IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Cross-Appellee

v. Case No. 75,797

OSCAR MASON,,

Appellee/Cross-Appellant

OSCAR MASON,,

Appellant,

v. Case No. 72,918

STATE OF FLORIDA,

Appellee

ON APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE
CASE NO. 72,918

REPLY BRIEF OF ~~APPELLEE~~ Appellant/CROSS-~~APPELLANT~~ Appellee
CASE NO. 75,797

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SUMMARY OF THE ARGUMENT

ISSUE II

After conducting the hearing as ordered by this Court, the court below found that Mason was competent. This finding was within the trial court's discretion and Mason has failed to show an abuse of that discretion.

ISSUE III

This issue is procedurally barred and without merit.

ISSUE IV

This issue is also without merit and is procedurally barred.

ISSUE V

This issue is also without merit and is procedurally barred.

ISSUE VI

This issue is also without merit and is procedurally barred.

ISSUE VII

This claim was rejected by the United States Supreme Court in Penry v. Lynaugh, 109 S.Ct. 2934 (1989).

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN VACATING MASON'S SENTENCE OF DEATH WHEN THE MOTION WAS UNTIMELY AND THE ERROR WAS HARMLESS.

Appellant/Cross-Appellee will rely on the argument as set forth in the initial brief of Appellant/Cross-Appellee as to this issue.

ISSUE II

WHETHER JUDGE HINSON'S RESOLUTION OF THE COMPETENCY CLAIM RESTS UPON AN ERRONEOUS LEGAL STANDARD, AND HIS RULING IS NOT FAIRLY SUPPORTED BY THE RECORD AS A WHOLE; THIS HONORABLE COURT SHOULD GRANT RELIEF OR REMAND THIS ACTION FOR AN APPROPRIATE ANALYSIS OF THE CLAIM BY THE CIRCUIT COURT.

Increasingly, defendant's convicted of First Degree Murder and sentenced to death are raising post-trial claims about their competency. Such claims are generally denied. See James v. State, 489 So.2d 737 (Fla. 1986); Card v. State, 497 So.2d 1169 (Fla. 1986); Copeland v. State, 505 So.2d 425 (Fla. 1987), and Henderson v. State, 522 So.2d 835 (Fla. 1988). However, in Hill v. State, 473 So.2d 1253 (Fla. 1985), this Court granted the defendant a new trial.

In the instant case, this Court remanded "the case to the Circuit Court for an evidentiary hearing as to the adequacy of earlier determinations of Mason's competency in light of additional extensive psychological evidence which may not have been considered by the examining psychiatrists." Mason v. State, 489 So.2d 734, 735 (Fla. 1986). This Court also ordered a "remand for a hearing on whether or not the examining psychiatrists would have reached the same conclusion as to competency had they been fully aware of Mason's history." Mason, supra at 736. This Court went on to state that "should the trial court find, for whatever reason, that an evaluation of Mason's competency at the time of the original trial cannot be conducted in such a manner as to assure Mason due process of law the court must so rule and grant a new trial." Id. at 737.

While at least one of Mason's experts stated that it is "difficult to assess behavior in retrospect." (R II. 295), no witness called by either side indicated that the type hearing called for by this Court could not be conducted. Accordingly, the trial court found that it had enough information to make a decision. Mason does not challenge the court's determination that the nunc pro tunc evaluation was sufficient, thus adequacy of the nunc pro tunc competency evaluation proceeding is not at issue and will not be addressed here.

The only issue remaining is whether Mason was competent at the time of his original trial. After conducting the hearing as ordered by this Court, the court below found that Mason was competent. This finding was within the trial court's discretion and Mason has failed to show an abuse of that discretion. Fowler v. State, 255 So.2d 513 (Fla. 1971); King v. State, 387 So.2d 463 (Fla. 1st DCA 1978).

The burden is on Mason to prove his incompetency to stand trial. King v. State, 387 So.2d 463 (Fla. 1st DCA 1980) and Martin v. Estelle, 583 F.2d 1373 (5th Cir. 1978). There is ample evidence (from both expert and lay witnesses and from the testimony of Mason himself) concerning Mason's competency. That evidence is in direct conflict. Experts appointed by the trial courts in 1980 found and find Mason competent. Attorneys who prosecuted Mason believed him competent as did (and still does) his trial attorney. Experts hired by current counsel for Mason (years after the trial) opine that he was not competent.

