom, attempted to walk out, and

stated that he perceived the trial as a game. A post trial report revealed that Hill had an I.Q., of 66.

In order to fully appreciate this defendant's competence, and the difference between Hill and Jones, this court could look to the defendant's representation of himself, at trial.[1]

An examination of the trial transcript reveals the defendant's astounding natural ability to present his own defense. In fact, throughout the trial the defendant utilized an extremely clever tactic of referring to himself as "Ronnie Lee Jones" or "the defendant", rather than "me" or "I". By doing so, many of the witnesses followed suit, giving the appearance of referring to someone other than the man on trial.

The defendant exhibited his innate abilities early in the trial. During cross-examination of a key State witness, David Lynch, the defendant attempted to utilize a common defense tool; impeachment with a prior inconsistent statement:

[1]Counsel will expand on these distinctions at oral argument.

Q: About 15 minutes. You never heard or have you read any newspapers as far as the defendant, Ronnie Lee Jones, being arrested, is that true or false?

A: That's true.

Q: Do you read any papers?

A: No, I haven't.

Q: Did you watch any news?

A: No.

Q: Mr. Lynch, I have a statement that you made under oath on deposition-- you stated you heard on the news and you called Detective Blocker, is that true or false?

(TR. 979).

Additionally, after the State directly examined the witnesses who identified the deceased victims, the defendant recognized the futility and lack of benefit of asking them any further questions. Those were the only witnesses the defendant did not choose to cross-examine. That action clearly reflected the defendant's ability to recognize their continued presence on the stand would only harm him.

Furthermore, the defendant was capable of utilizing correct courtroom procedure. During cross-examination of Gloria Tillman, the defendant had an inquiry of the court. Instead of blurting out a question he correctly and courteously moved for a sidebar. (See also 1236).

THE DEFENDANT: Mrs. Korvick, may I have a sidebar?

THE COURT: Yes, you may.

(TR. 1206).

Defendant's knowledge and understanding of the Rules of Criminal Procedure continued to reveal itself when he moved to exclude a photograph being admitted by the State based on a discovery violation. Defendant's claim was meritorious, and the court consequently excluded the photograph.

THE DEFENDANT: Your Honor, may I ask the State a question before I answer that?

THE COURT: Go ahead and see if they can answer it.

THE DEFENDANT: Was this picture attached to the warrant?

MS. KAGHAN: That's the way it appears.

THE DEFENDANT: Like that?

THE COURT: You may go ahead and answer him that, Officer.

Was the picture attached to the warrant when Gloria Tillman identified the warrant?

THE WITNESS: I believe it was, yes.

THE DEFENDANT: Mrs. Korvick, I believe this warrant and the photograph fall within discovery, and there is no copy with any picture on the warrant, and as far as any tangible papers or objects which were obtained from or belonging to the accused--

THE COURT: Let me ask the State--how do you respond to the discovery situation?

(TR. 1218).

THE DEFENDANT: I have no objection to the State removing the photograph and not attempting to introduce the photograph, since the defendant believes that is somehow prejudicial by learning of this at this late time. . . .

THE COURT: Your objection is sustained as to the photograph.

(TR. 1221).

One of the defendant's chief forms of attacking the State's case was to focus on the State's not presenting evidence that the bullets causing the deaths were necessarily those from the gun found under the defendant's pillow. During the examination of Detective Stone, the State asked very detailed questions regarding certain types of ammunition and the various effects they have. The defendant objected.

THE DEFENDANT: Objection, your Honor.

THE COURT: On what basis?

THE DEFENDANT: Mr. Jones is not a ballistics expert.

THE COURT: Sustained.

(TR. 1677-1678, 1679).

Defendant's closing argument epitomized his ability to hone in on any perceived weakness in the State's case. The following listing gleaned from the defendant's argument does not reflect a concession of insufficient evidence where the circumstantial evidence of defendant's guilt is overwhelming.

> 1. The witnesses that took this stand in this case never said they saw, Ronnie Lee Jones, the defendant kill any one of these witnesses.
>
> (TR. 1774).

