IN THE SUPREME COURT OF FLORIDA

ROBERT LACY PARKER,

Petitioner,

v. CASE NO. 74,978

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

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to Florida Rule of Appellate Procedure 9.100(h) and this Court's order, the Secretary of the State of Florida Department of Corrections responds to Parker's petition for writ of habeas corpus, by and through undersigned counsel, and asks this Court to deny all requested relief.

PROCEDURAL HISTORY

On February 25, 1982 a Duval County grand jury indicted Parker for two counts of first-degree murder for the killings of Richard Padgett and Nancy Sheppard, respectively. (R 3).[1] Three months later the grand jury filed an amended indictment charging Parker with a third count of first-degree murder for the killing of Jody Dalton. (R 133). At trial the jury found Parker guilty of first-degree murder on counts 1 and 2 (Padgett and Sheppard) and of third-degree murder on count 3 (Dalton). (R 409-11). Following the penalty phase, the jury recommended life imprisonment for each first-degree murder conviction. (R 434-

[1] "R" refers to the record on appeal in case no. 63,700.

35). The trial court sentenced Parker to life imprisonment for Padgett's murder (count 1), but overrode the jury's recommendation and sentenced him to death for Sheppard's murder. (R 472, 473).

Parker's trial counsel, Robert Link, also represented Parker on direct appeal and filed a brief raising twenty-two issues. This Court found no merit to any of the claims and affirmed Parker's convictions and sentences. Parker v. State, 458 So.2d 750 (Fla. 1984), cert. denied, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985). Parker filed his first motion for postconviction relief in May 1986, shortly before the governor signed his first death warrant. This Court affirmed the trial court's denial of relief in Parker v. State, 491 So.2d 532 (Fla. 1986).

Parker then filed a petition for writ of habeas corpus in federal court. Although the district court granted partial relief, the circuit court reversed that grant and denied the petition. Parker v. Dugger, 876 F.2d 1470 (11th Cir. 1989). Shortly thereafter, Parker's second death warrant was signed, prompting numerous filings in various courts.

On November 6, 1989 Robert Link petitioned the United States Supreme Court for certiorari review of Parker's convictions and death sentence.[2] Three days later, volunteer counsel filed a petition for writ of habeas corpus on Parker's behalf with this Court. The state responded and moved to dismiss the petition.

---

[2] The certiorari petition is attached to the state's motion to dismiss filed in the instant case on November 7, 1989.

On November 13, 1989 this Court stayed the execution and ordered that Parker "shall be allowed four (4) months from the date of this order within which to file any motions or petitions for any type of post-conviction or collateral relief, and may, within such time, file an amended habeas corpus petition."

Parker's current volunteer counsel, Jonathan Koch, filed the instant amended habeas petition with this Court and a second postconviction motion[3] with the trial court on March 8, 1990. Among other prayers for relief, the petition asked that the state court proceedings be stayed because of the pendency of a petition for writ of certiorari in the United States Supreme Court. (Petition at 5). The state responded on March 20, 1990.

The United States Supreme Court granted certiorari on June 28, 1990. Parker v. Dugger, 497 U.S. 1023, 110 S.Ct. 3270, 111 L.Ed.2d 780 (1990). In January 1991 it issued an opinion reversing the Eleventh Circuit and directing the State of Florida to return to state court for reconsideration of Parker's death sentence. Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). Before the case was returned to state court however, this Court issued a briefing schedule for the instant case and case no. 78,700 on November 19, 1991. Mr. Koch moved to stay these cases on December 13, 1991 until this Court reconsidered Parker's death sentence. On remand this Court eventually vacated Parker's death sentence and directed that he

---

[3] The denial of relief on that motion is the subject of case no. 78,700.

be resentenced to life imprisonment, which has been done. Parker v. State, 643 So.2d 1032 (Fla. 1994).

On March 2, 1995 this Court issued a consolidated briefing schedule for the instant case and case no. 78,700 and directed that "the guilt issues only" be addressed. (Emphasis in original.) Mr. Koch moved for a thirty-day extension of time, which this Court granted on March 21, 1995. This response is now filed pursuant to the Court's order.