In 1980, Mason was seen by Dr. Melvyn Gardner, Dr. Ernest Bourkard (twice), and Dr. Arturo Gonzalez concerning the issue of his competence to stand trial. (R 188) Dr. Bourkard is now deceased. (R 1043) Dr. Gardner and Dr. Gonzalez both testified at the hearing on remand. In addition to the information the doctors had about Mason in 1980, the doctors were given the following additional information for the latest evaluation: the background material comprising the appendix to Mason's post-conviction relief motion; state's exhibit #7 (Health Evaluation" dated November 3, 1976); State's Exhibit #8 (Transcript of Mason's testimony in his attempted First Degree Murder trial -- case #80-3791); and the reports of the defense experts (Dr. Arthur Norman, Dr. James Merikangas, Joyce L. Carbonell, Ph.D. and Ms. Ruth Luckasson). (R 36-40, 45, 212-219) Both doctors testified that their earlier opinions were not only unchanged, but verified and/or strengthened by the additional information. (R 41-43, 217-218)

The issue to be resolved is squarely one for the trial court. King, supra at p. 464. "It is the court's responsibility to determine a defendant's competency to stand trial; expert reports are simply advisory." Gillian v. State, 514 So.2d 1098 (Fla. 1987). In Bates v. State, 506 So. 2d 1033 (Fla. 1987) this Court went on to say that:

> "the fact finder has great discretion in considering the weight to be given to expert testimony even if all the witnesses are presented by one side, United States v. Esle, 743 F.2d 1465 (11th Cir. 1984). In other

> words, expert testimony ordinarily is not conclusive even when uncontradicted." United States v. Alverez, 458 F.2d 1343 (5th Cir. 1972).
>
> Id. at 1034.

This Court's remand in the instant case also stated that "a crucial issue on remand . . . will be the source of the examining psychiatrists' information utilized in their evaluations of competency." Mason, supra at 736. Dr. Melvyn Gardner candidly admitted that his source of information concerning the defendant came predominantly from the defendant himself. (R 206) But his testimony and an inspection of Dr. Gardner's report indicates that Mason provided information concerning: his innocence, his criminal record, his medication, and his prior psychiatric treatments (including where treated and by whom). (R 193, 206-210) Additionally, Dr. Gardner examined Mason nine (9) days prior to the commission of the murder for which he was convicted. (R 191)

Dr. Arturo Gonzalez likewise had the self history of Mason which included information concerning: his innocence, his criminal record, family history, prior psychiatric treatment (including hospitals, doctors and medications), and current legal status (knowledge that he had been at Raiford sentenced to life imprisonment for attempted murder). (R21-28) Additionally, Dr. Gonzalez had the benefit of the county hospital chart and the materials furnished by Mason's attorney, Richard Edwards, (R 19, 28) Dr. Gonzalez saw the defendant after the commission of the murder, but prior to trial. (R 16)

In addition to the testimony of Dr. Gardner and Dr. Gonzalez, the trial court heard the testimony of Mason's former attorney, Richard Edwards. Mr. Edwards testified that he worked as a Special Assistant Public Defender for years and represented defendants in approximately thirty (30) murder cases. (R 152) Mr. Edwards testified that he never felt the defendant was incompetent to stand trial. (R 154) Mr. Edwards stated that Mason maintained his innocence in spite of physical evidence to the contrary, could offer no reasonable alibi, and would not plead to the offense. Edwards testified that he was hindered in preparation for the case only to the extent that he did not have a lot of evidence on his side, but he was not hindered in any way dealing with Mason's mentality or his competency. (R154) Edwards testified that he could communicate with Mason and that Mason had the ability to assist in planning his defense. (R159) Mr. Edwards also testified that Mason behaved appropriately at trial. (R 155) That observation was echoed by Mr. Norman Cannella who prosecuted Mason on the murder charges and Mr. Ty Trayner who prosecuted Mason on the attempted murder charge. (R 145-146, 129)