> 2. If a person commits a robbery, why would a person. . . leave the jewelry on the man's hand and his watch? Why would a robber do that?
>
> (TR. 1774).

> 3. Why do you feel the State has not put a ballistics expert on the stand? They used every possible expert in this case to testify. Why wasn't a ballistics expert on the stand?
>
> (TR. 1775).

> 4. Anyone shot me, you bet I would remember who shot me, and I would get a look--not only at his shirt, I would look at his face, make sure that person would never get out of jail.
>
> (TR. 1778).

> 5. Ladies and gentlemen of the jury, the .357 magnum is in evidence. That gun had sat there for you all to look at. What happened to the ballistics expert to tell the difference?
>
> (TR. 1784).

The foregoing are only a few of the examples of the defendant's extraordinary ability to adequately represent himself at trial. In light of the strength of the State's evidence it would be difficult to imagine an attorney doing a better job.

Where a defendant's competency is demonstrated by his own adequate representation, a trial court surely could not be expected to hold a hearing to determine his competency. F.R.Cr.P. 3.210 would therefore never become activated, nor violated.

The foregoing recitation would not only respond to a claim of incompetency, but would additionally respond to a claim that the defendant did not adequately represent himself.

It is abundantly clear that the defendant freely, voluntarily and intelligently chose this avenue. He is, moreover, entitled to that right, pursuant to Faretta v. California, 422 U.S. 806 (1975).

Additionally, the State would urge this court to reject the affidavits supplied at this late date from defendant's previous attorneys. In fact, this court in Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985) noted that an

attorney's last minute attempt to stay an execution through supplying affidavits with groundless assertions will not persuade the court. (See footnote).

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Jones claim that his prior court appointed attorney's failed to adequately investigate his prior medical and mental background will fail. In fact, the affidavits submitted to the trial court, pursuant to the defendant's Motion for Post-Conviction Relief indicates that it was the defendant's wish that those matters not be investigated. It is an attorney's ethical obligation to follow his client's wishes. Alvord v. Wainwright, 725 F.2d 1282, 1289 (11th Cir. 1984), citing to Foster v. Strickland, 707 F.2d 1339, 1343 (11th Cir. 1983). Alvord, supra, recognized that there may be cases in which a client's faculties are so impaired that the client cannot determine and choose what to do. The Alvord court went on to say that an attorney should not ignore his client's wishes and pursue some unspecified course of action. Alvord relied on Brennan v. Blankenship, 472 F.Supp. 149 (W.D. Va. 1979), aff'd. mem., 624 F.2d 1093 (4th Cir. 1980) as support for his argument that the attorney should take matters into his own hands, despite his client's wishes. In Brennan, supra, the court therein observed:

> "While this court does not adopt the argument that defense counsel had an affirmative duty to enter pleas of insanity notwithstanding defendant's wishes, it is clear that a professional duty was breached through the total failure of defense counsel to develop the potential of Dr. Scott's testimony. Moreover, the extensive written communications between counsel and Brennan strongly suggests that the possibility and ramifications of an insanity defense were not actually discussed. Even if the court was to credit the testimony of counsel to the effect that such verbal discussions did take place, the record establishes that the advise provided by counsel was woefully inadequate. . . .
>
> 472 F.Supp. at 157.

Even in Brennan, supra, the court therein recognized that there comes a point when a defense lawyer cannot ignore the wishes of his client. In the instant case, the infirmities found by the court in Brennan do not exist.

The Alvord court rejected application of Brennan, supra, and held that if the client cannot adequately prepare his defense, then the trial judge must find him incompetent to stand trial. It is abundantly clear from an examination of the record and any transcripts that the defendant had the ability to adequately prepare his defense. This ability is quite apparent when examining his numerous pre-trial written motions. Accordingly, the prior attorneys were correct

when they abided by the defendants' wishes and did not undertake extensive investigation of prior histories. See McQueen v. Blackburn, 755 F.2d 1174 (5th Cir. 1985).