The 1990 amended petition for writ of habeas corpus raised five issues: I) this Court should vacate its earlier decision approving the override; II) the trial court improperly considered victim-impact evidence in overriding the jury's recommendation; III) in the penalty phase the trial court improperly relied on evidence from a codefendant's trial; IV) appellate counsel was ineffective for failing to argue that A) the general verdict rendered by Parker's jury violated Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), and B) imposing the death penalty impaired Parker's right to trial by jury; and V) the trial judge did not consider nonstatutory mitigating evidence. Pursuant to this Court's order that only guilt phase issues be addressed, the only issue left for resolution in this case is IVA, the alleged Stromberg violation.

ARGUMENT

Parker argues that his trial produced "a classic Stromberg claim" (petition at 52) both because "it is literally impossible to tell whether the jury relied on the premeditated murder theory

or the felony murder theory with respect to" (id.) Sheppard's murder and because "it is clear that there was insufficient evidence to convict petitioner of the Sheppard murder on a felony murder basis." Id. at 53. According to Parker, therefore, his appellate counsel rendered ineffective assistance by not raising a Stromberg claim. As will be demonstrated, there is no merit to any Stromberg claim and, thus, no merit to the claim of ineffectiveness.

The indictment charged Parker with three counts of first-degree murder effected from "a premeditated design." (R 133-34). The state proceeded on the theories of both premeditated and felony murder, and the trial court instructed the jury on both theories. (R 367-68). The jury returned general, nonspecific verdicts finding Parker "guilty of murder in the first degree." (R 409, 410). On appeal this Court found the evidence sufficient to support Parker's convictions: "In addition to considering all other issues raised on appeal, we have conducted an independent review of the record on trial and find no reason to award a new trial." Parker, 458 So.2d at 754.

In sentencing Parker to death for Sheppard's murder the trial court found in aggravation that her murder occurred during a robbery based on Parker's taking her ring and necklace. (R 500). This Court, however, invalidated the felony murder (robbery) aggravator, holding that the evidence did not support it. Parker, 458 So.2d at 754. In his motion for rehearing Parker argued that by striking the felony murder aggravator this Court held that Sheppard's killing was not felony murder and

that, therefore, the trial court erred in instructing the jury on felony murder as to Sheppard. This Court denied rehearing. Parker raised the same claim, eventually citing Stromberg, in the federal courts. The Eleventh Circuit found the issue procedurally barred, Parker, 876 F.2d at 1476-78, and the United States Supreme Court dismissed the issue because it "improvidently granted" review of the claim. Parker, 498 U.S. at 323.

Parker states that "Stromberg stands for the proposition that a general verdict of guilty must be set aside if a verdict is supportable on one ground but insupportable on another, because it is impossible for a reviewing court to determine the ground on which the jury relied in reaching its decision." (Petition at 51). This statement, however, extends Stromberg far beyond that case's holding.

Stromberg was convicted of violating a California statute that prohibited the flying of red flags on three alternative grounds, one of which was a first-amendment right. The United States Supreme Court reversed the general verdict against her because it could not tell if her conviction rested on the unconstitutional ground. In a later case that Court stated that Stromberg does "not necessarily stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." Griffin v. United States, 112 S.Ct. 466, 471, 116 L.Ed.2d 371 (1991). Neither felony murder nor premeditated

murder is an unconstitutional ground on which to base a conviction. Furthermore, this Court has long held that when an indictment charges only premeditated murder, the state can proceed on the theory of felony murder as well as premeditated murder. E.g., Armstrong v. State, 642 So.2d 730 (Fla. 1994). Also, special verdicts as to premeditated or felony murder are not required. E.g., Parker v. State, 641 So.2d 369 (Fla. 1994); c.f. Schad v. Arizona, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (conviction under instructions that do not require the jury to agree on either premeditated or felony murder does not deny due process). Stromberg is factually distinguishable from and inapposite to the instant case, and any claim based on that case is meritless.

Parker's real complaint is about the sufficiency of the evidence to support the charge of felony murder regarding Sheppard's killing, and he attempts to extend Stromberg to cover such a situation. Griffin tried to extend Stromberg in a similar manner, but the United States Supreme Court disagreed with her effort to expand that case "to a context in which we have never applied it before." Griffin, 112 S.Ct. at 472. Thus, the Court refused to extend Stromberg to cases where "one of the possible bases of conviction was . . . merely unsupported by sufficient evidence." Id.

