IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,867

BORIS McKINNEY

Appellant,

vs.

THE STATE OF FLORIDA

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

REPLY BRIEF OF APPELLANT

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TABLE OF CITATIONS

INTRODUCTION

May it please the Court:

All page references herein are to the Briefs. "D" refers to defendant and "S" to the State.

I

THE RECORD CLEARLY ESTABLISHES INEFFECTIVE ASSISTANCE OF COUNSEL AND THE INITIAL BRIEF CONTAINS A MOTION TO RELINQUISH JURISDICTION IF THE COURT WILL NOT CONSIDER SAME ON DIRECT APPEAL.

Appellee's assertion that no motion for relinquishment of jurisdiction to file a motion for post conviction relief in the trial court was filed herein is without merit. (S. 30, 31).

Rule 9.300 of Rules of Appellate Procedure does not set forth any particular form of motion in which to seek an order or other relief available under these rules except that it shall state the grounds upon which it is based, the relief sought, argument in support thereof and appropriate citations of authority; all of which are contained in our argument I.

In Defendant's Brief (D 61 par.3) while we argued that the record was replete with incidents showing ineffective assistance of counsel we moved that: "If the Court will not consider this issue on direct appeal, we respectfully request, with the provisions of Rule 3.850 in mind that the Court relinquish jurisdiction as to this issue and remand to the trial court for possible post conviction relief."

While we might concede that direct appeals are not as plentiful on this point because..."the review of a cold record on direct appeal provides an inadequate basis upon which to evaluate claims of ineffectiveness..." (S.30), the record in this case is red hot in that it is replete with the Court's frustration and vexation with defense counsel's repeated departure from basic principles of evidence, procedure and advocacy as well as defense counsel's own admissions as to his inability to cope with the machinations of the assistant state attorney, real and sometimes imagined.

We rely on our Initial Brief for facts and authorities which clearly manifest ineffectiveness in this cause. However, just briefly, the state's contention that failure to object to the state's opening that Defendant was asked to give a sworn statement and the prosecutor's discussion of its contents, was within the scope of defense counsel's sound strategy (S.32), ignores the fact that not only was the confession not sworn to, but was not even signed, nor witnessed. What kind of sound strategy would permit this wrong impression at the very outset to be lodged in the minds of the jury? The failure to object was just that: a failure to be effective. How can an untrue characterzation of a dead victim such as "nazi" by defense counsel, when he know there is no evidence of such, be argued, as did the state as an attempt by defense counsel to make the victim less appealing in the eyes of the jury? One need

only ask in what esteem do people hold those who engage in calumny? Nor was a defense objection to the attack in the prosecution's closing argument which was correctly overruled since there was no proof that deceased was a nazi any remedy for the uncalled for blight cast upon the deceased by defense counsel.

The state in its urging that ineffective assistance of counsel is not cognizable on direct appeal cites Meeks v. State, 382 So. 2d 673 (FLA.1980) and State v. Barber, 301 So. 2d 7 (FLA.1974) as authority.

In Meeks the defendant appealed from the denial by the trial court of a Post Conviction Petition a case totally different from the case at bar.

Barber is no longer authority for the theory of the State. That 1974 case was revisited by this Court in Stewart v. State, 420 So. 2d 862 (FLA. 1982) and by other courts in Whitaker v. State, 433 So. 2d 1352 (3rd D.C.A., 1983) and Gordon v. State, 469 So. 2d 795 (4th D.C.A. 1985), the holdings of which were that where it is apparent on the face of the record that counsel's assistance was ineffective it is correctly an issue to be included in a direct appeal.

Mann v. State 482 So. 2d 1360 (FLA.1986) cited as authority for the State's position that counsel's decision to object is strategic and may not be second guessed is not in point. In that case there were no objections to comments in final argument in the penalty phase. The Court ruled that the

record indicated the comments to be within the limits of fair comments and thus they could not be construed to cause substantial harm or material prejudice.

