IN THE FLORIDA SUPREME COURT

61,959

DAVID WALTER TROEDEL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No.

APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

On June 30, 1981, the Grand Jurors of the State of Florida, empaneled in Collier County, Florida, returned an indictment charging David Walter Troedel with two counts of Murder in the First Degree, with Robbery, and with two counts of Burglary. Troedel and co-defendant, David Hawkins, both pleaded not guilty and proceeded to separate jury trials. After trial by jury, Troedel was found guilty and the jury further advised that he be given two sentences 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 COURT ERRED IN ADMITTING THE RESULTS OF A NEUTRON ACTIVATION ANALYSIS TEST SINCE THE TESTS AS ADMINISTERED WAS IMPROPER AND LACKS TRUSTWORTHINESS.

II.
THE TRIAL COURT ERRED IN THE SENTENCING OF THE APPELLANT TROEDEL TO DEATH SINCE THE CRITERIA FOR IMPOSING THE DEATH SENTENCE, THE AGGRAVATING AND MITIGATING CIRCUMSTANCES, WERE IMPROPERLY USED AND WEIGHED.

III.
THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE ON APPELLANT TROEDEL SINCE THE PENALTY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT WHICH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Florida Supreme Court affirmed the judgment and sentences of death. Troedel v. State, 462 So.2d 392 (Fla. 1984).

On November 4, 1985, the Governor of the State of Florida signed a warrant providing for the execution of the death sentence upon Troedel. The warrant is effective from noon, Wednesday, November 27, 1985, until noon, Wednesday, December 4, 1985. Execution is presently scheduled for 7:00 a.m., Tuesday, December 3, 1985.

Appellant filed a motion pursuant to Rule 3.850, Fla.R.Crim.P. The trial court denied relief on November 27, 1985; this appeal follows.

STATEMENT OF THE FACTS

The following facts were taken from the Opinion of the Florida Supreme Court as reported in 462 So.2d at 394-396:

Appellant was charged with the robbery and murder of Chris Musick and Robert Schreckengost and with the burglary of their home. The victims had been shot some time during the early morning hours of June 12, 1981. Appellant was arrested near the victims' home shortly after they had been shot. The evidence presented against appellant at trial was overwhelming.

At the trial Jim Decker, a state attorney's investigator, testified that after midnight on the night of

June 11, 1981, he observed on the road in front of his neighbor's residence a truck which he did not recognize. Because the area is sparsely populated and the road little used except by residents, his curiosity was aroused and he proceeded to go and take a closer look at the truck. Not seeing anyone around, he nevertheless returned home and telephoned the sheriff. A sheriff's deputy was dispatched to the area. Decker and the deputy then went to investigate and found appellant and David Hawkins standing beside the truck.

The sheriff's deputy testified that on the seat in the cab of the truck he saw a .25 caliber pistol and a .22 caliber automatic pistol. Appellant claimed ownership of the .25 caliber while Hawkins said he had borrowed the automatic. While the deputy talked to the two men, Decker went to the house and discovered that the front door was ajar. He reported this to the deputy who then warned the two suspects of their rights not to answer questions and conducted a "pat-down" search. In Hawkins' front pocket he found some coins and some foreign paper currency.

Investigator Decker then entered his neighbor's house and discovered the two victims. Both had been shot. A bedroom had been ransacked. Musick was dead but Schreckengost was still breathing. Decker called for emergency medical assistance but Schreckengost soon died.

Appellant and Hawkins were taken into custody. At the Collier County Jail, sheriff's deputy Lt. Jack Gant conducted the first step of a chemical test to detect the presence of barium and antimony on the suspect's hands. He testified that he rubbed both hands of both men with cotton swabs treated with a five-percent solution of nitric acid, using a separate cotton swab for each hand. Each cotton swab was separately packaged in plastic. A separate swab treated with the solution only was also separately packaged for use as a control sample in the chemical analysis. These samples were sent to an F.B.I. crime laboratory to be examined for the presence of the gunshot residues.