II

THE CLAIMS RAISED IN POINTS V-XI OF THE MOTION TO VACATE WERE PROCEDURALLY BARRED BY FAILURE TO RAISE THEM ON DIRECT APPEAL. FOSTER V. STATE, 400 SO.2D 1, 5 (FLA. 1981).

Claims five through eleven are of a nature that they could have been and should have been raised on direct appeal. Indeed, claims 9 and 11 are restatements of matters addressed by this court in Jones v. State, 449 So.2d 253 (Fla. 1984). Accordingly, the appellant has waived his opportunity to bring these claims. Foster v. State, 400 So.2d 1, 5 (Fla. 1981). As a footnote to this procedural bar argument on the last six claims, it should be noted that regarding claim ten, the so-called "Enmund" issue of lack of adequate jury instruction, see Enmund v. Florida, 458 U.S. 782 (1982), the Eleventh Circuit has firmly rejected its applicability in the factually similar Francois v. Wainwright, 763 F.2d 1188, 1189 (11th Cir. 1985) on authority of Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985)(en banc). see also Porter v. State, ___So.2d___, (Fla. October 25, 1985).

III

THE APPELLANT'S PRIOR EXERCISE OF HIS CONSTITUTIONAL SELF-REPRESENTATION BARS REVIEW OF A COLLATERAL CONSTITUTIONAL RIGHT TO ASSIST HIS NON-EXISTENT ATTORNEY.

Beyond the obvious lack of evidence of incompetency, the distinctions of Hill v. State, and the procedural bar imposed on claims five through eleven, is the clear and undisputed waiver by the appellant of his constitutional rights as outlined in Dusky v. United States, 362 U.S. 402, 403 (1960), and set out by criminal procedure Rule 3.211, (F.R. Cr.P. 1980). This waiver of a constitutional right was accomplished in this case by the appellant's competent, determined exercise of his right to self-representation. See Jones, at 275. This court's recent opinion in Peede v. State, 474 So.2d 808 (Fla. 1985) reinforces the state's position that Jones' choice to represent himself bars this eleventh hour attempt to litigate a collateral right to competently assist a lawyer he never had at trial. Writing for a unanimous court in Peede, Justice Alderman noted:

> "We now hold that just as in non-capital cases, the presence requirement is for the defendant's protection and, just as he can knowingly and voluntarily waive any other constitutional right, a defendant can waive his right to be present at stages of his capital trial if he personally chooses to voluntarily absent himself. (emphasis added).
>
> 474 So.2d 814-15, citing Illinois v. Allen, 397 U.S. at 345.

Accordingly, the determination by this court that Ronnie Jones made an "unequivocal, voluntary and intelligent election to exercise his right of self-representation and to discharge his trial counsel",[2] binds the appellant and precludes the granting of a hearing on the complaint now raised to the extent that complaint refers to assisting counsel with preparation of the case. The law of this case, as set out at 449 So.2d 257, is that:

> "Faretta holds that the sixth amendment grants an accused the right to self-representation. The record affirmatively shows that defendant was literate, competent, and understanding, that he was voluntarily exercising his informed free will, and that the court made it explicitly clear that it thought defendant was making a mistake in refusing to accept the appointment of counsel."

That he now claims (albeit without evidentiary support) that such a mistake was made should be of no moment to this court. As Justice Shaw noted:

> "As we make clear below, neither the exercise of the right to self-representation nor to appointed counsel may be used as a device... to frustrate orderly proceedings.
>
> Id. at 257.

[2] Peede, supra at 815.

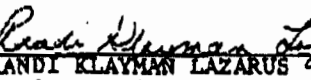
CONCLUSION

Based upon the foregoing reasons and citations of authority, the Appellee would seek affirmance of the trial court's rulings on the Stay of Execution and Motion for Post Conviction Relief.

Respectfully submitted,

JIM SMITH
Attorney General

RICHARD E. DORAN
Assistant Attorney General



RANDI KLAYMAN LAZARUS
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 FINE, JACOBSON, SCHWARTZ, NASH, BLOCK & ENGLAND, P.A., 777 Brickell Avenue, Miami, Florida 33127 on this____day of November, 1985.

RICHARD E. DORAN
Assistant Attorney General

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