IN THE SUPREME COURT OF FLORIDA

PAUL B. JOHNSON,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida,

Respondent.

Case No. 68,319

RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF AND A WRIT OF HABEAS CORPUS

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A. THE GRIGSBY CLAIM

Petitioner relies on the pendency of Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), cert. granted sub nom Lockhart v. McCree, 38 Cr. L. 4030 in support of his request for a stay of execution and a new sentencing hearing. The question presented to the court in Lockhart is the constitutionality of excluding from a capital jury those persons who could not inpose a sentence of death under any circumstances. Respondent respectfully submits this challenge to the capital sentencing procedure must fail when viewed in light of the Supreme Court's earlier decisions in both Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and Wainwright v. Witt, 469 U.S. ____, 105 S.Ct. ____, 83 L.Ed.2d 841 (1985).

In Witherspoon v. Illinois, supra, the Court was concerned with the constitutionality of excusing for cause veniremen who have scruples against the death penalty. The court in essence held a venireman cannot constitutionally be excused for cause if he simply voices a general objection, for religious or other reasons, to capital punishment. The court went on to say:

> "And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings."
> (Text at 20 L.Ed.2d p. 785)

Thus, Witherspoon, says a venireman can be excused for cause if he could not under any circumstances impose a sentence of death. That prospective juror is saying he could not follow the law since the death penalty is a part of the law.

This interpretation of Witherspoon was affirmed in Wainwright v. Witt, supra. The court outlined the proper test to be applied in determining whether a prospective juror could be excused for cause based on his views on the death penalty. The Supreme Court concluded that the standard is whether his views would prevent or substantially impair his performance as a juror. A juror is sworn to follow the law as given to it by the court. The law as given to the jury in a capital sentencing in Florida includes a directive of determining if any of the statutory aggravating circumstances exist; existence of at least one such circumstance is a prerequisite to imposition of a sentence of death. Next the jury is told if aggravating circumstances are found, they must determine if there are mitigating circumstances and, if so, they must further decide if the mitigating circumstances outweigh the aggravating circumstances. A prospective juror who says under no circumstances could he impose death has told the court he could not follow the above procedure.

The procedure of excusing for cause persons who could not impose a sentence of death under any cirucmstance does not differ constitutionally from excluding persons who would automatically vote for death in a first degree murder case. Both prospective jurors have made it clear they could not follow the law. Yet, there has been no suggestion that the State is entitled to keep such people as also representing another "fair cross section" of the community. Are we to have yet another set of alternate jurors who can sit through the guilt/innocence phase but must be excused from sentencing because they would automatically vote for death?

B. SECOND GROUND FOR RELIEF

As his second ground for relief, Petitioner asserts that he was denied the effective assistance of appellate counsel. The United States Supreme Court has recognized that there is a constitutional right of effective assistance of counsel on the first appeal as a matter of right. Evitts v. Lucey, 469 U.S. ____, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). However, even though there is a constitutional right to receive effective assistance of appellate counsel, there is no constitutional duty to raise every non-frivolous issue. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). The failure of appellate counsel to brief issues he reasonably considers to be without merit is not ineffective assistance of counsel. Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir.), cert. denied, 105 S.Ct. 355 (1984). An examination of those claims Petitioner now asserts should have been raised on direct appeal by appellate counsel reveals that, indeed, appellate counsel rendered reasonably effective assistance of counsel. The instant case is inapposite to this Honorable Court's decision in Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). In Wilson, this Court determined that appellate counsel's performance therein was so deficient as to undermine confidence in the fairness and correctness of the appellate result. Sub judice, there is no doubt as to the fairness and correctness of this Court's decision in Johnson's direct appeal.

1. Permitting the jury to separate during deliberations.

Petitioner claims that he was denied the effective assistance of appellate counsel where appellate counsel did not raise an issue concerning whether the trial court erred by permitting the jury to go home overnight after submission of the case to the jury for deliberation. In his petition at page 27, Petitioner acknowledges that the objection made by

defense counsel to the jury separation was done so on the advice of appellate counsel who was present at the time. Thus, this is not an issue which appellate counsel was unaware of. Therefore, the question becomes whether Petitioner was denied the effective assistance of appellate counsel by virtue of the non-inclusion of this claim in Petitioner's direct appeal.

In support of his proposition, Petitioner relies upon the decision rendered by this Honorable Court in Livingston v. State, 458 So.2d 235 (Fla. 1984). In Livingston, this Court established a "strict rule" that in a capital case the jury must be sequestered after its deliberations have begun. This case, of course, was rendered subsequent to the decision of this Court in Johnson. Therefore, it is necessary to review the law as it existed at the time of Johnson's trial in order to determine whether appellate counsel was ineffective for failure to raise this claim on direct appeal.

