IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,366

DAVID KIDD GORHAM,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGES**

PRELIMINARY STATEMENT

Appellee will utilize the same symbols used by appellant: "Tr." will denote record from evidentiary hearing, "Trial" will denote record from October 1982 trial, "SR" will denote the supplemental record containing transcript from April 1982 trial.

STATEMENT OF THE CASE

Appellee does not accept appellant's slanted version of the statement of case and offers the following;

Appellant was convicted of first degree murder and attempted robbery. Following a jury recommendation for life, the judge sentenced appellant to death. Gorham v. State, 454 So.2d 556 (Fla. 1984). Although the trial court found four aggravating factors, this court struck two.[1] Appellant's sentence was affirmed based on the finding that the crime was committed while appellant was under a sentence of imprisonment, and the crime was committed during the course of a robbery. Gorham, 454 So.2d at 559.

Appellant filed a motion for post-conviction relief which was denied by the trial court without an evidentiary hearing. This court affirmed apart of the trial court's order but remanded for an evidentiary hearing on four specific claims. Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988). The instant appeal pertains to the denial of those claims following an evidentiary hearing.

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[1] There was evidence admitted at trial to support the finding of the aggravating factor that defendant committed a prior violent felony. Appellant had been convicted of robbery. (Trial 788). For an unexplained reason the trial court did not include this factor in the sentencing order. (Trial 1007-1008).

STATEMENT OF THE FACTS

Appellee does not accept appellant's version of the facts regarding the trial testimony. Appellee will rely on the facts as outlined in this court's direct appeal opinion. Gorham, 454 So.2d at 558-559. The following relevant facts not appearing in that opinion are;

Ada Johnson testified that no deal existed between her and the state regarding her testimony. (Trial 540).

Appellee does not accept appellant's slanted version of the facts regarding the evidentiary hearing. Although not inaccurate, the statement contains argument and editorial comments rather than an objective rendition of the evidence presented. The testimony presented consisted of the following;

Mike Gelety, appellant's trial counsel, testified that he was never told of any deal between the state and Ada Johnson, although he made a specific request for such information. (Tr. 32). He further stated that he was never informed that Loretta Forehand gave a statement to the police on the night of the murder, nor was he told about Slocum's statement concerning two other potential suspects. (Tr. 31,35). Gelety stated that had he known the existence of the note containing Slocum's statement, he would have figured out a way to get it before the jury regardless of the fact that it was inadmissable hearsay. (Tr. 47).

Gelety admitted that appellant never mentioned Forehand's presence at the scene during his trial testimony. (Tr.

59). He stated that he spoke to Forehand during the first trial and that she knew nothing about the case. (Tr. 62-64). He decided not to call her as a witness because she was not lucid, she was eccentric and that her testimony was not helpful. (Tr. 62-66, 83,86,100).

Loretta Forehand testified that she spoke to police the night of the murder. (Tr. 132). She denies ever speaking with Mr. Gelety. (Tr. 134,157). She testified that she heard two shots coming from the garage and at that same time she saw appellant walking across the street. (Tr. 121-122, 126-132). Two men emerged from where the shots were fired and ran right by her. (Tr. 129,149). She did not see them drop anything on the street. (Tr.130-131). She asked appellant how his wife was and she saw him pick something up from the ground and put it in his pocket.(Tr.123-124,161). She told appellant's wife about what happened. (Tr. 180-181).

Detective Pyroth testified that Johnson was a C.I. for Detective Murray. (Tr. 217). Pyroth also testified that Willie Pickett may have been wanted for questioning regarding the whereabouts of the murder weapon. (Tr. 221). He further stated that he never heard anyone offer a deal to Johnson, nor did hear that Forehand had ever given a statement to the police. (Tr. 222,225).

