IN THE SUPREME COURT OF FLORIDA

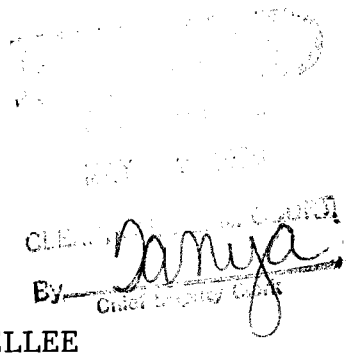
STEPHEN TODD BOOKER,

Appellant,

v. CASE NO. 68,239

STATE OF FLORIDA,

Appellee./



ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Stephen Todd Booker was the movant below and will be referred to herein as Appellant or Mr. Booker. The State of Florida will be referred herein as Appellee.

The record on appeal consists of one volume and shall be referenced by the symbol "R", followed by the appropriate page number in parentheses. The one volume transcript of the evidentiary hearing held January 10, 1986, shall be referred to herein by the symbol "T", followed by the appropriate page number in parentheses.

Appellee notes that for purposes of appeal, the order below must be regarded as a denial of a successive motion for post-conviction relief pursuant to Rule 3.850 and Fla.R.App.P. 9.140(g). See Committee Notes to Fla.R.App.P. 9.140(g). In State v. Creighton, 469 So.2d 735 (Fla. 1985) Appellee learned the hard way that the right to appeal is limited by Statute. See Section 924.06 Florida Statutes (1985). Otherwise Appellant has no right to appeal and the trial court loses jurisdiction once the fraud on the court standard of State v. Burton, 314 So.2d 136 (Fla. 1973) has been determined adversely to Appellant.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's statement of the case and adds the following supplement to Appellant's statement of facts.

Doctor Barnard did not deny discussing the existance of mitigating factors in Mr. Booker's case, he testified he had no record or recollection. (T 24-25). Dr. Carrerra testified the same way. (T 42-43). Doctors Barnard and Carrerra both testified they could have met with Stephen Bernstein to discuss mitigating factors in Mr. Booker's case, only they did not remember the meetings. (T 25) (T 31) (T 42-43).

Doctor Carrerra testified that he read the entire transcript of the November 1983 hearing regarding Stephen Bernstein's testimony and had no disagreement about what was in the transcript. (T 47).

SUMMARY OF ARGUMENT

I. The testimony presented by Appellant did not refute, contradict or establish in any way the basic falsity of the testimony taken in the previous hearing. There is no basis for reopening the previous order.

Likewise, the motion to reopen may be treated as a second successive motion for post-conviction relief raising the same claim i.e., ineffective assistance of trial counsel, which issue was decided adversely on the merits in the earlier motion for post-conviction relieft.

II. The trial judge did not act unreasonably in refusing to allow Appellant to reopen his case where the evidence sought to be admitted was irrelevant and not probative of any matter pending before the court.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

For nearly eight (8) years and three death warrants Appellant has artfully dodged execution in the electric chair for this heinous rape and murder. This is so despite the fact that there is no doubt as to guilt and the additional circumstance that Mr. Booker wrote a letter to Judge Crews prior to sentencing and asked for the death penalty. This court should not lose sight of these facts in sifting through the slurry of affidavits filed since November 1983.

In State v. Crews, 477 So.2d 984 (Fla. 1985) this court sustained Judge Crew's decision to hold an evidentiary hearing over the very strenous opposition of Appellee. Now that the evidentiary hearing has been held and the trial court has determined that the testimony of Stephen Bernstein was not "basically false" this matter is just another episode in the seemingly endless spate of last minute appeals which must come to a close.

The testimony of Doctors Barnard and Carrerra revealed only that they could not remember any specific, formal or informal meetings with Stephen Bernstein to discuss mitigating factors present in Mr. Booker's case. (R 15-16) (R 38). This is one compelling reason in support of this Court's decision not to re-weigh the credibility of witness in a motion for post-conviction relief. See Matera v. State, 266 So.2d 661, 663 (Fla. 1972).

