IN THE

SUPREME COURT OF FLORIDA

Case Nos. 68,846 and 68,862

JAMES CARD, SR.,

Petitioner/Appellant,

v.

STATE OF FLORIDA

Respondent/Appellee

/

ANSWER BRIEF OF RESPONDENT/APPELLEE

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STATEMENT OF THE CASE

The Appellee accepts the statement of the case and facts as stated in the initial brief.

ISSUE I

THE VALIDITY OF THE TRIAL COURT'S ORDER TRANSFERRING THE CAUSE TO A COUNTY IN ANOTHER JUDICIAL CIRCUIT AND TRYING SAID CAUSE ABSENT A TEMPORARY ASSIGNMENT TO THE OTHER CIRCUIT IS CLEARLY A MATTER WHICH COULD HAVE AND SHOULD HAVE BEEN RAISED AT TRIAL OR ON DIRECT APPEAL.

Fla.R.Crim.P. 3.850 as amended by this court incorporates the long standing principle of this court's decisions that:

> This rule does not authorize relief based upon grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.

See The Florida Bar Re: Amendment to Rules of Criminal Procedure (Rule 3.850), 460 So.2d 907, 908, (Fla. 1984). It is clear from case law that a defendant may object to a change of venue to a county in another circuit where the state has moved for a change of venue. See Davis v. State, 256 So.2d 566 (Fla. 1st DCA 1982) where the court quashed an order of First Judicial Circuit Judge Blanchard transferring a cause to Duval County after timely objection by defendant.

Likewise, this court has held that the power and authority of an assigned state attorney (a state attorney acting pursuant to an order by the governor assigning the state attorney of one circuit to discharge the duties of a state attorney of another circuit) may be tested in direct proceedings by quo warranto, Austin v. State, ex. rel. Christian, 310 So.2d 289 (Fla. 1975).

In Austin, surpra, Governor Askew acted in accordance with the statutory authority of section 27.14 Florida Statutes. Similarily, Card could have filed a petition for writ of common law certiorari, prohibition or simply object to preserve the matter for appellate review, or take it upon himself to notify the Chief Justice of the Florida Supreme Court that the cause had been transferred to another circuit and an appointment is otherwise necessary for the prompt dispatch of his trial proceeding. Interestingly enough Card did file a second change of venue on grounds of pre-trial publicity existed in Okaloosa county. (R 118) (R300-303).

In Sawyer v. State, 94 Fla. 60, 113 So. 736 (1927), this court held that when a constitutional officer exercises the de facto authority of his position, "such acts should be given the same effect as to the public and third persons as would ordinarily be given to the act of an officer de facto occupying and exercising the functions and powers of a de jure office, unless timely objection had been made thereto before pleadings on the merits and going to trial." Id. at 745.

Moreover, for purposes of this appeal, the court in Sawyer also held:

> Neither the common law nor our own statutes favor the policy of a defendant in waiting until the last stage of the cause and attacking such defects by a motion in arrest of judgment, the granting of which would have the effect of unraveling the whole proceeding. This rule would apply in

> still greater force to motions made after the term to vacate judgments. Id.

Sawyer, supra was reaffirmed by this court in State v. King, 426 So.2d 12 (Fla. 1982). King, supra involved a challange to a jurisdicitonal defect on plenury direct review. King would bar raising this question on direct review and Sawyer clearly bars raising the question by motion for post conviction relief.

Judge Turner clearly had jurisdiciton over the subject matter of the cause at the time he granted Appellant's motion for a change of venue. Card also personally appeared in the Bay County proceedings and the Okaloosa County proceedings. The proceedings below were clearly not a nullity on de facto grounds and are not void. If Judge Turner were a county judge without jurisdicition of the subject matter (felonies) and he preceded to rule on the case without a direct appointment by either the chief judge of the circuit or the chief justice of this court then the argument could be made that all proceedings were void ab anitio.

There is absolutely not one wit of difference between what this trial was and what it would have been had a solitary slip of paper signed by the Chief Justice of this court been found in the record.