Neither is Wilson v. Wainright 472 So.2d 1162(FLA.1985) said by the State to have been approved at 493 So.2d 1019. In actuality, this Court affirmed in part and reversed in part, reducing a sentence in one murder to life because it occurred during a heated domestic confrontation. Another murder conviction was reduced to second degree.

Nor is Spaziano v. State, 429 So.2d 1344(2nd D.C.A.1983) supportive of the State's position. In that case Defense counsel in opening statement said Defendant had borrowed the car in question from an acquaintance. Defendant rested without the presentation of any evidence. The State's motion for mistrial was granted. Nothing in that decision supports the State in the case at bar.

Suffice it to say that a perusal of Appellant's Brief on this point evinces that the assistance of counsel in this case was as benevolent to Defendant's case, as was the proverbial bull in the china shop in its assistance to the shopkeeper.

At page 35 of the State's Brief it is stated that mere conclusary allegations of ineffectiveness do not set forth a cognizable claim, and refers to Combs v. State, 403 So.2d 418(FLA.1981).

We rely on our Initial Brief as to facts of ineffectiveness but feel compelled to point out that Combs does not stand

for that which the State, states. The appellant therein asserted no trial errors, but contended the death sentence was improperly imposed. In oral argument, however, he stated he may find it necessary to raise issues in later post conviction proceedings. This case, decided before Stewart v. State; Whitaker v. State and Gordon v. State (SUPRA) which cases affirmed direct appeal if ineffective assistance appeared on the record, required presentment of that claim to the proper appellate tribunal so that a remand to the trial court can be made to avoid unnecessary duplicitous proceedings.

To avoid unnecessary and duplicitous proceedings and upon the strength of the Stewart, Whitaker and Gordon cases we included that claim in our direct appeal. If in the opinion of this Court we erred then, and in that event, we moved for a relinquishment and remand in our Initial Brief.

Nowhere in our Initial Brief did we accuse defense counsel as unethical or a cheat which would be the only conclusion possible, if, as the State urges, some of his actions rather than being ineffective were planned tactical devices of astute counsel. There, indeed, would be a case for the Grievance Committee.

II

THE TRIAL COURT DID ERR IN ADMISSION OF TESTIMONY AS TO STATEMENTS AND ENTERING CONVICTIONS ON ALL CHARGES.

Sans the confessions there was no independent evidence of any wallet or watch, and indeed, even with the confession there was no evidence of any ring belonging to the deceased having been taken from him. While witness Lange from Nassau testified deceased wore a wedding band and a gold Rolex watch, the witness was not in Miami nor did he intimate Mr. Patela wore them on the day in question.

Jose Santos, the only eye witness did not hear any shots nor could he identify defendant (D.7). Officer Barnes asked deceased if it happened here and he nodded his head affirmatively, gave his name verified by a car rental agreement, told her where he stopped and furnished a description of the car and partial tag number.

The fire rescue crew was told by the victim that a black man had shot him. (S.5-6)

There was no evidence whatsoever that the victim uttered these statements in fear, of causa mortis, yet no objection was made by defense counsel.

These statements were rank hearsay and do not fall within the Hearsay exceptions of Section 90.804 (2)(b) of the Florida Statutes which provides:

> Statement under belief of impending death. - In a civil or criminal trial, a statement made by a declarant while reasonably believing that his death was imminent, concerning the physical cause or instrumentalities of what he believed to be his impending death or the circumstances surrounding his impending death.

There was no evidence that he believed his death was imminent in the case at bar. Whenever this court upheld statements as dying declarations there was more in the record than in the instant case.

In Torres-Arboledo v. State, 524 So.2d 403 (Fla.1988) the trial court improperly admitted murder victim's hearsay statement that black people tried to steal his medallion to emergency room physician, but this Court held that was harmless error where those statements were merely cumulative of properly admitted testimony of another witness, for although no one witnessed the shooting:

1. A witness testified defendant was in possession of gun immediately after shooting.

2. Other witnesses testified that when trio returned to the car, defendant had a gun in his hand and ordered the driver to "go."

3. The testimony established that three men tried to take victims gold chain and medallion worth about $400.00 and that victim was shot twice when he refused to give up the chain.