IN THE SUPREME COURT OF FLORIDA

TOMMY S. GROOVER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO.: 68,845

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant Tommy Groover will be referred to as "Appellant" or "Groover"; the Appellee will be referred to as "Appellee" or "the State".

References to the record shall be by use of the symbol "R" followed by the page number. References to the transcripts (pre-trial, trial and sentencing) shall be by use of the symbols "T.T." followed by the page number. Attached hereto is Appellee's Appendix A and B.

STATEMENT OF THE CASE AND FACTS

Groover was found guilty on January 8, 1983 of three counts of first-degree murder for the deaths of Richard Padgett, Nancy Sheppard, and Jody Dalton (R 242-243). The facts of these murders, as found by the sentencing judge, are as follows:

The evidence at trial showed that all defendants and all the victims--except Nancy Sheppard--were drug pushers or drug users. The defendant was a pusher and Richard Padgett owed him money for drugs. On the early morning of February 5, 1982, the defendant, armed with a shotgun, went about looking for Padgett to collect the debt, but was unable to locate him. Later that evening the defendant and Billy Long chanced upon Padgett and his 17-year old girlfriend, Nancy Sheppard, in a nightclub and defendant drove them to the mobile home of Robert Parker and his wife, Elaine Parker. From there Billy Long drove Nancy Sheppard home, and defendant, the Parkers and Padgett drove to various places where Padgett attempted to obtain money to pay the debt--but his efforts were unsuccessful. Then they drove to a junkyard where defendant fought with Padgett and threatened him with a pistol and intimidated him into the car. They drove to a wooded area in the Yellow Water section of Duval County where Padgett was ordered out of the car. Padgett dropped to his knees and begged not to be killed--whereupon defendant pointed the pistol and snapped the trigger three or four times before it fired--striking Padgett in the

head. The gun was reloaded and defendant shot the victim again. Then the defendant and Mr. Parker dumped the body in a water-filled ditch and left the scene. The trio went back to the junkyard, cleansed themselves, changed clothes and melted down the murder gun--and then went to a bar.

At the bar they met Jody Dawn Dalton, 20, with whom defendant had previously had an intimate relationship. Miss Dalton unwisely asked defendant if she could accompany him--whereupon the four left the bar and drove to a secluded area where defendant threw the melted gun into the river. Unfortunately for her, Miss Dalton witnessed the gun disposal. All four then drove to the Parker home where they left Miss Dalton at approximately 2:00 a.m.. The defendant and the Parkers then drove to the residence of Joan Bennett and invited her to pay a social visit to the Parker abode. Miss Bennett, having nothing better to do at that early hour, accompanied the fatal trio.

Upon their return, they discovered that Ms. Dalton had partaken of some of the drugs in the Parker home. With considerable forethought, defendant and Mr. Parker loaded four concrete blocks and rope into the trunk of the car and invited Miss Dalton on a trip to Donut Lake--which was in a wooded area several miles from the location of Padgett's body.

On the way to the lake, defendant had Miss Dalton perform oral sex upon him. As the ride progressed, Miss Bennett overheard defendant tell Mr. Parker that they would have to "get rid" of Miss Dalton.

At the lake Miss Dalton was stripped of her clothes, taunted and repeatedly kicked and beaten by the defendant. When she begged him to stop and asked "Why are you doing this?" he replied "You know." He then shot the hapless Miss Dalton five times in the head and body. Defendant and Mr. Parker then completed the grisly crime by tying the four concrete blocks to the dead body and sinking it into the lake.

On the trip back to the Parker manse, defendant and Mr. Parker discussed killing Joan Bennett because she had witnessed the Dalton murder--however, Elaine Parker intervened with assurances of Miss Bennett's trustworthiness. Being so assured, they drove Miss Bennett home--and the trio proceeded on their homicidal way. They concluded that Nancy Sheppard would link them with Padgett's death and thus she too had to be killed. They proceeded to the home of Billy Long so that he could direct them to Nancy's residence. Once there, Elaine Parker induced Nancy into the car by telling her that she would be taken to Richard Padgett.

The four schemers then took Nancy to the woods and showed her Padgett's body. She fell to her knees beside the body and sobbed, "Oh God, Oh God"--and Long shot her in the back of the head and body five times as the defendant screamed "Shoot her again, shoot her again." Defendant then offered Long a knife and told him to cut her throat--which Long refused to do. Long testified that he had been threatened with death if he did not shoot young Nancy. (R 275-278).