The validity of a nunc pro tunc appointment depends upon the

effect given the Florida Rules of Judicial Administration on the parties to the action. The above rules appear to be nothing more than procedural guidelines to assist judges' in the performance of their administrative duties. For instance, Fla.R.Jud.Admin. 2.030(a)(3) states the Chief Justice may upon request or when otherwise necessary temporaily assign a circuit judge to sit in another circuit. Fla.R.Jud.Admin. 2.050(b)(4) gives the chief judge of a circuit the power to temporarily assign a judge from outside his circuit for service in his circuit.

There is no dispute that Judge Turner was in fact and in law a circuit judge of the Fourteenth Judicial Circuit. It was therefore clearly within the power of the Chief Justice of the Florida Supreme Court to appoint Judge Turner as a temporary circuit judge in the First Judicial Circuit. This administative act was not performed then and given Appellant's failure to timely raise this issue, it need not be performed now.

The state courts of Florida do not allow counsel's failure to object to constitute grounds for a claim of ineffective assistance. Anderson v. State, 467 So.2d 781 (Fla. 3rd DCA 1985). The United States Supreme Court agrees. See Murray v. Carrier, ___U.S.___Case No. 84-1554 (June 26, 1986).

ISSUE II

THE RECORD CONCLUSIVELY REBUTTED CARD'S POST CONVICTION ALLEGATION THAT HE WAS ENTITLED TO A COMPETENCY TO STAND TRIAL HEARING.

Appellant relies on Hill v. State, 473 So.2d 1253 (Fla. 1985). Appellee will rely on James v. State of Florida, 11 F.L.W. 268 (Fla. June 12, 1986).

Card was examined by Doctor Cartwright and Doctor Berland. (See R-75-79). Both these examining experts found Card, competent at the time of the offense and competent to stand trial. There is also further evidence of Card's competency as revealed to the trial judge in the pro se motion for dismissal of attorneys for the defense in Card's handwriting filed by Card to Judge Turner on November 6, 1981. (R 101-102). Card also filed a motion to recuse the trial judge Orf Tenus. (R 466-468). Thus, the reports of the examining experts and Mr. Card's performance at trial in the presence of the trial judge clearly rebut any allegation that there was evidence of incompetency before the court which should have necessitated sua sponte hearing on competency to stand trial. James, supra.

Moreover, defendant's claim that he was denied a full and fair competency hearing as required by Pate v. Robinson, 383 U.S. 375 (1966), and Drope v. Missouri, 420 U.S. 162 (1975), is an issue not cognizable in a Rule 3.850 proceeding because the matter should have been determined on direct appeal. Adams v. State, 456 So.2d 888, 890 (Fla. 1984). Furthermore, the record

refutes the allegations that Defendant is entitled to relief. In Drope, post hoc evidence was presented to the state court in a collateral proceeding. The appellate court refused to consider that evidence in determining whether there was a Pate violation. The Supreme Court of the United States, in ruling Drope should have been given a hearing under the facts shown on the record at trial stated:

> In reaching this conclusion [that the trial court should have made further inquiry] we have not relied upon the testimony of the psychiatrist at the §27.26 hearing, which, we agree with the Missiouri Court of Appeals, is not relevant to the question before us. [Emphasis supplied].

Id. at 181, n. 12.

In Reese v. Wainwright, 600 F.2d 1085 (5th Cir. 1979), cert. denied, 444 U.S. 983 (1979), cited with approval in Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985), the Court correctly interpreted Pate, saying:

> When habeas relief is sought on grounds of a violation of the Pate procedural right to a competency hearing, a petitioner shoulders the burden of proving that objective facts known to the trial court were sufficient to raise a bona fide doubt as to the defendant's competency. Pedrero, supra, at 1387. The emphasis in a Pate analysis is on what the trial court did in light of what it then knew.

600 F.2d at 1091

See also Bowden v. Francis, 733 F.2d 740, 746-748 (11th Cir. 1984).

ISSUE III

MR. CARD WAS NOT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF TRIAL.

This case presents an interesting scenario in the ever changing claim of ineffective assistance of counsel. Trial counsel informs the trial court prior to trial that he is not ready to defend Mr. Card and asks for a continuance. If they go to trial and get a life sentence the self-proclaimed incompetents have succeeded in the "trial for life." If on the other hand, Card receives the death penalty, a built in claim of ineffective assistance of counsel has been read into the record. A ruling by this court that defense counsel Ingles was ineffective would mean Ingles was very effective because he set up a successful claim for post conviction relief. Strickland v. Washington, 104 S.Ct. 2052 (1984) was written to illuminate this "catch 22" aspect of representing the heinous killer at trial in capital cases.