Johnson stated that she was never offered any deal in exchange for her testimony. (Tr. 245,248). She stated that she gave a sworn statement claiming that a deal had in fact been made

in order to get appellant's counsel to buy her furniture. (Tr. 265,266-269). She also stated that she became a confidential informant for the state but was not a C.I. for appellant's case nor was she a C.I. for the police at the time of this prosecution. (Tr. 273,278,282). Johnson stated that when she wrote the motion for mitigation she was under the impression that Kern and Murray would speak on her behalf. She was given that information from her mother. (Tr. 291). She did not receive any such recommendation and her motion for mitigation of sentence was denied. (Tr. 294).

Attorney Brian McDonald testified as an expert witness for appellant. (Tr.339). McDonald stated that Gelety should have hired an expert. He also opined that Gelety's decision not to call Forehand was premature as he (Gelety) did not have enough information upon which to make a tactical decision. McDonald later admitted that he was unaware that appellant's version of what happened that night was different than Forehand's and such information is significant. (Tr. 371). However, that information does not preclude Gelety from making a proper investigation. (Tr.371).

Tom Kern testified that he did not remember the existence of a note regarding Solcum's statement. (Tr. 386). He was unaware that Forehand allegedly spoke to police the night of the crime nor was he aware that Johnson filed a motion to mitigate. (Tr. 558, 557). Kern also stated that there was no deal between the state and Johnson. (Tr. 554).

Judge Dimitirouleas testified that no deal was made between Johnson and the state. (Tr. 592-593).

Jim Oscar Smith's attorney, Hillard Moldoff, testified that no deal was made involving his client and Johnson's testimony. Smith received probation based on a lack of evidence and not because of any deal between the state and Johnson. (Tr. 609-614).

Steven Sessler, private investigator for appellant, testified that appellant's present counsel, did not offer Johnson anything in exchange for her sworn statement, nor was Johnson ever told that her testimony would not be used in court. (Tr. 407-410).

Appellant's girlfriend, Louise Owens, testified that appellant told her about Forehand and that she gave that information to Mr. Gelety. (Tr. 430-432). She stated that she never told Gelety the substance of Forehand's information. (Tr. 433).

Detective Murray the lead law enforcement officer in the investigation, testified that Pickett was never a suspect and his name was not given to the State Attorney's Office. (Tr. 445,450). Pickett was only wanted for questioning regarding the murder weapon. (Tr. 452,488). A BOLO was never issued for Pickett. (Tr. 445,489). Slocum's statement was not given much credence. (Tr. 453,491). Murray never heard of Forehand even though officers spoke to hundreds of people over a two day period after the murder. (Tr. 497-498). Since he was the lead detective, he would have been given her name. (Tr. 498).

Detective Murray testified that Ada Johnson was a confidential informant for him, but never in this case. (Tr. 471, 196, 215). A ten dollar payment was given to her after the first trial but not for any information regarding this case. (Tr. 471). Murray never made any recommendation that Johnson should receive a more lenient sentence. (Tr. 480,496).

SUMMARY OF THE ARGUMENT

The trial court correctly determined that Ada Johnson's testimony was not given in exchange for a more favorable sentence for her or her boyfriend, Jim Oscar Smith. Since no exculpatory evidence existed the state cannot be guilty of a Brady violation.

The trial court correctly determined that the state was not required to give to appellant any information concerning other "suspects" as it was not discoverable.

The trial court correctly determined that Mr. Gelety was not ineffective in failing to call Ms. Forehand as a defense witness in the guilt phase. His decision not to call her was sound trial strategy. The trial court correctly found that Ms. Forehand's testimony would not have been helpful nor was she a very credible witness.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DETERMINED THAT THE STATE DID NOT OFFER A STATE WITNESS LENIENT TREATMENT IN EXCHANGE FOR INCULPATATORY TESTIMONY AGAINST APPELLANT

Appellant claims that the state, in violation of Brady v. Maryland, 373 U.S 83 (1963), failed to disclose promises of leniency made to Ada Johnson in exchange for inculpatory testimony against him. After an evidentiary, the trial court determined that no such promise or deal existed. (Tr. 754-755). The trial court's factual findings are more than supported by the record.