A chemist who tested the samples was qualified as an expert in the analysis of chemical elements. He testified that the neutron activation test can detect and measure small amounts of barium and antimony, two elements widely used in the manufacture of ammunition. Trace amounts of the elements escape from the chamber of a firearm when discharged and may be deposited on the hands of the person firing the weapon. The chemist testified that barium and antimony are present in all commercially available ammunition except for .22 caliber ammunition. The expert testified that large amounts of barium and antimony were found in the material taken from both appellant's and Hawkins' hands.

The chemical expert also conducted a test firing of appellant's .25 caliber pistol and found that upon discharge it deposited large amounts of both barium and antimony. Twenty-two caliber ammunition, the expert said, emits less traceable amounts, if any, of these elements. His comparison of the residue samples taken from the hands of the two defendants revealed that there was twenty-five to thirty percent more barium and four hundred percent more antimony on appellant's hands than on Hawkins'. The expert therefore concluded and offered the opinion that appellant had fired the .25 caliber pistol while Hawkins was nearby.

A forensic pathologist testified that he performed the autopsies and that both victims died from gunshot wounds to the head. He testified that Schreckengost was shot twice in the head, once in each thigh and once in a finger, this last being characteristic of a defense wound according to the pathologist. There was a penny found in the posterior nasal pharynx of victim Schreckengost which the expert said was probably swallowed and then drawn upon through the throat. The pathologist also testified that Musick was shot twice in the head, and offered the opinion that he was alive when shot the second time.

A firearms examiner testified that bullets recovered from the heads of both victims were conclusively determined

to have been fired from appellant's .25 caliber pistol. Another witness testified that he had sold the pistol to appellant a few weeks before the murders.

There was detailed testimony by a detective about the crime scene and expert testimony about various items of evidence found there. In a bedroom adjacent to the bathroom where the bodies were found there was a pillow with a large black hole on one side and three small holes on the other. An expert testified that the holes were caused by shots from a gun held directly against the pillow. The purpose of using the pillow in this manner, in the expert's opinion, was to muffle the sound. Feathers from inside the pillow were scattered around the room. A feather was found in the barrel of appellant's pistol which was similar in composition, according to a fiber expert's testimony, to the feathers in the pillow. Four .25 caliber bullet casings found on the bathroom floor had markings that were consistent with the firing characteristics of appellant's pistol.

In addition to the two firearms that appellant and Hawkins admitted were in their possession, a third pistol was also found in the truck. A .22 caliber revolver, it was examined for fingerprints and was found to bear one of appellant. In a wooded area near the victims' house, police

found a pillowcase containing two rifles, a shotgun, some jewelry, and a knife in a case bearing the initials, "D.T." A package of Playtex-brand rubber gloves were found under the truck.

Eric Schreckengost testified that he owned and lived in the house where the murders took place and that the victims were his son Robert and his stepson Chris. He identified the rifles, the shotgun, and the .22 caliber revolver found in the truck as his own. He said that some of the coins found in Hawkins' pocket were like the coins missing from his home. His wife identified the jewelry and said that the rubber gloves were not hers.

The state presented the testimony of a witness who said that during the evening of June 11, 1981, he went to a lounge with appellant and Hawkins. The witness said that Hawkins asked him and appellant whether they had guns. Appellant replied that he did have one. The witness told Hawkins that he had a shotgun but Hawkins said that would be too loud. According to the witness, Hawkins said there were "two dudes" that he wanted to "blow away."

Appellant testified in his own behalf. He admitted being at the lounge with Hawkins and the last-mentioned witness, but denied hearing Hawkins say anything about guns or "blowing away" anyone. Appellant said that Hawkins was

to give him a ride home but stopped at the Schreckengost home saying he needed to talk to someone. While they were in the house, according to appellant, Hawkins drew his gun and robbed and then shot the two victims. Appellant testified that he did not try to interfere because of concern for his own safety. For the same reason he carried certain items out of the house when Hawkins told him to.

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

> I.
> The homicides were committed while Troedel was engaged in both a robbery and burglary;
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> II.
> The capital felonies were committed to avoid or prevent a lawful arrest or to escape from custody;
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> III.
> The capital felonies were committed for pecuniary gain;
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> IV.
> The homicides were especially heinous, attrocious or cruel; and
>
> V.
>
> The capital felonies were committed in a cold, calculated and pre-meditated manner.