The question of sequestration of the jury after jury deliberations had begun was first discussed in this Honorable Court's decision of Raines v. State, 65 So.2d 558 (Fla. 1953). In Raines, as in the instant case, the trial court permitted the jurors to go home overnight after deliberations had begun. However, unlike the instant case, no judicial instructions were given as to communicating with others. This Court concluded that a 15 hour absence under no restraint whatever are circumstances sufficient to release a defendant from his burden of producing evidence of prejudice. Raines, Id. at 560. In the instant case, however, the trial court more than adequately instructed the jurors not to communicate with each other, with a spouse or other family members, or with friends. The jury was further admonished not to read anything or do anything outside the jury room concerning the trial (R.1598-1599). Upon the jury's return early the next morning, the Court inquired as to whether any of the jurors had seen or heard anything which could influence their deliberations

(R.1603-1604). Thus, it is clear that the trial court's activities sub judice materially differ from the circumstances presented in Raines where no instructions as to communication were given.

Inasmuch as Raines is materially distinguishable from the facts presented in the instant case, it is clear that appellate counsel was not ineffective for failing to raise this point as a claim on appeal. As noted above, appellate counsel was responsible for directing defense counsel to object to the failure to sequester the jury. It is unreasonable to assume anything other than that appellate counsel was aware of the issue but chose not to raise same for good reason. The decision to not raise this claim is supported by this Honorable Court's decision in Engle v. State, 438 So.2d 803 (Fla. 1983), a case decided one month after the direct appeal in Johnson. In Engle, this Honorable Court noted the distinctions between the case before it and the decision in Raines:

> [3] The facts in the case sub judice are, however, distinguishable from those in Raines. . . Furthermore, prior to their separation for the evening, the trial judge admonished the jury to neither discuss the case with outsiders, nor read, watch, or listen to any media reports thereon. Unlike in Raines, we are here convinced that appellant's trial was conducted with that degree of fairness and security that the bill of rights contemplates, and do not believe that he has good reason to believe that he was deprived of any fundamental rights. (Emphasis in original)

Engle, at 808. Although the court in Engle notes that trial counsel agreed to the separation of the jury during deliberations, unlike the instant case where a motion to sequester was made, this Court nevertheless relied upon the fact that the jury was properly admonished by the trial judge as to not being influenced by outside sources. Thus, inasmuch as Raines was notable for the lack of trial court instruction as to communication with others, appellate counsel sub judice

could not be considered ineffective for the failure to raise, at best, a colorable issue. Appellate counsel cannot be held to the standard of attempting to predict a future decision of this Court (Livingston) and, in fact, had this issue been raised it is clear that it would have failed based upon this Court's decision in Engle rendered during the same period of time as was the Johnson decision.

There is no language in Livingston to indicate that the rule announced therein would be applied retroactively. Thus, although Petitioner now asserts that this court should, if it finds that appellate counsel was not ineffective, consider the claim on its merits, such a result cannot obtain because of the doctrine of finality. This Honorable Court and the United States Supreme Court have consistently adhered to the finality doctrine. For example, in State Farm Mutual Automobile Insurance Company v. Judges of the District Court of Appeal, Fifth District, 405 So.2d 980 (Fla. 1981), this Honorable Court stated:

> . . . All things must have end, even a district court's power to correct inconsistencies. The reasons for this form the bedrock of Anglo-American jurisprudence: "There must be an end of litigation. Public policy, as well as the interests of individual litigants, demands it, and the rule just announced is indispensable to such a consummation." (citations omitted) (Text at 982)

Similarly, the United States Supreme Court has expressed its concern that the doctrine of finality be adhered to:

> . . . Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless post-conviction collateral attacks. To the contrary, a final judgment commands respect.
>
> [6] For this reason, we have long and consistently affirmed that a collateral challenge may not do service for an appeal.

United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816, 828, Reh. den., 102 S.Ct. 2287 (1982). Therefore, inasmuch as the claim presented was not a fundamental right at the time of Johnson's direct appeal, Engle, supra, at 808, this claim must fail at this time also.