Also introduced as evidence in the hearing was a transcript of Mason's testimony in his trial for attempted First Degree Murder held during July of 1980 (R 48, 149). Mason's trial for attempted murder took place after the commission of the murder for which he was sentenced to death, but before his trial for the murder charge. The transcript stands in stark contrast to the

claims in the reports of defense experts who theorized that Mason could not testify relevantly. While the transcript "speaks for itself", it should be noted that Mason testified for fifty nine (59) pages of transcript including forty two (42) pages of cross-examination, answered in narratives (page 339 beginning at line 20, page 342 beginning at line 2 and page 365 beginning at line 6 of State's Exhibit #8), remembered the medication he took on two (2) separate days approximately six (6) months earlier (page 336 line 23 and page 342 line 2 of State's Exhibit #8) corrected the assistant state attorney as to the amount of medication taken on those days on cross-examination (page 361 beginning at line 14 of State's Exhibit #8), and attempted to provide an explanation for his being "falsely accused" (page 334 line 13 of State's Exhibit #8). A review of that transcript shows a man testifying relevantly, logically and coherently with a motivation to help himself.

The transcript of Mason's testimony was provided to defense experts after their reports were compiled. Despite their claims that Mason would probably not be able to testify relevantly or provide information to his attorney, none of the defense experts felt that State's Exhibit #8 contradicted their positions or opinions.

It is the State's position that based on the testimony of Dr. Gardner, Dr. Gonzalez, Mr. Edwards and the testimony of Mason in State's Exhibit #8, that Mason had sufficient present ability to consult with his lawyer with a reasonable degree of rational

understanding and had a rational, as well as, factual understanding of the proceedings against him at his trial for First Degree Murder in 1981.

Present counsel for Mason put on several witnesses who have examined Mason since he has been on death row. Mason was convicted of First Degree Murder on March 23, 1981. Since that time, Mason has been living on Florida's Death row. Dr. Arthur Norman, a defense expert, examined Mason on May 26, 1985, approximately four (4) years after Mason's trial. The remaining defense experts (Carbonell, Merikangas and Luckasson) examined Mason in March of 1987, approximately six (6) years after Mason's trial. (R 402, 576, 1046) No expert witness for the defense saw Mason contemporaneously to the time of his trial. Their opinions are based on assessing Mason's competency in retrospect.

Dr. Carbonell, Dr. Merikangas and Ms. Luckasson were all given the forty one (41) exhibits which comprised the appendix to Mason's motion for post-conviction relief as background information on Mason. (R 403, 574, 978) What is not listed or discussed in any of their reports is any mention of prison records (of any type) on Mason covering the period from March 23, 1981 to the time of their interview with Mason. Ms. Luckasson candidly admitted that she did not review those records prior to writing her report. (R 1058) Dr. Merikangas could not answer whether he had or had not seen such records. (R 495) He acknowledged that they are not listed or discussed in his report and that they would be important in evaluating Mason. It is

incredible that Dr. Merikangas could have had the records, which would cover the six years of Mason's life preceding the examination and yet neither list them or discuss them. It is interesting that Mr. Merikangas faults the evaluations conducted by Dr. Gardner and Dr. Gonzalez for various reasons, including their alleged failure to have adequate background material, yet apparently was unconcerned himself with the six years Mason had spent on death row. Those six years are surely documented as is evidenced by Ms. Carbonell's testimony at the hearing that she had now seen those records. Interestingly, Ms. Carbonell testified at least a week after Dr. Merikangas; time within which Mason's records could have been obtained. Ms. Carbonell acknowledged that she neither listed such records in her report or discussed them. (R 697) Again, it borders on the incredible that three mental health professionals would examine someone in 1987 in an attempt to determine that person's competency to stand trial in 1981 and ignore the prison records (including medical and disciplinary records) which document the person's life from 1981 to 1987.