The court did not find any mitigating circumstances. Although the Supreme Court disapproved the trial court's finding that the defendant committed the capital felonies to avoid or prevent a lawful arrest, both death sentences were affirmed.

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.

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 raised on direct appeal and are not cognizable on 3.850. Jones v. State, 446 So.2d 1059 (Fla. 1984).

ARGUMENT

There is a presumption of validity and regularity that attaches to a judgment of conviction and sentence. Nelson v. State, 208 So.2d 506 (Fla. 4th DCA 1968); Coleman v. State, 193 So.2d 699 (Fla. 1st DCA 1967). Thus, on petition to vacate or set aside judgment of conviction (3.850 Motion), the burden of proof is upon the Petitioner to prove his allegations, and such proof must overcome the presumption of validity which attends the judgment. Harris v. State, 177 So.2d 543 (Fla. 3d DCA 1965). In order to prevail on a motion for post conviction relief the defendant must establish a recognized ground for relief by clear and convincing evidence. State v. Gomez, 363 So.2d 624 (Fla. 3d DCA 1978).

Appellee denies each and every allegation indicating petitioner is entitled to relief and demands strict proof thereof.

ISSUE I: Use of Perjured Testimony

It is well-settled law that a defendant may raise via 3.850 motion the prosecutor's knowing use of perjured testimony. Cf. Cash v. State, 207 So.2d 18 (Fla. 3d DCA 1968); Smith v. State, 191 So.2d 618 (Fla. 4th DCA 1966) and Wade v. State, 193 So.2d 459 (Fla. 4th DCA 1967). However, to prevail on such a claim it must be demonstrated that the witness gave false testimony and the prosecutor knew the testimony was untrue. Williams v. State, 261 So.2d 855 (Fla. 3d DCA 1972) and Wade v. State, supra.

Sub judice, Appellant has failed to demonstrate any false testimony. John Riley, a special agent with the Federal Bureau of Investigation, testified at the defendant's trial and the co-defendant's separate trial. At both trials he testified the presence of barium and antimony on the defendant's hands indicated they either fired a gun or were in close proximity when the gun was discharged. At Troedel's trial the witness further stated, based on his experience and the amount of the elements found on Appellant's hands, Appellant probably fired the .25 caliber gun.

There is nothing false or inconsistent about the testimony. Thus, the use of perjured testimony does not arise. Attached hereto as Appendix I is an excerpt from the

Hawkins trial containing the testimony of John Riley.

ISSUE II: Brady Claim

Troedel filed a general Demand for Discovery pursuant to Rule 3.220, Fla.R.Crim.Proc., in the trial court; and he now argues that evidence which the prosecution was required to make available to him pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) was not disclosed. Specifically, Troedel claims that the State failed to disclose (1) a statement given by witness Paula Ayres, (2) the arrest record of co-defendant David Lee Hawkins, and (3) that Hawkins "beat up" another inmate after Hawkins' trial but before Troedel's trial.

The Brady rule applies only to evidence which is both favorable to the defendant and material either to issues of guilt or punishment. Doyle v. State, 460 So.2d 353 (Fla. 1984), United States v. Bagley, 473 U.S. ____, 87 L.Ed.2d 481, 489, 105 S.Ct. ___ (1985).

As explained in United States v. Agurs, 427 U.S. 97, 104, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976); "a fair analysis of the holding in Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."

For the following reasons, Troedel's claim must fail:

Statement of Paula Ayres:

A Brady violation is normally predicated on the defendant's not knowing of the withheld evidence. Arango v. State, 437 So.2d 1099, 1102 (Fla. 1983). Troedel was well aware of witness Paula Ayres' testimony and there is no support for a claim that Troedel was denied a fair trial based on a purported omission by the prosecution.

Witness Paula Ayres was deposed by the defense prior to Troedel's trial. In addition to Ayres' deposition, the investigating officer was deposed and repeated the substance of Ayres' statement during his own deposition. It is therefore readily apparent that Troedel was not denied access to any statements given by witness Paula Ayres.

