IN THE SUPREME COURT OF FLORIDA

NOLLIE LEE MARTIN,

Appellant,

v. CASE NO. 79,780

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE ~~FIFTEENTH~~ 2nd JUDICIAL CIRCUIT
IN AND FOR ~~PALM BEACH~~ Leon COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The Florida Parole and Probation Commission conducted an investigation for the Executive Clemency Board pursuant to the Governor's request dated September 13, 1991. As a result of that investigation, authorized by Rule 7, Rules of Executive Clemency (1986) [and new Rule 15, Rules of Executive Clemency (1992)], Martin's case was set to be heard at the regular meeting of the Executive Board Tuesday, March 10, 1992, at 9:00 a.m. Martin's counsel was unable to attend and voluntarily submitted a video tape presentation thereafter. After reviewing the clemency materials, the Governor declined, by written notification, to grant clemency.

On April 7, 1992, Governor Lawton Chiles signed a death warrant setting the week for Martin's execution to commence at 12:00 p.m., Tuesday, May 5, 1992, through 12:00 p.m., Tuesday, May 12, 1992. The execution has been set for 7:00 a.m., