IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,804

FILED
SID J. WHITE
MAY
CLERK, SUPREME COURT
By
Chief Deputy Clerk

THE STATE OF FLORIDA,)

Petitioner,)

vs.)

AMY STEELE DONNER,)
Circuit Judge of the
Eleventh Judicial Circuit,)

Respondent.)

_____)

PETITION FOR WRIT OF MANDAMUS/OR IN THE ALTERNATIVE WRIT OF PROHIBITION

Petitioner, **THE STATE OF FLORIDA**, petitions this Court for issuance of a Writ of Mandamus or in the alternative a Writ of Prohibition and in support thereof states as follows:

I. JURISDICTION

The decision to seek death penalty

The State of Florida seeks to invoke the jurisdiction of this Court on the basis of Florida Rule of Appellate Procedure 9.100(a)(3) and Article IV, Sections 3(b)(4) and 3(b)(5), Florida Const., which authorize this court to issue Writs of Prohibition and Mandamus, the appropriate remedies based on the facts and relief sought as noted below. See, Bundy v. Rudd, 366 So.2d 440 (Fla. 1978)(Supreme Court has jurisdiction in case in which sentence of death might ultimately be imposed); Reina v. State, 352 So.2d 853 (Fla. 1972); D'Alessandro v. Shearer, 360 So.2d 774 (Fla. 1978).

II FACTS

Jorge Zerquera and Scott David Puttkamer were indicted for first degree murder (App., pp. 1-4). On February 13, 1986, trial was commenced before the Hon. Arthur Maginnis, Circuit Judge, 11th Judicial Circuit. At the time that the trial was commenced, the State was not seeking the death

penalty. After the prosecutor presented his opening argument, Howard Landau, the attorney for Defendant Puttkamer presented his opening argument. (App. 21-25). During the course of his opening argument, on several occasions he indicated that the jury would have to conclude, based on the evidence, that Zerquera is the one who is guilty (App. 21-25). As a result of the accusations against Zerguera, the attorney for Zerquera moved for a severance based upon Bruton violations and antagonistic defenses. (App. 25). Zerquera's attorney argued:

> "They're going to say my client is the guy who had the gun and I'm going to say their guy had the gun. It is clearly antagonistic in terms of pre-meditated first degree murder. My client would not be able to get a fair trial. Not only is he being prosecuted by the prosecutor, he is also being prosecuted by two Public Defenders." (App. 25).

After lengthy arguments about the need for severance, the trial judge announced:

> "A granting of severance is not like finding the Defendant not guilty or dismissing the case, you understand, it just gives another trial. I'm going to grant the motion. We're still going to proceed with this trial against--well, --" (App. 44).

At that point, the prosecutor responded:

> "I think we have to proceed with Mr. Puttkamer on the basis of your ruling that Mr. Zerguera has already been pre-judiced by the opening argument." (App. 44). (The transcript reflects that this comment was made by defense counsel. Undersigned counsel has spoken to the court reporter who has verbally indicated that such attribution was an error, and that the prosecutor made the comment. A certified correction has been obtained and appears at page 80 of the Appendix.

The Court agreed. (App. 44). The judge then announced that Zerquera's trial would proceed after Puttkamer's. (App. 45-46).

The Court then recessed for an hour and upon resuming, co-defendant Puttkamer announced that he was entering a plea to reduced charges and was agreeing to testify against Zerquera. (App. 48 et seq.). After the plea colloquy, the prosecutor stated:

> "I'm not sure if we can get the other Defendant [Zerquera] and go with this jury, although he's been severed out. There's no need for the severance anymore. I don't know if that's an option that we have or not." (App. 64-65).

The judge indicated that Zerquera's attorney would want to depose Puttkamer, Zerquera's attorney agreed and the prosecutor stated:

> "Since the basis of the severance was Mr. Landau's remark about Mr. Jacob's client [Zerquera], then we can't very well use that jury." (App. 65).

The Court then discharged the jury. (App. 65-66).

On April 22, 1986, before Circuit Judge Amy Steele Donner, Zerquera argued that the State should be precluded from seeking the death penalty against Zerquera in the new trial. (App.68-71). The State responded that based on the new evidence from Puttkamer, it now had enough evidence to seek the death penalty. (App. 72-73). The judge announced that the State would be precluded from death qualifying a jury at the new trial. (App. 72-73).

On May 9, 1986, Judge Donner entered an Order Prohibiting the State from seeking the Death Penalty. (App. 78). The Order provides:

1. Before the defendant went to trial with his co-defendant the State announced that it would not seek the death penalty. A non-death qualified jury was therefore picked to try the case.

2. The renewed motions for severance filed by the defendant and his co-defendant were granted after the co-defendant's opening argument. The defendant was then told by the prosecutor that it would be in defendant's interest to have a new trial with a different jury. Relying upon the prosecutor's representation that defendant did not object to a new jury.

3. The co-defendant then pled guilty and will now testify against the defendant at his trial. The co-defendant will testify that the defendant was the person who fired the fatal shot. Such evidence was not abailable to the State before the co-defendant's plea.

4. Since the State induced the defendant to forego trial by a jury which could not recommend the death penalty it is estopped from seeking the death penalty in this case.

5. As an independent ground for prohibiting the State from seeking the death penalty the Court finds, after consideration of the potential aggravating and mitigating circumstances, that a jury could not validly recommend the death penalty in this case.

6. As a further independent ground for prohibiting the State from seeking the death penalty, the Court finds that, if the State were permitted, now, to death qualify a jury, the defendant could seek relief, if convicted, under Florida Rule of Criminal Procedure 3.850, alleging ineffective assistance of counsel. (App. 78-79).

III. RELIEF SOUGHT

The Petitioner seeks an order of mandamus compelling the Respondent to death qualify the jury in Zerquera's trial

and to permit the State to seek the death penalty. Petitioner seeks an order compelling the Respondent to excuse any and all jurors who unequivocally state that they would be unable to consider a recommendation of death or who state that they could not under any circumstances vote for such a penalty, notwithstanding the fact that the prospective juror could return a verdict as to guilt or innocence, and compelling her to impel only one jury in this cause which will decide the issue of the defendant's innocence or guilt and will also determine the advisory sentence of the defendant unless special circumstances prevent them from doing so. Alternatively, Petitioner prays that this Court prohibit the Respondent from refusing to "death qualify' the jury.

IV. ARGUMENT

In Cleveland v. State, 417 So.2d 653 (Fla. 1982), this Court reaffirmed the proposition that the State Attorney's decision to charge and prosecute is not subject to judicial review, as such is entirely within the State Attorney's prosecutorial function. As such, once an indictment has been returned, the determination as to whether to seek the death penalty rests with the prosecutor, and the trial court cannot preclude the prosecutor from seeking the death penalty. It has been duly noted that the existence of prosecutorial discretion in seeking capital punishment does not violate a defendant's constitutional rights. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Downs v. State, 386 So.2d 788 (Fla. 1980).

The inability of the trial court to preclude the State from seeking the death penalty is implicit in Section 921.141 (1), Florida Statutes, which provides:

> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a

> separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. (Emphasis added).

The inability of the trial court to preclude the State, at the outset, from seeking the death penalty, is further implied by those cases which hold that the accused need not be notified, in advance, of the aggravating factors set forth in §921.141(5), which the State intends to prove. See, e.g., Sireci v. State, 399 So.2d 964 (Fla. 1981); Clark v. State, 379 So.2d 97 (Fla. 1980). If such factors need not be set forth in advance, how can the trial court be in a position to know, in advance, whether the case is one in which the State is appropriately seeking the death penalty?