Pursuant to subsection 921.141(4), Florida Statutes, and Florida Rules of Appellate Procedure 9.140(f), this Court is obligated to decide if an appellant's conviction and sentence of death are legally proper. LeDuc v. State, 365 So.2d 149 (Fla.

1978). To fulfill this obligation, this Court will consider the sufficiency of the evidence to support a first-degree murder conviction even if an appellant does not raise the issue. E.g., Jones v. State, 20 Fla.L.Weekly S29 (Fla. Jan. 12, 1995); Fennie v. State, 648 So.2d 95 (Fla. 1994); Slawson v. State, 619 So.2d 255 (Fla. 1993); Fotopoulos v. State, 608 So.2d 784 (Fla. 1992); Jackson v. State, 559 So.2d 103 (Fla. 1992); Ponticelli v. State, 593 So.2d 483 (Fla. 1991); Watts v. State, 593 So.2d 198 (Fla. 1992); Asay v. State, 580 So.2d 610 (Fla. 1991); Pentecost v. State, 545 So.2d 861 (Fla. 1989); Kight v. State, 512 So.2d 922 (Fla. 1987); Williamson v. State, 511 So.2d 289 (Fla. 1987); Brown v. State, 473 So.2d 1260 (Fla. 1985); Mills v. State, 462 So.2d 1075 (Fla. 1985); LeDuc. As set out earlier, this Court determined that the evidence was sufficient to affirm Parker's convictions even though counsel did not raise the issue on appeal.

This case is a far cry from Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985), where this Court found appellate counsel ineffective for failing to challenge the evidence of premeditation. There was no possible felony in Wilson, so the state's only theory was premeditation. Here, on the other hand, there were two theories and sufficient evidence to charge on both. The record contains enough evidence of premeditation, as pointed out by counsel's acknowledgement that Parker knew Sheppard would be killed (R 2193, 2243), that no prejudice can be shown from any failure to question the sufficiency of the evidence as to felony murder. There is, therefore, no merit to

any claim regarding the sufficiency of the evidence or appellate counsel's performance in regard thereto.

Based on Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court has held that one alleging ineffective assistance of appellate counsel

> must show, first, that there were such specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and second, that the failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome under the governing standards of decision.

Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985). Parker cannot meet this standard.

Appellate counsel did not challenge the sufficiency of the evidence supporting Parker's conviction. As set out above, this Court must and did determine the sufficiency of the evidence, so any failure of counsel to raise the issue is not an omission of such magnitude that it constituted professionally unacceptable performance that undermined confidence in the outcome. E.g., cases cited, supra, where sufficiency of the evidence was not raised on appeal. Also as stated earlier, Stromberg is inapplicable to this case, so not citing it to this Court does not meet the two-part test set out in Johnson. Additionally, appellate counsel's failure to raise nonmeritorious issues does not constitute ineffective assistance. E.g., Groover v. Singletary, 20 Fla.L.Weekly S151 (Fla. Apr. 6, 1995); Chandler v. Dugger, 634 So.2d 1066 (Fla. 1994); Swafford v. Dugger, 569 So.2d

1264 (Fla. 1990); King v. Dugger, 555 So.2d 355 (Fla. 1990). There is no merit to any complaint about the sufficiency of the evidence to support all of Parker's convictions or to the current "Stromberg" issue. Parker has failed to demonstrate that appellate counsel rendered ineffective assistance, and this petition should be denied.

CONCLUSION

As demonstrated by the foregoing argument, Parker's appellate counsel was not ineffective for not raising the nonmeritorious claim argued in the instant petition. Therefore, the respondent asks this Court to deny the petition for writ of habeas corpus.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Barbara J. Yates

BARBARA J. YATES
Assistant Attorney General
Florida Bar No. 293237

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 U.S. Mail to Jonathan C. Koch, Esq., Post Office Box 2311, Tampa, Florida 33601-2311, this 8th day of May, 1995.

Barbara J. Yates

BARBARA J. YATES
Assistant Attorney General