Appellant claims that the trial court incorrectly found that no deal ever existed between Johnson and the state. Appellant has failed to establish an abuse of discretion in the trial court's factual findings, consequently the judge's findings must be sustained. Williams v. State, 16 FLW 1769, 1770 (2nd DCA July 5, 1991); Kelly v. State, 569 So.2d 754, 762 (Fla. 1990).

Appellant's challenge to the trial court's order rests on the following evidence presented by appellate at the evidentiary hearing; 1. Ada Johnson's pro se motion to mitigate sentence that was filed on May 13, 1982. (See appellant's exihibit A). In that sworn motion Johnson asks the trial court to mitigate her sentence based on the death of her new born twins, her poor health and the alleged recommendations of ASA Tom Kern

and Detective Murray. The motion was denied absent any response by the state on May 26, 1982; 2. Ada Johnson gave a sworn tapped statement to Appellant's present counsel claiming that her common-law husband Jim Oscar Smith was given leniency in exchange for Johnson's testimony.(See appellant's exhibit B). Appellant claims that this evidence is corroborated by the surrounding facts. Appellee strongly disagrees.

At the evidentiary hearing Ms. Johnson repeatedly stated that no deal was ever made between her the state. (Tr. 245-248 259-260, 263 266-269, 293-294, 305, 309, 314, 319). When appellant attempted to impeach her with a prior sworn statement, Ms. Johnson alleged that the prior sworn statement was given in exchange for a promise that appellant's counsel would buy Ms. Johnson a couch. Ms. Johnson was also told that her statement would not be admissible in court. (Tr. 256, 259-261, 265-269,314).

Assistant State Attorneys Tom Kern and William Demitiouleas, and Detectives Pyroth and Murray, all stated that no deal had ever been made to Johnson. (Tr. 225, 480, 496, 554, 592-593).

Further evidence corroborating the fact that no deal was made between the state and Ms. Johnson is the fact that Johnson's motion to mitigate was denied. She was sentenced to three years imprisonment and she served three years in jail. (Tr. 583-586). More telling is the fact that even after her motion was denied, Ms. Johnson still testified at appellant's

retrial. (Tr. 306). Consequently, irrespective of the conflicting evidence the unrefuted fact remains that Ms. Johnson testified at the second trial regardless of the fact that she did not receive any leniency. Appellee submits that such uncontroverted facts support the trial court's finding that no deal ever existed between Johnson and the state.

Appellant claims that during cross examination of Johnson at trial, he was denied the opportunity to impeach Ms. Johnson with her prior motion to mitigate. Such evidence would not have affected the outcome of the trial as it would have clearly established that the state did not have a deal with Ms. Johnson as she was still serving her original three year sentence.

Ms. Johnson's sworn statement to Holly Skolnick, appellant's defense counsel, makes reference to a deal involving lenient treatment to Jim Oscar Smith in exchange for her testimony. Not only was this sworn statement recanted by Ms. Johnson, it was also refuted by the testimony of now Judge William Dimitirouleas (then assistant state attorney) and Jim Oscar Smith's attorney, Hillard Moldoff (Tr. 593, 609-614). Appellant has failed to establish any legal reason why the trial court's findings should not be upheld by this court. Kelly.

Appellant also claims that Ms. Johnson's confidential informant status is also Brady material. Appellant is in error. First of all it has not been established that Ms. Johnson was a C.I. in appellant's case. Quiet to the contrary, none of Ms.

Johnson's informant activities were performed during this case. (Tr. 274, 471). Appellant's reliance on United States v. Shaffer, 789 F.2d 682 (9th Cir. 1986) is unavailing. There the federal appellate court found unrelated informant activity relevant to impeach a witness's statement that he had never participated in any other heroin transactions. Shaffer, 789 F.2d at 689. The informant activity performed in unrelated cases was only relevant to the extent that it rebutted a prior inconsistent statement. Informant activity is not per se Brady material in and of itself. The fact that Mr. Kern stated that he would have revealed Ms. Johnson's informant status to Appellant is hardly dispositive of this issue.