As previously noted, the defense experts did not have the benefit of Mason's testimony at his attempted murder trial when they issued their reports. Nor had the defense experts spoken with Mason's trial counsel, Mr. Edwards when they issued their reports. (R 523, 695, 1058)

The one area of agreement between all experts involved is that Mason is only mildly mentally retarded. The experts all

agree that a mentally retarded individual can be competent to stand trial. Indeed, retarded individuals have been tried and convicted of murder before. Penry v. Lynaugh, 492 U.S. ____, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (Eighth Amendment does not preclude the execution of any mentally retarded person convicted of a capital offense simply by virtue of their mental retardation alone.); Kight v. State, 512 So.2d 922 (Fla. 1987), cert. den. 108 S. Ct. 1100, 485 U.S. 929, 99 L.Ed.2d 262 ("although there was expert testimony that Knight's I.Q. is only sixty nine (69), mental weakness is but one factor to be considered in determining voluntariness of a confession. Ross v. State, 386 So.2d 1191, 1194 (Fla. 1980). The record clearly illustrates that Knight understood his constitutional rights and knowingly and intelligently waived them." . 358 -- defendant's death sentence affirmed), Doyle v. State, 460 So.2d 353 (Fla. 1984); (" . . . the defense presented evidence concerning Doyle's low intelligence, classed as 'dull normal' and 'borderline retarded' by expert witnesses . . . " p. 357 -- defendant's death sentence affirmed); and Thompson v. State, 456 So.2d 444 (Fla. 1984). ("Dr. Merin testified that appellant had an impaired personality and I.Q. between fifty (50) and seventy (70), which placed him clinically in the mildly retarded range." p. 447 -- conviction affirmed).

The question remanded by this Court for determination by the trial court is whether the trial court erred in finding that Oscar Mason, a mildly retarded young man, was competent at his

trial in 1981. The state contends, as it did below that the people in the best position to gauge Mason's competency are Mason's own attorney and the mental health professionals who examined him prior to trial. In accordance with this Court's remand these same experts reaffirmed their initial findings after reviewing extensive collateral sources. Thus, this Court's concerns regarding the sufficiency of the competency determinations based largely on self-report should be satisfied.

Again, these experts, as well as the defendant's attorney, who had considerable experience in representing capital defendendo, all reconfirmed the original determination that Mason satisfied the statutory requirements for competency to stand trial. After-the-fact opinions by professionals brought in to examine a defendant on an emergency basis after a death warrant had been signed are inherently suspect. This is especially true when the defendant has been on death row since 1980 and none of those experts evaluated the effect this incarceration may have had on the defendant's competency.

The trial court's finding comes to this Court clothed in a presumption of correctness. Accordingly, the state urges this Court to affirm the findings of the lower court.

ISSUE III

WHETHER MR. MASON'S SENTENCE OF DEATH, RESTING ON THE "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING FACTOR, IS IN CONFLICT WITH MAYNARD V. CARTWRIGHT AND VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Initially, it must be observed that this claim is clearly procedurally barred as it is an issue that is cognizable on direct appeal. Atkins v. State, 541 So.2d 1165 (Fla. 1989), footnote 1(5). Also, the failure to object to the standard jury instruction results in procedural default.

Further, this claim has been repeatedly rejected by this Court on its merits. In Smalley v. State, 546 So.2d 720 (Fla. 1989), this Court rejected, on direct appeal, the same claim now asserted by Mason collaterally. This Court explained the failure to object results in a procedural bar obviating relief and went on to hold, for the benefit of the bench and bar in future cases, that the claim has no merit in the State of Florida. Based upon the clear procedural default, however, this Honorable Court should reject and summarily deny this claim.

This argument has also been squarely rejected with respect to the Maynard v. Cartwright, line of reasoning. The standards championed by petitioner are those used by the appellate court in their review of death sentences. There is no requirement, as the Supreme Court has noted, that the jury be instructed on the appellate standards in the penalty phase of a capital trial. The standard jury instructions have been upheld many times, but more importantly, the failure to raise the claim in this context on direct appeal precludes collateral review. Smalley v. State, supra.

ISSUE IV

WHETHER THE COLD, CALCULATED, PREMEDITATED AGGRAVATOR WAS OVERBROADLY APPLIED, GIVEN THE JURY INSTRUCTIONS AND THE STATEMENTS OF THE SENTENCING ORDER, AND RELIEF PURSUANT TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND MAYNARD V. CARTWRIGHT IS APPROPRIATE.

This argument has been repeatedly rejected on its merits by this Court. Brown v. State, 565 So.2d 304 (Fla. 1990); Occhicone v. State, 570 So.2d 902 (Fla. 1990). Thus, even if this issue was not procedurally barred as an issue that could have been and should raised on direct appeal, counsel cannot be deemed ineffective for failing to object to the jury instruction as given.