2. Death qualification of capital jurors

Respondent submits appellate counsel cannot be held ineffective for failing to raise as an issue on appeal the matter of death qualification of jurors. Although the issue was raised before the lower court, the case law available at the time of Petitioner's appeal demonstrates this was not a viable issue. Both this Court and the federal courts had rejected Grigsby - type arguments. See, Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Gafford v. State, 387 So.2d 333 (1980); Jackson v. State, 366 So.2d 752 (Fla. 1978); Riley v. State, 366 So.2d 19 (Fla. 1978); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978).

Counsel cannot be held ineffective for failing to raise an issue he reasonably believed would not entitle the defendant to any relief on appeal. Cf. Jones v. Barnes, supra.

3. Admission of James Smith's testimony re: Petitioner's violent "intentions"

As his final contention regarding whether appellate counsel was ineffective, Petitioner asserts that certain testimony at trial dealt with "future crimes" so as to reveal to the jury Johnson's general predilection for violence. At trial, defense counsel moved for a mistrial (R.1132). The trial court denied that motion (R.1132). The testimony in

question occurred during the direct examination of State witness, James Smith. Smith's testimony which is relevant to the instant claim as set forth as follows:

> Q. What did he say about going to the hospital?
> A. If they sent a little cop, he knew he could take his gun, if he took that big son-of-a-bitch's gun in Lakeland, and he would be home free then.
>
> * * *
>
> Q. What did he say about the hospital?
> A. He said if they sent a little deputy with him to take him to the hospital, if he could take that big dude's gun in Lakeland, he could take that little one's and he'd be home free.

For the reasons expressed below, appellate counsel was not ineffective where he did not argue this claim on appeal.

It must be observed that defense counsel, although moving for mistrial, never did ask for a curative instruction. A motion for mistrial should never be granted in a midst of a criminal trial unless there is an absolute necessity to stop the trial and discharge the jury. Williams v. State, 354 So.2d 112 (Fla. 2d DCA 1979); Dunn v. State, 341 So.2d 806 (Fla. 3d DCA 1977); Kelly v. State, 202 So.2d 901 (Fla. 2d DCA 1967). The proper procedure to follow when remarks are made that are not by their very existence of such an inflammatory nature as to deny a fair trial is to object and move for curative instructions. A mistrial is the remedy when the corrective instruction is denied or inadequate, or when the offense is repeated. Mabry v. State, 303 So.2d 369 (Fla. 3d DCA 1974), cert. denied, 312 So.2d 756 (Fla. 1975). The granting of a motion for mistrial is a matter within the sound discretion of the trial court. Ballard v. State, 323 So.2d 297 (Fla. 3d DCA 1975); Sweetser v. State, 258 So.2d 287 (Fla. 3d DCA 1972); Reis v. State, 148 So.2d 656 (Fla. 3d DCA 1971).

In the instant case, it is clear that Smith's testimony was not offered to show the bad character or propensity of the defendant to commit the crime charged. Rather, the statements

of Johnson as testified to by Smith are corroborative of Johnson's other confessions insofar as deputy Burnham's murder is concerned. In other words, the statements now objected to by Petitioner relate to and are concerned with statements of Johnson admitting to facts surrounding the murder of Burnham. As such, this testimony is certainly relevant as being evidence tending to prove or dispute a material fact. By concerning himself with the "little cop", Petitioner ignores the major substance of the testimony, that is, Johnson's admission that during his murder spree he managed to take deputy Burnham's weapon.

The testimony of Smith obviously did not deal with Williams Rule testimony in that the Williams Rule addresses the question of the relevancy of past criminal conduct. Any discussion as to future intended crimes is purely speculative. Also, had we been dealing with Williams Rule type evidence, inasmuch as the testimony of Smith does not establish all the elements of a crime, the question of admissibility of prior criminal acts would not be present. See Malloy v. State, 382 So.2d 1190 (Fla. 1979). Nevertheless, the State asserts that the statements of Johnson as related by Smith were properly admitted as relevant to establish the fact that Johnson obtained Burnham's gun. This confession was properly admitted.

Inasmuch as no curative-type instruction was requested by trial counsel, and inasmuch as this issue is colorable at best, appellate counsel was not ineffective for not raising this claim on direct appeal.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the Petition for Extrordinary Relief and a Writ of Habeas Corpus should be denied. The United States Supreme Court will resolve the Grigsby claim and a review of the record and the brief filed on behalf of Petitioner by appellate counsel reveals that Petitioner received effective assistance of appellate counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. mail to Steven H. Malone, Assistant Capital Collateral Representative, University of South Florida - Barboro, 140 7th Avenue, South, Room COQ-216, St. Petersburg, Florida 33701, this 21st day of February, 1986.

Robert J. Krauss

OF COUNSEL FOR RESPONDENT