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IN THE SUPREME COURT OF FLORIDA

NOV. 4

CLERK, SUPREME COURT
By
Deputy Clerk

BENNIE DEMPS,

Petitioner,

v. CASE NO.

RICHARD L. DUGGER,

Respondent.

______________________/

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIR
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The details of Demps' crimes have been adequately reported and will not be repeated herein.

Demps, following the denial of his petition for writ of habeas corpus, filed a second successive motion for post conviction relief pursuant to Fla.R.Crim.P. 3.850.

The Circuit Court denied relief on the grounds that:

(1) The petition was untimely inasmuch as it was filed after January 1, 1987.

(2) The petition was successive, and raised issues either previously litigated or procedurally barred.

This appeal ensued.

SUMMARY OF ARGUMENT

The various procedural bars attending the petition filed by Mr. Demps should be upheld, along with the decision of the Circuit Court.

In argument I, Demps tries to argue a Caldwell v. Mississippi claim that has been available (if ever) since 1985. Pursuant to Rule 3.850 Demps could and should have attempted to argue this claim by January 1, 1987. He did not do so, probably because the issue was never preserved at trial or on direct appeal.

In argument II, Demps presents a claim held to be procedurally barred in his first "3.850" and withheld until this late date for improper and untimely refiling.

In argument III, Demps tries to obtain "indirect rehearing" on his just-denied habeas petition - in defiance of this court - in another untimely and barred argument.

In argument IV, Demps attacks his trial counsel's competence for the first time. This, again, could have been filed prior to January 1, 1987 and, in addition, is an improper piecemeal attack on counsel (whose appellate competence was challenged earlier).

ARGUMENT

POINT I

DEMPS' "CALDWELL" CLAIM WAS PROPERLY DISMISSED

Ten months after his deadline for filing a "3.850" petition, Demps contends that the trial judge "erred" by telling the advisory jury the correct law governing capital sentencing in Florida. Although this claim, based upon Caldwell v. Mississippi, 105 S.Ct. 2633 (1985) is totally without merit in Florida, see Alderidge v. State, 503 So.2d 1257 (Fla. 1987), it is imperative, if this Court's judgment is to survive federal intervention and obstruction, that the procedural bar found by the trial court be affirmed as part of any decision rendered herein. Pope v. Wainwright, 496 So.2d 798 (Fla. 1986).

In Caldwell, the Supreme Court recognized that the jury instruction claim contained therein would have been procedurally barred "but for" waiver of that bar by the Mississippi Supreme Court. Demps, in not discussing this fact, apparently hopes this Court will make the same error and cause similar federal intervention.

It is a telling admission that on page (1) of his brief, Demps confesses that his arguments are taken from briefs pending in Mann v. Dugger, Case no. 86-3182. Speaking to its decision to even review the Caldwell claim, the Eleventh Circuit held (in its original opinion):

> "However, as discussed, the Florida Supreme Court ignored any procedural default in deciding the Rule 3.850 motion and dismissed all claims presented in the motion on the merits. Therefore, federal habeas review is warranted".

Although the Mann majority would not have upheld Florida's procedural bar anyway, at that time, because they equated Florida and Mississippi sentencing procedures, this Court has distinguished the Mississippi law and does not agree with the federal circuit on this issue of state law. Alderidge v. State, supra. Therefore, the possible "conflict" with the Eleventh Circuit should not prompt waiver of our valid procedural bar. Pope v. Wainwright, supra.

The Supreme Court of Florida is not an inferior court to the Eleventh Circuit and should not, through waiver of 3.850 procedural bars, abandon or forfeit either its constitutional status as an equal court, see Duckworth v. Serrano, 102 S.Ct. 18 (1981) or inadvertently waive the constitutional rights of the people of Florida to their own court system, free of federal oversight and "intermediate federal court review".

The only court with power to review Florida Supreme Court decisions on federal constitutional claims is the United States Supreme Court, Duckworth, supra; Barefoot v. Estelle, 463 U.S. 880 (1983), unless federal intervention and review is invited by ruling on the merits of a procedurally barred collateral attack. Barefoot, supra.

Caldwell was decided in 1985, almost two years prior to the filing deadline created by Fla.R.Crim.P. 3.850. Demps, demonstrating total contempt, has chosen to file this known claim ten months after the January 1, 1987, deadline created by this court and continually contested by "CCR". Apparently, the intent of CCR is to ignore the

rules and defy the Court to respond, since removal of counsel on the eve of execution is unlikely. We would suggest that appropriate measures can be taken later, State v. Meyer, 430 So.2d 440 (Fla. 1983), but the appropriate response now is simply to uphold the Circuit Court's finding that the claim is untimely, unpreserved (never preserved by objection or appeal) and subject to dismissal. Since there is no constitutional right to collateral attack, Pennsylvania v. Finley, ____ U.S. ____ (1987)[1 F.L.W. Fed. S. 583], no loss of rights will befall Mr. Demps if he is held to the same standards of conduct as the state. State v. Meyer, supra. Thus, the recognized procedural bar governing this issue, Pope v. Wainwright, supra, should prevail.

Wherefore, the first claim was properly dismissed as untimely filed and procedurally barred.