Misdemeanor Record of Hawkins; Hawkins' Post-Trial Altercation

Troedel further asserts that somehow the arrest record of co-defendant, Hawkins, which indicated three arrests 1/ for disorderly conduct, fell within the ambit of Brady

1/ §90.610(1), Florida Statutes, allows a party to discredit a witness with evidence of prior felony convictions or convictions for crimes involving dishonesty or false statements; however, Hawkins was not a witness in the instant case, and his prior misdemeanor arrests for disorderly conduct would not qualify as impeachment evidence under §90.610.

material. Hawkins did not testify at Troedel's trial and there can be no merit to a claim that somehow Hawkins' prior misdemeanor arrests for disorderly conduct were "material." Troedel cannot seriously contend that disclosure of Hawkins' prior arrests for misdemeanor offenses probably would have resulted in his acquittal or affected his punishment. Troedel was implicated as the "trigger-man" at trial and his co-defendant's prior arrests for disorderly conduct neither support Troedel's defense nor warrant mitigation of Troedel's sentence.

In the absence of actual suppression of evidence favorable to an accused, the State does not violate due process in denying discovery. Antone v. State, 410 So.2d 157 (Fla. 1982). This is especially true where a defendant and the state have the same access to the sought after information. See State v. Counce, 392 So.2d 1029 (Fla. 4th DCA 1981), James v. State, 453 So.2d 786, 790 (Fla. 1984). The statements made by Paula Ayres was equally accessible to the defense and the prosecution and in fact was obtained by the defense prior to trial. Sub judice, there was no showing that Troedel was denied access to Paula Ayres' statements. While it is true that Brady requires the prosecutor to disclose material exculpatory information that the prosecutor has in his possession, the police need not comb their files to allow the defense complete inspection of

police investigative reports. Perry v. State, 395 So.2d 170, 174 (Fla. 1981). In the instant case, the co-defendant's misdemeanor arrest record was neither exculpatory, nor material, nor subject to disclosure under a general demand for discovery. See Rule 3.220 Florida Rule of Criminal Procedure. Further, there is no showing (1) that the State was aware that Hawkins fought with another inmate prior to Troedel's trial and that the evidence was suppressed by the prosecution, (2) that the evidence was favorable to Troedel or exculpatory, or (3) that the allegedly suppressed evidence was material either to his guilt or punishment.

ISSUE III: Ineffective Assistance of Counsel

A claim of ineffective assistance of counsel must be viewed in light of the United States Supreme Court's recent decision in Strickland v. Washington, ____U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). 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 is a high probability that the outcome of the proceeding would have been different but for the actions of defense counsel. In applying this two-prong test, a reviewing court must indulge in a strong presumption that counsel's representation was effective. In this case Appellant has absolutely failed to demonstrate that he was prejudiced and that there is a reasonable probability that his trial would have been different but for his defense counsel's purported errors. Appellee maintains, however, that not only was petitioner not prejudiced by defense counsel's action, but trial counsel rendered reasonably effective counsel. The Florida Supreme 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's allegation that counsel was ineffective for failing to call experts for the defense is without merit. None of the cases relied on by Appellant indicate a defense counsel must use his own experts when the state presents

expert witnesses. In Knott v. Mabry, 671 F.2d 1208 (8th Cir. 1982), that court said:

> Although petitioner's trial counsel probably should have increased his knowledge of the relevant scientific techniques and principles by consulting an expert. . .
>
> * * *
>
> . . .or by studying literature in the field, we have difficulty in light of the existing record holding that counsel's representation was constitutionally inadequate. Human nature is such that most people think they have a better understanding of the demands of an event after it has happened. Trial of law suits is peculiarly susceptible to hindsight appraisal of another lawyer's endeavors. When trial counsel exercise their judgment in making strategic decisions, third party post-trial construction of strategic alternatives cannot be the sole basis for finding constitutional deficiency.
>
> (Text at 1212)

It is clear from the record, cross-examination of witnesses, motions, etc., that in this case defense counsel did familiarize himself with the fields testified to by experts. There is nothing in the record which would have suggested to defense counsel the State's expert was not qualified, etc., to render an Opinion.