The existence vel non of any arrangement between Ms. Johnson and the state is only relevant to the extent that a promise of leniency was interpreted by the witness as contingent upon the nature of any testimony. Marrow v. State, 483 So.2d 17 (Fla. 2d DCA 1985). In the instant case such a contingency did not exist. (Tr. 293-294). Appellant has failed to demonstrate how the trial court abused it's discretion in finding that no deal existed between the state and Ms. Johnson. Kelly. A fortiori, appellant's alleged Brady claim must be denied.

POINT II

THE TRIAL COURT CORRECTLY DETERMINED THAT THE STATE DID NOT WITHHOLD ANY MATERIAL EVIDENCE IN VIOLATION OF BRADY V. MARYLAND

Appellant claims that the state withheld evidence regarding the existence of two other suspects and also failed to disclose that a potential witness, Willie Pickett, may have some information about the case. Appellee asserts that the trial court properly determined that this information was not relevant.

Specifically Appellant claims that the police had in their possession a handwritten note which revealed that a state witness, Charles Slocumbs, believed that two men from Deerfield may have had something to do with this crime. (State's exhibit 1.)

In order to demonstrate that he is entitled to relief, Appellant must demonstrate that the state withheld material evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). On numerous occasions this Court has applied the rule articulated in Brady. In a prior opinion regarding Appellant, this Court has reiterated the definition of materiality;

> "The rule enunciated in Brady is that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." As noted by the Supreme Court, "the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the

> outcome of the trial, does not establish 'materiality' in the constitutional sense." citing to United States v. Agurs, 427 U.S. 97 (1976).

Gorham v. State , 521 So.2d 2067, 1069 (Fla. 1988).

Applying this test to the instant case it is apparent that Mr. Slocum's hunch that others may have been involved in this crime was not discoverable Brady material. Slocum's statement that two other men had previously stolen from the victim coupled with the fact that one of them just bought a car can not seriously be characterized as material evidence. There was no evidence to confirm that the victim had ever reported any such theft. (Tr. 36). The fact that Tom Kern would have given this information to appellant does nothing to alter it's minimal impact. Tom Kern also stated that he would have given the information even though he did not believe it was discoverable. (Tr. 543, 546). Furthermore, the note regarding the two "potential" suspects is simply apart of the police investigatory work and is not subject to discovery. Perry v. State, 395 So.2d 170, 173 (Fla.1981).

Lastly, Slocum's theory was accessible to the defense as he was a state witness and therefore subject to deposition. (Trial 439-441). Appellant has failed to demonstrate how Slocum's hypothesis could not have been discovered through reasonably diligent preparation. Perry, 395 So.2d at 174; Breedlove v. State, 413 So.2d 1, 4 (Fla. 1982).

Also without merit is the claim that the state was required to give Appellant any information regarding Willie Picket. Willie Picket was never a suspect. (Tr. 452, 488) The police contemplated that he may have some knowledge regarding the murder weapon. (Tr. 488). A BOLO was never even formally issued for him. (Tr. 489). Again this information is simply apart of the police department's investigatory work and is not subject to discovery. Perry. Furthermore Appellant has failed to demonstrate materiality. Gorham. The trial court properly determined that the state did not withhold any information that would constitute Brady material.

POINT III

THE TRIAL COURT CORRECTLY DETERMINED THAT APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Based on factual findings articulated in the trial court's order, the court correctly determined that Mr. Gelety's performance was not ineffective. (Tr. 754-755). The essence of appellant's argument on appeal is that the trial court's findings are erroneous. Appellee strongly disagrees.

Appellant claims that trial counsel was ineffective for failing to fully investigate/interview Loretta Forehand. Had a more complete interview taken place, appellant alleges that trial counsel would have discovered that Ms. Forehand had compelling exculpatory evidence. The evidence adduced at the post-conviction hearing completely dispels appellant's contention.