ARGUMENT

POINT II

THE "SECRET DEAL" CLAIM WAS PROPERLY DISMISSED

The Circuit Court ruled on this issue on the ground that Demps' 3.850 petition was untimely and the claim itself was procedurally barred. The court was correct on both counts. As this Court has already held in Demps v. State, 416 So.2d 808 (Fla. 1982), this claim was available at trial but was not properly preserved or appealed. It was procedurally barred at the time of Demps' 1982 petition, and it remains so now.

In addition, of course, the claim is untimely since, if available, it could and should have been filed prior to January 1, 1987.

Due to the lateness of the hour in which the State was served Demps' petition and the hurried response provoked by his misconduct, the State commented that this issue was "fully litigated". This was an error. The issue was litigated "indirectly" during the "Squires" hearing (prior to the final decision in Demps v. State, 462 So.2d 1074 (Fla. 1984)).

Under the umbrella of the Squires hearing, Hathaway and Zeigler were deposed (and Mr. Maddox' affidavit was later procured). The "love nest" transfers were explored and, by the time Demps got to federal court, he was demanding that the federal courts disregard the "procedural bar" and rule on the merits.

Nevertheless, the federal courts respected our procedural disposition of this issue and no reason exists to abandon our position. This

is especially true since Demps has known of this claim <u>at least</u> since 1984, when the first 3.850 appeal terminated and he has deliberately withheld this claim until now, long after the January 1, 1987 deadline, simply to abuse process and obstruct his execution with his successive, and repetitive, claim.

ARGUMENT

POINT III

THE THIRD CLAIM WAS PROPERLY DISMISSED

When this Honorable Court denied Demps' "Hitchcock" based habeas corpus petition, you stated that no motion for rehearing would be entertained. To circumvent the Court's order, Demps went to Circuit Court with the patently false claim that he was "denied notice" and had "no opportunity" to rebut "purported facts" used to sentence him to death.

Demps had from March 17 to April 17, 1978, to prepare to rebut anything in the PSI. He never challenged the PSI on appeal, in his first 3.850 or either of his two federal petitions or his recent state habeas petition. Demps' attempt to state he was "misled" by Hitchcock proves that this issue is a bad faith attempt at reargument.

The trial court rejected this issue on procedural grounds as untimely (post January of 1987) and procedurally barred. It did not rule on the merits.

We would, in passing, note:

(A) A "general discharge" is equivalent to an "undesireable discharge" (especially given Demps' Courts-martials and sordid service record). "Dishonorable discharges" are not issued in this draft-less era. This quibbling over terminology does not improve Demps' bad record.

(B) Demps prison record takes him outside the scope of Skipper v. South Carolina, 106 S.Ct. 1669 (1986), and adds significantly to

any "harmless error" analysis, for it removes the prospect of showing Demps had a "good" record, as in Skipper.

(C) The lack of evidence Demps was on drugs counter's CCR's claims regarding Demps' past drug use or later use of medicine.

(D) Demps "loathsome distinction" refers, of course, to the valid aggravating factors surrounding his prior murders.

(E) The "automatic death sentence" argument is baseless reargument of a rejected theory.

Demps' entire argument is raised in bad faith and is regretable. More important, it is procedurally barred.

ARGUMENT

POINT IV

DEMPS' CLAIM OF INEFFECTIVE TRIAL COUNSEL
WAS PROPERLY DENIED

In point four, Demps utilized the standard "last refuge" of an attack, however baseless, on defense counsel.

Although Demps was represented by Mr. Carroll, among other attorneys, during the course of this case he was never precluded from attacking counsel's competence. Indeed, he attacked counsel's appellate performance in his first 3.850, or at any time prior to January 1, 1987. Counsel had no more "conflict" over his trial "ineffectiveness" than he did over his "appellate effectiveness", and Demps knows it.

This level of piecemeal, one-issue-at-a-time attacks upon counsel was declared abusive in In Re: Shriner, 735 F.2d 1236 (11th Cir. 1984) and in Witt v. Wainwright, 755 F.2d 1396 (11th Cir. 1986).

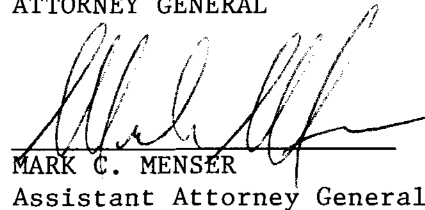
The circuit court was well within its power to reject this claim as improperly raised for the first time in a successive petition and, of course, as untimely.

CONCLUSION

The Circuit Court's summary denial of Demps' petition on procedural grounds should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



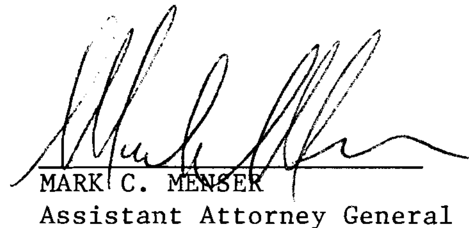
MARK C. MENSER
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Mr. Larry Helm Spalding, Esq., Office of Capitol Collateral Representative, Independent Life Building, 225 West Jefferson Street, Tallahassee, Florida 32302; and Mr. Robert Harper, Esq., 225 West Jefferson Street, Tallahassee, Florida 32302, this 4 day of Novemeber, 1987.



MARK C. MENSER
Assistant Attorney General

OF COUNSEL