In sentencing Groover to death for the murders of Richard Padgett and Jody Dalton, the trial judge found no mitigating circumstances existed. The judge found four aggravating circumstances existed in both the Dalton and Padgett murders (R 266-300).

On direct appeal to this Court, Groover raised the following claims: 1) error in admitting testimony concerning collateral crimes; 2) improper prosecutorial argument; 3) prosecutorial testimony by virtue of the prosecutor 'testifying' while cross-examining Groover; 4) denial of motion to suppress statements involuntarily obtained and in connection with Groover's offer to plead guilty; 5) error in the judge overriding the jury's recommendation of life as to the Padgett murder; 6) jury improperly instructed on the aggravating and mitigating circumstances, and 7) the court failed to consider mitigating circumstances as to the Dalton murder.

As to the guilt phase, this Court found that only one of Groover's claims merited discussion. In Groover v. State, 458 So.2d 226 (Fla. 1984) this Court found no error in the admission into evidence of Groover's statements given in fulfillment of his plea agreement. This Court affirmed all three convictions.

As to the sentences, this Court found no error in the trial court's refusal to find duress or coercion as a mitigating factor. This Court also found no error in the jury override, and stated that there was nothing in the facts of this case

upon which the jury could rationally have based the recommendation of life sentence, citing to Tedder v. State, 322 So.2d 908 (Fla. 1975). The sentences and convictions were affirmed.

Groover's petition for writ of certiorari in the United States Supreme Court raised the sole issue of the admission into evidence of Groover's statements, as being obtained by direct promises of leniency and in violation of Groover's Fifth, Sixth and Fourteenth Amendment Rights. The United States Supreme Court denied certiorari review on April 1, 1985. Groover v. Florida, ___U.S.___, 105 S.Ct. 1877 (1985).

On May 7, 1986, Governor Graham signed a death warrant on Tommy Sands Groover. The execution is scheduled for Wednesday June 4, 1986 at 7:00 a.m.; the warrant expires at noon on Thursday, June 5, 1986.

On Sunday June 1, 1986, at approximately 2:30 p.m., the Office of Capital Collateral Representative, on behalf of Groover, filed an 88 page Motion to Vacate Judgment and Sentence (pursuant to Rule 3.830, Fla.R.Crim.P.) in the Circuit Court of Duval County. Accompanying the Motion were an 87 page Memorandum of Law and a three-inch thick Appendix. Circuit Court Judge Hudson Oliff held a hearing on Sunday June 1, 1986 at 4:30 p.m. The State filed a Motion for Summary Dismissal.

Groover's Motion raised the following claims (abbreviated for purposes of this statement): 1) incompetence to stand trial; 2) improper to introduce Groover's statements; 3) denial of expert psychiatric assistance; 4) denial of individualized

capital sentencing hearing because of ineffectiveness of counsel as to Groover's drug use, mental state; 5) prosecutor's failure to disclose payments to state witnesses (Brady claim); 6) inflammatory prosecutorial argument; 7) prosecutorial vindictiveness in adding Count III after Groover breached his plea agreement; 8) violation of professional conduct by defense lawyer Nichols in testifying against Groover at the suppression hearing; 9) defense lawyer Nichol's ineffectiveness in giving incorrect legal advice as to the plea agreement; 10) defense lawyer Shore's ineffectiveness in failing to present voluntary intoxication defense; 11) error in allowing involuntary statements in deposition to be used for impeachment; 12) ineffectiveness in failure to investigate the defense of coercion, duress; 13) the sentence violates North Carolina v. Pearce; and 14) the sentencing judge, by virtue of his 'comment,' improperly considered criminal activity for which there was no conviction.

The State's Motion for Summary Dismissal alleged that the grounds raised in the Motion were grounds that 1) were raised on direct appeal and therefore not subject to relitigation, or 2) could have and should have been raised on direct appeal and thus are not cognizable in a 3.850 proceeding, or 3) raised ineffectiveness of trial counsel but that such grounds are speculative and inconcrete, are inadequate as a matter of law and/or are refuted by the trial transcript. The State's Motion set out in detail facts showing conclusively that Groover's

defense attorney(s) were effective. (See State's Motion for Summary Dismissal, pp. 4-13, Appendix A).

The circuit court granted the State's Motion for Summary Dismissal on June 1, 1986, and entered a written order thereon. (App.B) This appeal followed.

SUMMARY OF ARGUMENT

The Motion to Vacate failed to state grounds for any relief because the grounds asserted therein were either 1) previously litigated at trial and on appeal; 2) issues that could have been raised at trial and on appeal; 3) failed to state grounds for relief as a matter of law; or 4) refuted by the state court records. In short, the trial judge did not err in summarily denying the Motion to Vacate; nor did he err in denying the Motion for Stay of Execution and request for evidentiary hearing.

ARGUMENT

ISSUE I

THE TRIAL JUDGE DID NOT ERR IN SUMMARILY DENYING THE MOTION TO VACATE JUDGMENTS AND SENTENCES AND DENYING THE MOTION FOR STAY OF EXECUTION.

The Appellee respectfully submits that the Motion to Vacate, though voluminous, failed to state grounds for any relief because the grounds asserted therein were either: (1) previously litigated at trial and on appeal; (2) issues that could have been raised at trial and on appeal; (3) failed to state grounds for relief as a matter of law; or (4) refuted by the state court records.

The 88-page Motion filed by Appellant raised 14 separate claims for relief, including claims that both attorneys that represented him at trial were ineffective. The specific claims raised in said motion were:

1. Incompetence to stand trial;

2. Improper introduction of statements given in fulfullment of the guilt plea;

3. Denial of expert witnesses to determine his mental condition for use at guilt and penalty proceedings;

4. Ineffectiveness of counsel in failing to present mitigating evidence of mental disorders and drug use;

5. Improper payment of monies by the prosecutor to state witnesses;

6. Improper argument of counsel;

7. Indictment filed after withdrawal of the plea constituted prosecutorial misconduct;

8. Improper conduct on part of former counsel in testifying before the court on the motion to suppress;

9. Appellant's initial attorney was ineffective in advising him as to the consequences of the plea agreement;

10. Ineffectiveness of counsel in failing to present the defense of voluntary intoxication;

11. Ineffectiveness of counsel in failing to object to the use of the deposition for impeachment purposes;

12. Ineffectiveness of counsel in failing to investigate and present evidence of coercion in the guilt and penalty phase;

13. The death sentence was improperly imposed because the Appellant exercised his right to trial by jury; and

14. The trial judge improperly considered criminal activity not resulting in a conviction in imposing sentence.

Ground 6 was raised on the direct appeal but not addressed by this Court in its opinion simply because the comments were not objected to at trial. The procedural default cannot be obviated by the simple filing of a motion to vacate raising a ground that could have, if properly preserved at trial, been raised on appeal. Johnson v. State, 463 So.2d 207 (Fla. 1985).

Grounds 2,6,7,8,9,13 and 16 were all grounds that could have and should have been raised at trial and, if preserved, on direct appeal, and therefore were not cognizable by motion pursuant to 3.850. Spinkellink v. State, 350 So.2d 85 (Fla. 1977); Witt v. State, 387 So.2d 922 (Fla. 1980); Downs v. State, 453 So.2d 1102 (Fla. 1984); Johnson v. State, supra; Middleton v. State, 465 So.2d 1218 (Fla. 1985); Sireci v. State, 469 So.2d 119 (Fla. 1985) and Quince v. State, 10 F.L.W. 493 (Fla. 1985). Since these issues could have been raised and are barred from consideration the Appellee will not address them on their merits since to do so would allow Appellant to claim that Appellee waived the procedural bar.

Appellant's claim that he was incompetent to stand trial based upon the affidavits contained in the appendix, to-wit: The affidiavits of Krop, Barnes and Greenberg, are inadequate to establish incompetency and they are refuted by the record and findings of the trial judge. Appellant's reliance upon Hill v. State, 473 So.2d 1253 (1985) is totally misplaced. The Appellee submits this case is governed by Adams v. State, 456 So.2d 888 (Fla. 1984). In Hill the defendant at trial exhibited "unusual behavior" indicating his lack of appreciation of the nature of the proceedings against him. He attempted to walk out of the courtrooms, thought the trial was a game and laughed with friends in the courtroom against his attorney's instructions; moreover, testimony by his attorney's investigator clearly revealed he could not assist him in his investigation

of the case. The mental health experts in the case had personally examined Hill. The Hill case correctly held that based upon the record at trial, the trial judge should have conducted a competency hearing as required by Dusky v. United States, 362 U.S. 401 (1960). In the instant case, the various statements given by Appellant (R 128-185; 439-634), his testimony at the guilt plea (T 58-68) and the motion to suppress (T.T. 174-188) clearly demonstrate that the Appellant understood the nature of the proceedings. Moreover, Mr. Nichols' testimony at the suppression hearing removes all doubt that Appellant knew the nature of the proceedings and could assist counsel (T.T. 136-174), particularly pp. 155,156 and 158). In short, there is no evidence at trial that Appellant was incompetent and thus there was no basis for the court to on its own motion conduct a competency hearing or to appoint experts to inquire into his competency.

It should be noted that although Dr. Krop's affidavit shows he did examine Appellant on May 19, 1986, his opinion in affidavit form is also based upon portions of the record but not upon the entirety of Appellant's testimony during the various stages of trial. Moreover, the doctor only said there was "substantial evidence" that Appellant was incompetent--not that he in fact was incompetent. The same deficiencies exist with the opinions of Doctors Barnes and Greenberg, dated May 27 and May 28, 1986. (See Appellant's App. B and C). Dr. Barnes' affidavit merely says that based

upon the date he examined, "A full, competent, psychiatric/ psychological evaluation" would be important to "determine Tommy's state of mind at the relevant stages of the proceedings. His affidavit does not say Appellant was incompetent or insane. All the motions and files before this Court show, is that one psychiatrist has an opinion now that Appellant was incompetent based upon an examination of incomplete records. The Appellee urges that the allegations fail to establish entitlement to relief under Dusky and its progeny. Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985) (defendant must show more than evidence that he might have been incompetent and the statements of counsel, as well as his failure to claim that accused was incompetent, is highly important). Id. at 1360.

The Appellant's claim III that he was denied expert psychiatric witnesses under Ake v. Oklahoma, ___U.S.___, 105 S.Ct. 1087 (1985) is patently frivolous because the attorneys never filed a motion seeking such appointment of experts. To the extent that Appellant argues that counsel were ineffective for not doing so it is submitted they obviously did not feel it was required because the defense was that Appellant did not commit the crimes in question (T 1273-1275, 1306, 1737). See Middleton v. State, 465 So.2d 1218,1224 (Fla. 1985); and Straight v. Wainwright, 422 So.2d 827 (Fla. 1982).

Claim IV was properly rejected because it merely second-guesses counsel's presentation of the denial defense rather

than an intoxication defense which the Appellee submits is inconsistent with the selected defense. Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985). This same thing holds true with the alleged failure to present mitigating evidence pertaining to Appellant's childhood history of drug use and his low intelligence raised in Claims X and XII. Porter v. State, 478 So.2d 33 (Fla. 1985); Stone v. State, 481 So.2d 478 (Fla. 1985); Middleton v. State, supra; Straight v. Wainwright, 772 F.2d 674 (11th Cir. 1985); Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) and Harich v. State, 484 So.2d 1239 (Fla. 1986). It must be presumed that counsel decided not to introduce the defenses because they were inconsistent with the chosen defense and that strategy cannot be second-guessed by a court. Strickland v. Washington, 466 U.S. 668 (1984). Moreover, the Appellant has failed to demonstrate the omissions complained of would probably have changed the outcome of the proceeding. Middleton, supra. The Appellee submits Appellant is engaging in pure "speculation" that it would have produced a different result. Porter v. State.

The Appellant's claim that his rights under Brady [v. Maryland, 373 U.S. 83 (1963)] were violated was properly rejected. First, the payment of small sums of money to state witnesses for meals and traveling expenses was not Brady material. Counsel could have learned of this information by merely asking the witnesses. In short, the evidence was not in the exclusive

control of the prosecutor. See: Halliwell v. Strickland, 747 F.2d 607 (11th Cir. 1984); James v. State, 453 So.2d 786 (Fla. 1984). Even if it were Brady material, the undisclosed information was not "material" evidence as recently interpreted by the Supreme Court of the United States in United States v. Bagley, 473 U.S.___, 87 L.Ed.2d 481 (1985). To be "material" under Bagley it must be shown that it is reasonably probable that the outcome of the trial would have been different had the evidence been disclosed to the defense. Id. at 494.

The Appellant's guilt of the Dalton murder was predicated upon the testimony of Joan Bennett (T.T. 1035-1037) and other corroborative testimony. Counsel for the Appellant vigorously cross-examined the witness and established that she received a reduction of charges from first-degree murder to an accessory after the fact, an offense which carried a maximum of five years imprisonment (T.T. 1048-1052) and that she was released on her own recognizance (T.T. 1051). The Appellee submits that simply because this witness allegedly received $20 from the prosecutor (Appellant's Appendix P) for food and gas, would not have added one whit to the attempted impeachment of the witness, given that the jury obviously believed her in spite of the substantial benefit given to her by the prosecution. The non-disclosed evidence simply was not "material" under Bagley, James, and United States v. Antone, 603 F.2d 566 (5th Cir. 1979) and thus, even if the hearsay allegations are true, Appellant is entitled to no relief.

The Appellant's claim number IX respecting the competency of Mr. Nichols' advice to him regarding the plea agreement and its consequences is nothing but an attempt to raise the substantive claim raised on appeal in the guise of competency of counsel. Indeed, they cite the same cases cited on direct appeal. (Memo in Support of Motion, pp. 60-61). In Sireci, supra, this Court specifically held that "claims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel." Id. at 120. The contention that Mr. Groover didn't know he even had a choice is absolutely refuted by the record (T.T. 58-68; R 128-185), the trial judge's order on the motion to suppress (R 117-127) and this Court's opinion. The only reason that the complaint regarding Mr. Nichols is now raised is because the Appellant broke the plea agreement which he knowingly, intelligently and voluntarily entered into upon the advice of counsel.

Appellant's claim that Mr. Shore was ineffective for not objecting to the use of the deposition for impeachment purposes (Claim XI) is without legal merit. First, Mr. Shore did object to the use of the deposition by the prosecutor for impeachment purposes (T.T. 1329-1339) and when he was offerred a hearing he declined further than that presented in the argument (T.T. 1339). This was no doubt due to the fact that counsel could not prove Mr. Greene coerced him to give the deposition testimony, any more than he proved that Mr. Greene coerced him to give

the May 17th statement which was found to have been given voluntarily by Judge Oliff. (R 117-127).

Notwithstanding, there was no prejudice simply because the motion admits at page 78 and 79 that there was "no apparent inconsistency between the deposition and the trial testimony" and "the deposition was not at all inconsistent with the testimony Tommy Groover had just given." (Motion at 79.)

Thus, on the face of the motion and the record this alleged deficiency of counsel could not form the basis for relief because there is no likelihood that it affected the outcome of the proceedings and it is not alleged that it did.

It should be remembered that a criminal defendant is not entitled to "errorless counsel," Williams v. Maggio, supra, at 392, and competent counsel does not mean counsel who will perceive every conceivable constitutional claim. Engle v. Isaac, 456 U.S. 107, 134 (1982). The Constitution guarantees defendants only a fair trial and a competent attorney under the totality of circumstances. Strickland v. Washington, supra. The Appellant received a fair trial and the attorneys who represented him did so in a reasonably competent manner. Indeed, as in Maggio, counsel "made the best of a bad case" 679 F.2d at 393, and the motion herein is nothing but an attempt to second-guess counsel with the benefit of hindsight, contrary to Strickland v. Washington and Downs v. State, supra. The Appellee's motion to dismiss set out in detail the defense efforts

that were taken on Appellant's behalf and the Appellee submits the record is the best evidence that Mr. Nichols and Mr. Shore zealously although unsuccessfully represented the Appellant. Indeed, Mr. Shore obtained a life recommendation as to the Padgett murder and that surely says something, Porter v. State, supra. Be that as it may, an attorney is not determined to be incompetent because he fails to win his case.

CONCLUSION

The lower court properly denied the motion to vacate judgments and sentences and the order appealed should be affirmed.

Respectfully submitted:

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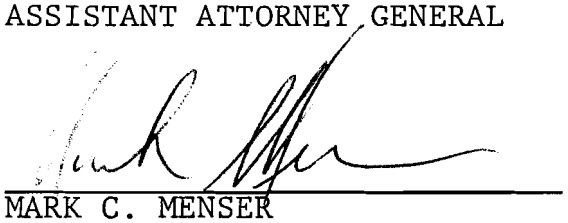

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was hand-delivered to Mark Olive, Capital Collateral Representative, 225 West Jefferson Street, Tallahassee, Florida, 32301, on this 2nd day of June, 1986.

ANDREA SMITH HILLYER
ASSISTANT ATTORNEY GENERAL