Strickland v. Washington and Knight v. State, 394 So.2d 997 (Fla. 1981) in essence stand for the proposition that counsel must allege that trial counsel performed so poorly that there is serious doubt about the defendant's guilt on the out come of the proceedings. Appellant cannot meet this test.

Vicky Elrod testified that Card told her he killed Janice Franklin. Card told her about the coin and about the minor knife wounds he received due to the location of the knife. Janice Franklin's husband corroborated the existence of the coin and the

fact that it was missing. A physical exam and photographs presented to the jury corroborated the knife wounds sustained by Mr. Card when he hid the knife in his pants. This information was not revealed to the public prior to Vicky Elrod's decision to inform the police. James Card's defense was that he did not commit the crime. It is obvious from his psychiatric reports that James Card chose this defense. (R 180). Counsel successfully moved for a change of venue. Card has not challenged the fairness or impartiality of the jury which convicted him. Card cannot show that the jury's outcome would have been different had anything else been done. For if the jury believed Card carried a knife into the Western Union and slit Mrs. Franklin's throat a verdict of less than premeditation would be unbelievable.

ISSUE III-B

CARD DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL CAMILL CARDWELL IN THE PENALTY PHASE.

Card alleges that trial counsel's failure to present Camille Cardwell's rank hearsay at sentencing was an act so deficient as to meet the Strickland-Knight test. Card alleges that the jury which had just convicted him of premeditated murder was going to flip flop and recommend life because of their residual doubt. This argument may make sense in the felony murder context involving multiple defendants where there is doubt as to who actually pulled the trigger but not here.

In Burr v. State, 466 So.2d 1051 (Fla. 1985) this court affirmed a jury override which imposed death. The defendant had argued that the jury's life recommendation was based on the jury's non reasonable doubt due to the recantation of the state's witness. This court rejected the notion that a convicted murderer who shoots someone execution style can be "a little bit guilty." Id at 1054. It is just as arguable a point that a defendant who claims innocence in the penalty phase forfeits any predisposition of the jury to recommend mercy by his refusal to admit guilt in the face of overwhelming evidence. This is especially true in light of the government's strategic choice in the penalty phase not to present evidence.

ISSUE IV

MR. CARD WAS AFFORDED A COMPETENT AND APPROPRIATE PSYCOLOGICAL EXAMINATION.

Trial counsel successfully moved for the appointment of Doctors Hord and Wray. Unfortunately for Mr. Card, Dr. Wray's examination of the medical record, family history, interviews with family members and interviews with Mr. Card did not yield the hoped for results. In fact Doctor Wray's testimony if presented would have confirmed the death recommendation. This case is not unlike Booker v. State, 413 So.2d 756 (Fla. 1982) where defense counsel resubmitted Mr. Booker's medical data to a different expert who divined "significantly different" conclusions. Id; James, supra. Competent and appropriate psycological examinations are favorable to capital defendants and incompetent inappropriate examinations are apparently those which are unfavorable to capital defendants.

This court by now must be very familiar with this sad refrain. Mr. Card was thirty-five years old with an I.Q. in the 100-135 range. He was neither under the influence of drugs nor alcohol at the time of the offense. We cannot expect criminal defendants who rob, kidnap and viciously murder by near decapitation to be the boy next door type. Card's family members could have testified and exposed themselves to cross-examination concerning Card's violent behavior and previous threatening use of a knife. (R 180-186). This case is really no different that Harich v. State, 484 So.2d 1239 (Fla. 1986) except there was even

less mitigating factors than Harich presented. See also Middleton v. State, 465 So.2d 1218 (Fla. 1985); James, supra and Witt v. State, 465 So.2d.

CONCLUSION

The trial court below correctly denied Appellant's motion for stay of execution, motion for post conviction relief and motion for an evidentiary hearing.

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 Larry Helm Spalding and Steven H. Malone, Office of Capital Collateral Representative, Univ. of So. Fla.-Bayboro, 140 7th Avenue So., RM COQ-216, St. Petersburg, Florida 33701, on this 26TH day of June 1986.

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