Mr. Gelety testified that he had spoken to Ms. Forehand during the first trial for several minutes. It became readily apparent that she knew nothing about the case, nor did she know appellant that well. (Tr. 61-62). Any information that she conveyed to Mr. Gelety about appellant consisted of very general statements that he was a good man. (Tr. 63). Based on her lack of knowledge regarding the crime or appellant, her eccentric nature and unpredictability Gelety made a strategic decision not to call Ms. Forehand. (Tr. 61-61, 83, 86, 101). Appellant has failed to overcome the strong presumption of effective assistance that is attached to Mr. Gelety's performance. State v. Bolender, 503 So.2d 1247, 1249 (Fla. 1987).

Although the trial court's factual findings are more than supported by the record and therefore must be sustained, Kelly v. State, 569 So.2d 754, 762 (Fla. 1990), Ms. Forehand's account of the events are further impeached with the following evidence. If Ms. Forehand was actually an eyewitness who spoke to appellant at the scene why did he (appellant) fail to even mention this "exculpatory" evidence during his testimony at the first trial. (Tr. 59, SR 4-7). As a matter of fact appellant testified that he was unaware of any eyewitnesses that the state may have known about. (SR 16, 19). Appellant has given three different versions of how he obtained the victim's credit cards. (Tr. 90-91, SR 15, 20-21, 26). Furthermore Mr. Gelety's case notes corroborate his testimony that he spoke to Ms. Forehand yet she denies ever speaking to him. (Tr. 157). Three other witnesses, Assistant State Attorney Tom Kern, lead Detective Murray and Detective Pyroth, testified that Ms. Forehand did not speak to officers at the scene the night of the crime. (Tr. 222, 498, 558). The trial court correctly determined that Ms. Forehand's testimony was of little value to the defense. Jones v. State, 528 So.2d 1171, 1173-1174 (Fla. 1988).

Contrary to appellant's assertion otherwise, Ms. Forehand's testimony did not corroborate appellant's most recent defense that he found the credit cards on the ground immediately after the shooting. The fact that she saw appellant pick up something from the ground (Tr. 123) does nothing to explain how he obtained the victim's credit cards as Ms. Forehand also stated

that the two men she saw running from the scene did not drop anything. (Tr. 130-131). In other words if the two men Ms. Forehand claims killed the victim ran by her and they did not drop the victim's property then how did the victim's credit cards get on to the street outside the warehouse before the victim was killed? Nor does Ms. Forhand's testimony explain the single most damaging evidence, i.e., appellant's fingerprints were found on the victim's personal papers which were discovered right next to the body? Ms. Forhand never saw appellant drop anything, she testified that he picked something up at put it in his pocket. (Tr. 123). This testimony contradicts appellant's assertion that he dropped the victim's papers on the street and some unknown person must have picked them up, went into the warehouse and placed the papers next to the body. In summation, Ms. Forehand's testimony contradicts appellant's various versions of what happened that night. Her testimony is anything but helpful to appellant's defense.

The trial court properly found that Mr. Gelety did in fact speak to Ms. Forehand. The trial court was also correct in finding that Mr. Gelety did not call her as a witness based on sound trial strategy as she was not credible. (Tr. 754-755). The trial court's legal determination that trial counsel was not ineffective was correct and must be sustained by this court. Jones , supra.

CONCLUSION

WHEREFORE, based on the foregoing facts and relevant case law, Appellee respectfully requests that this court AFFIRM the trial court's order in it's entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been furnished by United States Mail to: STUART H. SINGER, HOLLY R. SKOLNICK, AND MICHELLE A. FONGYEE, ESQUIRE, 1221 Brickell Avenue, Miami, Florida 33131, and THOMAS K. EQUELS, ESQUIRE, 1500 San Remo Avenue, Suite 200, Coral Gables, Florida 33146, this 22nd day of August, 1991.

Of Counsel

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