It is also being argued that counsel was ineffective for failing to investigate and call witnesses concerning the violent nature of co-defendant Hawkins. This allegation does not meet the standard as outlined in Strickland since there is not a reasonable probability that the outcome would have been different if such testimony had been introduced. The testimony introduced at trial indicated Appellant heard Hawkins say he wanted to kill two dudes, yet he made the choice to ride with Hawkins instead of Michael Tillman when the three left the bar. The trial judge found as a part of his sentencing that Appellant was the trigger man. The co-defendant's violent or dominant nature would not have negated these facts. Appellee further submits even if such testimony would have been mitigating, that alone would not have outweighed the three good aggravating circumstances found; therefore, the outcome would not have been different.

ISSUE IV: Prosecutor's Comments During Voir Dire

The failure to raise this claim on direct appeal precludes consideration in a proceeding for post-conviction relief. Sireci v. State, 469 So.2d 119 (Fla. 1985); Smith v. State, 457 So.2d 1380 (Fla. 1984); Demps v. State, 416 So.2d 808 (Fla. 1982).

Assuming, arguendo, that Troedel's allegation was properly before this Court, his claim is without merit. The prosecutor at bar advised the jurors that "the nature of a trial in a capital case is different than the nature of a trial in all other cases in the State of Florida," and then proceeded to accurately apprise the jurors of the distinguishing features peculiar to a capital case. (See R.275-276) The jurors were never mislead nor was the significance of their role minimized by the State.

ISSUE V: Grigsby Claim

Appellee submits Appellant cannot challenge his conviction based on a Witherspoon v. Grisby claim since he made no objection in the trial court to the excusal for cause of several prospective jurors based on their beliefs regarding the death penalty.1/ Since there was no objection at trial, the issue has been waived. See, Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) and Engle v. Issac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

1/ The two jurors who were objected to and not excused for cause were stricken peremptorily.

Additionally, it should be noted that the Supreme Court upheld the practice of excusal for cause for prospective jurors whose views on the death penalty would prevent or impair his performance as a juror in Wainwright v. Witt, 469 U.S. ____, 105 S.Ct. ____, 83 L.Ed.2d 841 (1985).

ISSUE VI: Prosecutorial Misconduct

It is well-settled law in Florida that a criminal defendant's failure to raise an issue which could or should have been asserted on direct appeal precludes consideration of that issue on a motion for post-conviction relief. Mikenas v. State, 460 So.2d 359 (Fla. 1984); 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 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).

ISSUE VII: Conflict of Interest

The argument concerning conflict of interest because the public defender's office at one point talked with both Hawkins and Troedel is toally frivolous. Appellant was represented by a private attorney appointed by the trial court. Appellant has no standing to assert any claim of Hawkins' that he should have had other counsel. Cf. Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

ISSUE VIII: Timing of Appeal

This is yet another frivolous issue. Appellant has failed to demonstrate any right to have his appeal heard after the co-defendant's. The reduction of the co-defendant's sentence to life was raised by Appellant on motion for rehearing in this court.

ISSUE IX: Need for 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. 198); Meeks v. State, 382 So.2d 683 (Fla. 1980); Middleton v. State, 465 So.2d 1218 (Fla. 1985) and Porter v. State, 10 F.L.W. 573 (Opinion filed October 25, 1985). 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 burden is on the movant to show the necessity for an evidentiary hearing. See Williams v. Griswald, 743 F.2d 1533 (11th Cir. 1984). One consideration applicable to the determination of the issue is whether the allegations if proven would entitle the defendant to relief. Johnson v. State, 362 So.2d 465 (Fla. 2d DCA 1978) and Ramsey v. State, 408 So.2d 675 (Fla. 4th DCA 1981).

Sub judice, not only do the files and record show Appellant is not entitled to relief, but also Appellant would not be entitled to relief even if the allegation is proven.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the denial of Appellant's motion for post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Steve Malone, Counsel for Appellant, by hand delivery on this 29th day of November, 1985.

OF COUNSEL FOR APPELLEE