IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 11 1987
CLERK, SUPREME COURT
By
Deputy Clerk

CHARLES KENNETH FOSTER,

Petitioner,

v.

CASE NO. 70,597

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent.

_____/

RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS

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COUNSEL FOR RESPONDENT

The Respondent, hereafter referred to as the State, replies as follows to the Petition for Writ of Habeas Corpus:

(1) The State submits that habeas corpus relief is not available to Mr. Foster and has not become available as a result of the decisions rendered in Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986); Copeland v. Wainwright, 12 F.L.W. 178 (Fla. 1987); Harvard v. State, 486 So.2d 537 (Fla. 1986) or Songer v. State, 365 So.2d 696 (Fla. 1978).

(2) Habeas corpus is not available for use as either a second appeal or as a substitute for petitions filed pursuant to Rule 3.850. The claim raised in this petition has previously been disposed of on appeal from Foster's first 3.850 petition.

(3) No claim of ineffective assistance of appellate counsel has been raised and Foster has waived any such claim.

STATEMENT OF THE CASE AND FACTS

The details of Foster's crime are adequately set forth in Foster v. State, 369 So.2d 928 (Fla. 1979) and need not be repeated. Foster has filed several collateral attacks upon his sentence as outlined in his petition.

The State would note that Foster's federal habeas corpus petitions have attacked counsel (Mr. Mayo) for failing to investigate, prepare or present statutory and non-statutory mitigating evidence. There is an inherent inconsistency in alleging that the sentencer and the advisory jury "failed" (or "were restricted") to (or in) consider(ing) non-statutory mitigating evidence which, in another forum, Foster is claiming was never gathered or presented. This is especially important when we recall that:

(A) Foster refused to permit Mayo to prepare sentencing phase evidence.

(B) Foster has yet to identify the non-statutory evidence he would have proffered.

(C) Foster objected at trial and on appeal to the admission of evidence of his character and criminal record because the evidence was harmful, not mitigating.

(D) Mr. Mayo did put on Foster's ex-wife as a non-statutory sympathy witness. Mayo also argued (with Court approval) that Foster should not be executed for being "poor" and discussed "mercy". (T 642 et seq.)

(E) The Court expressly limited "aggravating" circumstances (T 646) but allowed the jury to consider mitigating factors supported by the evidence. (T 648).

ARGUMENT

The claim that the trial judge restricted the advisory jury's, and his own, review of non-statutory mitigating evidence is procedurally barred. Foster's arguments to the contrary misapprehend his cited caselaw.

Kennedy v. Wainwright, 483 So.2d 424-426 (Fla. 1986) states:

> "The purpose of the writ of habeas corpus is to provice a means of judicial evaluation of the legality of a prisoner's detention. McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983). It is not properly used for purposes of raising issues that could have been raised on direct appeal, or for relitigating questions that have been determined by means of a prior appeal".

Kennedy requires a litigant seeking an exception to this standard to establish a violation of fundamental constitutional rights. As noted in Strickland v. Washington, 466 U.S. 688 (1984), not every error at trial, even if of constitutional proportions,

is "fundamental". Petitioners like Foster must show error so serious as to undermine confidence in the outcome. This is something Foster's petition does not even attempt.

First, Foster cannot challenge the trial court's "failure" to consider evidence which he admittedly never even offered. Second, Foster noted on appeal that the "character" evidence held by the State (including violent attacks on his parents and others) was very damaging (which explains why Mr. Mayo avoided bringing Foster's character into dispute). Third, Foster espoused a "walk or burn" philosophy and interfered with defense counsel. Finally, some non-statutory evidence and argument was admitted (i.e., a "mercy" plea from Foster's ex-wife).

Thus, Foster cannot demonstrate "prejudice" just as he has previously been unable to establish "cause". The mere fact that the law may have been misunderstood in "some" courts prior to Lockett v. Ohio, 438 U.S. 586 (1978), does not mean it was misunderstood in all courts. At worst, trial courts were confused or divided. Foster must show "which side of the aisle" his trial court fell on. This he has not done, and no significance at all attaches to the wording of either the courts' instructions (which have been upheld in other cases) or its orders, even though only statutory factors are listed. Johnson v. Wainwright, slip opinion 83-3962; Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985); Raulerson v. Wainwright, 732 F.2d 803 (11th Cir. 1984).

Therefore, the question is not whether Foster simply has no other means of revue but rather, whether habeas corpus is to be expanded to facilitate endless relitigation of non-fundamental claims of error. This is not a function of the writ. Copeland v. Mayo, 87 So.2d 501 (Fla. 1956); Messer v. Wainwright, 439 So.2d 875 (Fla. 1983); McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983); Witt v. Wainwright, 465 So.2d 510 (Fla. 1985); Steinhorst v. Wainwright, 477 So.2d 537 (1985).

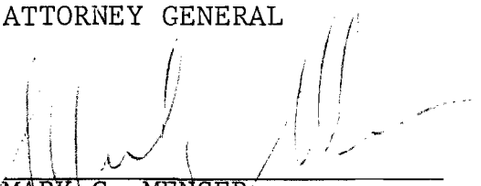
Foster has failed to allege or show any basis for expanding the writ of habeas corpus to permit him to reargue a claim previously rejected by this Court. He has failed to establish either fundamental error or even a basis of fact for filing such a claim even if he could do so. His claim is procedurally barred.

CONCLUSION

Habeas Corpus should be denied given the fact that Foster's claim is procedurally barred.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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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 Mr. Richard H. Burr, III, Esq., 99 Hudson Street, 16th Floor, New York, New York 10013, and to Mr. Steven L. Seliger, Esq., 229 East Washington Street, Quincy, Florida 32351, this 11th day of June, 1987.

MARK C. MENSER
Assistant Attorney General

OF COUNSEL