ISSUE V

WHETHER BECAUSE OF ERRORS UNDER BOOTH V. MARYLAND AND ITS PROGENY, MR. MASON WAS DEPRIVED OF A RELIABLE CAPITAL SENTENCING DETERMINATION AS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner next contends that the precepts of Booth v. Maryland, 482 U.S. 496 (1987), were violated where the prosecutor argued that the jury should have no sympathy for Mason but presented evidence and argument calling on the jury to have sympathy for the victim and the victim's family.

This claim should be summarily rejected by this Honorable Court for several reasons not the least of which is the United States Supreme Court's rejection of Booth today in Payne v. Tennessee, No. 90-5721 (june 27, 1991).

Further, a Booth claim must be preserved by a timely objection before the claim will be considered in a collateral proceeding. Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989); Eutzy v. State, 541 So2d 1095 (Fla. 1989). No objection was made below to the now challenged statements or evidence. Further, the claim was neither presented on direct appeal nor in Mason's original Rule 3.850 motions. Therefore, this claim is procedurally barred. Parker v. Dugger, 550 So.2d 459 (Fla. 1989).

Further, the evidence as alleged by capital collateral counsel is not the type of evidence which Booth and its progeny sought to prohibit. The victim's children testified as witnesses to the brutal slaying of their mother. The children were present during the murder and discovered their mother's body as she lay dying. This relevant and necessary testimony was not violative

of the precepts of Booth. And, it must be noted that all of the alleged Booth-type evidence was introduced in the guilt phase of trial and not in the sentencing phase. In Smith v. Dugger, 565 So.2d 1293 (Fla. February 15, 1990), this Honorable Court rejected a similar claim when the evidence was not presented in the penalty phase. This is true because Booth and its progeny required that a sentence of death be imposed based upon permissible aggravating factors and victim impact statements are not valid aggravating factors. As in Smith, supra, there is simply no way to find in the instant case that these matters now complained of had any bearing on the weighing of the aggravating and mitigating circumstances as instructed by the trial judge at the penalty phase. See Parker v. Dugger, 550 So.2d 459 (Fla. 1989).

ISSUE VI

WHETHER THE PENALTY PHASE JURY INSTRUCTIONS AND PROSECUTORIAL ARGUMENT SHIFTED THE BURDEN TO MR. MASON TO PROVE THAT DEATH WAS NOT APPROPRIATE, LIMITED FULL CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE WHICH OUTWEIGHED AGGRAVATING CIRCUMSTANCES, AND WERE CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

This claim is also procedurally barred as it is an issue that could have been and should have been raised on direct appeal. Buenoano v. State, 559 So.2d 1116 (Fla. 1990); Bolender v. State, 564 So.2d 1057 (Fla. 1990). Further, as this Court noted in Bolender, supra, the failure of trial counsel to object to this instruction, as well as the instructions Mason challenges in Issues III and IV, does not constitute ineffective assistance of counsel as the cases now relied upon by Mason were undecided at the time of his direct appeal and there is no merit to the underlying claim. See, also, Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir.).

ISSUE VII

WHETHER THE EXECUTION OF OSCAR MASON, A MENTALLY RETARDED, BRAIN DAMAGED AND MENTALLY ILL OFFENDER WHO FUNCTIONS AT THE LEVEL OF A CHILD, WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Penry v. Lynaugh, 109 S.Ct. 2934 (1989), the United States Supreme Court held that the Eighth Amendment does not preclude the execution of any mentally retarded person convicted of a capital offense simply by virtue of their mental retardation alone. Mason has been found to be only mildly mentally retarded. Under these circumstances the potential execution of Oscar Mason does not constitute cruel and unusual punishment.

CONCLUSION

The State respectfully urges this Honorable Court to reverse the lower court's Order granting a new sentencing hearing and affirm the lower court's ruling as to the issues raised by Mason on cross-appeal.

Respectfully submitted,

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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. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, and to Billy H. Nolas & Julie D. Naylor, Special Assistant CCR, P. O. Box 4905, Ocala, Florida 32678-4905, this 27 day of June, 1991.

OF COUNSEL FOR THE STATE OF FLORIDA