Moreover, the hearing also resolved the latent ambiguity of the term evaluate which so concerned Judge Crews in the September 1985 hearing on the state's motion to dismiss. Doctor Carrerra cleared up this ambiguity. His testimony was that he was never asked to conduct a formal professional exercise aimed at a specific focus i.e., mitigating factors present in Mr. Booker's case. (R 37). Dr. Barnard's testimony was the same. (R 18-19). An evaluation results in a written report which is subject to rebuttal by the prosecution. The informal method employed by Stephen Bernstein allows defense counsel to obtain valuable information without tipping his hand. Doctors Barnard and Carrerra testified this was a common defense practice in the Eighth Judicial Circuit. (R 15-16). (R 38-39).

Furthermore, the evaluation conducted by Dr. Barnard which supposedly reveals the presence of two statutory mitigating factors is nothing more than:

> a new interpretation of facts that were known and considered at trial. . . If "evidence" such as that offered here is found to warrant a new proceedings, there will be no end to the appeal process. The finality of the judicial process would be nil if a new proceeding was required every time a party found an expert who reached a conclusion, with regard to information available at the time of trial, that differed from the opinions and conclusions presented at that trial. There must be a point at which the proceedings is concluded and the matter is settled.

Booker v. State, 413 So.2d 756 (Fla. 1952). See also Henry v. State, 456 So.2d 466 (Fla. 1984); Shriner v. State, 452 So.2d 929 (Fla. 1984).

Finally, the trial court's order entered January 24, 1986 found that Mr. Booker's motion to reopen the November 1985 hearing may be considered as a second successive motion for post-conviction relief raising the same claim of ineffective assistance of counsel and as such he dismissed the motion as an abuse of the writ. There is no distinction between this ruling and that in Adams v. State, 11 F.L.W. 94 (Fla. March 3, 1986) where this court rejected a similar attempt to relitigate a claim of ineffective assistance of counsel stating:

> We find that Appellant's instant claim represents precisely the type of procedural abuse which the rule expressly prohibits. The claims of incompetency and ineffective assistance of counsel, the bulk of appellant's present argument, have been considered and ruled upon in the previous motion for post-conviction relieft. As we held in McCrae v. State, 437 So.2d 1388, 1390 (Fla. 1983), "[A] motion may . . . be summarily denied when it is based on grounds that have been raised in prior post-conviction motions under the Rule and have been decided adversely to the movant on their merits." See also Songer v. State, 463 So.2d 229 (Fla. 1985); Smith v. State, 453 So.2d 388 (Fla. 1984). Both Florida's rules and its caselaw, therefore, prohibit yet another review of these issues.
>
> Id at 94 .

In short, Stephen Bernstein's testimony at the November 1983 hearing remains unrefuted and uncontradicted. Mr. Bernstein remembers the events surrounding Mr. Booker's case and the doctors do not.

ARGUMENT

ISSUE II

THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW APPELLANT TO REOPEN HIS CASE.

Appellee agrees that the decision to allow a party to reopen their case is within the discretion of the trial court. Stewart v. State, 420 So.2d 862, 865 (Fla. 1982). In Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980) the test for appellate review of an act within the discretion of the trial judge was stated simply as whether reasonable men could differ as to the propriety of the action. If the answer is yes, "then it cannot be said that the trial court abused its discretion." Id at 1203. This "reasonableness" test must afford great weight to the superior vantage point of the trial judge.

Judge Crews has been a trial judge for over twenty years. He has presided over three post-conviction hearings in this case in addition to his role as sentencing Mr. Booker to death in 1978. No mention of dates of any meetings was ever made in either Mr. Bernstein's testimony in November 1983 or in the testimony on the instant motion. There would be no basis for admission of this testimony even if counsel had attempted to present the testimony during his case in chief or rebuttal. Judge Crews did not abuse his discretion in refusing to reopen Mr. Booker's case.

CONCLUSION

The trial judge has correctly determined that the testimony in the earlier proceeding was not "basically false" and properly denied Appellant's motion to reopen that proceeding. The trial judge acted reasonably in denying Appellant's motion to reopen this proceeding. Therefore the order entered on January 24, 1986 should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail to James E. Coleman Jeffrey D. Robinson, WILMER, CUTLER & PICKERING, 1666 K Street, N.W. Washington, D.C. 20006; Marian E. Lindberg, KORNSTEIN, VEISZ & WEXLER, 757 Third Avenue, New York, New York 10017; and Jeffrey S. Weiner, WEINER, ROBBINS, TUNKEY & ROSS, P.A. 2250 Southwest Third Avenue, Miami, Florida 33129 on this 7TH day of May, 1986.

Gary L. Printy

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