The reasons presented in the trial court's Order Prohibiting the State from Seeking the Death Penalty do not support the trial court's conclusion. First, the trial court concluded that "the State induced the defendant to forego trial by a jury which could not recommend the death penalty" and thus the State "is estopped from seeking the death penalty in this case." The record does not support the conclusion that the State induced Zerquera to forego the first jury. After the co-defendant's attorney argued that Zerquera was the guilty party, Zerquera's attorney promptly moved for a severance and argued that his "client would not be able to get a fair trial." (App. 25). Thus, when the prosecutor pointed out that the first jury should continue with Puttkamer (App. 44), the comment was based on the obvious notion that Zerquera had been prejudiced by Puttkamer's attorney's arguments. Zer uera's counsel acknowledged this when he said his "client would not get a fair trial." As the jury had already heard a co-defendant's attorney accuse Zerquera, but had not heard any accusations against Puttkamer, common sence dictates that if anyone required a new jury, it would be Zerquera. When Puttkamer then entered a plea, before the jury had been

discharged, the prosecutor brought up the possibility that the same jury might continue with Zerquera (App. 64), but then noted that Zerquera's severance motion was still predicated upon the prejudicial comment by Puttkamer's attorney. (App. 65). Thus, when Zerquera moved for severance due to prejudicial comments by Puttkamer's attorney , it can hardly be said that the State induced Zerquera to forego the first jury. Zerquera's consel moved to sever because the first jury was deemed prejudicial, and the State's stronger case subsequently arose when the co-defendant pled guilty and agreed to testify.

Similar situations have arisen in which the State does not seek the death penalty, a conviction and life sentence are appealed and reversed, and on retrial the State seeks the death penalty. The government was permitted to do so in Gully v. Kunzman, 592 F.2d 283 (6th Cir. 1979).

Under the circumstances herein, it cannot be said that the defendant acted because of any inducements by the State.

The trial court's second reason for prohibiting the State from seeking the death penalty is that the potential aggravating and mitigating circumstances would not support the death penalty in this case. In the instance case, the trial court has not conducted any evidentiary proceedings; there is no basis from which the existence or non-existence of any aggravating or mitigating circumstances can be ascertained. Section 921.141, Florida Statutes clearly contemplates that such factors will be considered only after hearing all of the evidence. Moreover, as noted above, such a pre-trial statement clearly interferes with the prosecutorial right to determine which cases are proper for seeking the death penalty. Cleveland, supra; Proffit, supra. Such a pre-trial statement is further inconsistent with the principle that the aggravating factors need not be set forth prior to trial. Sireci, supra.

The trial court's final reason for prohibiting the State from seeking the death penalty is that "the Court finds that, if the State were permitted, now, to death qualify a jury, the defendant could seek relief, if convicted, under Florida Rule of Criminal Procedure 3.850, alleging ineffective assistance of counsel." With respect to this ruling, it should be axiomatic that potential grounds for a Rule 3.850 motion cannot be considered before a Rule 3.850 motion has been filed, let alone before trial or conviction. Moreover, from a practical view of the situation, if Zerquera's counsel had continued with a jury which had been prejudiced against him by virtue of the co-defendant's attorney's opening argument, a decision to continue with that jury would quite possibly result in ineffective assistance charges. As noted in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), informed strategic decisions by counsel will generally not result in findings of ineffective assistance. A decision to forego a jury which is deemed to have been prejudiced would constitute such a strategic decision. As the issue is premature, with the accused not yet convicted or sentenced, and with the absence of any opportunity for the State to inquire of counsel as to the reasons for his decision, whether he conferred with his client, etc., this basis for the trial court's decision is clearly improper.

WHERERFORE, Petitioner prays that this Court issue an Order to Show Cause directing the Respondent to Show Cause on a date certain why Writ of Mandamus and/or Prohibition should not be issued, compelling Respondent to death qualify the jury and to enable the State to seek the death penalty in the case of State of Florida v. Jorge Zerquera, Case No. 84-27304B, Circuit Court, Eleventh Judicial Circuit, Dade County, Florida. Mandamus is an appropriate remedy to force a trial court to

follow the law. D'Alessandro v. Shearer, 360 So.2d 774 (Fla. 1978); Bundy, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITION FOR WRIT OF MANDAMUS/OR IN THE ALTERNATIVE WRIT OF PROHIBITION** was furnished by mail this 20th day of May, 1986 to **HON. AMY STEELE DONNER,** Circuit Judge, Metropolitan Justice Building, 1351 N.W. 12th Street, Miami, Florida 33125 and **STEVEN R. JACOB, ESQUIRE,** Babbitt & Jacob, P.A., Suite 502, 800 N.W. Cypress Creek Road, Fort Lauderdale, Florida 33309.

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RLP/dm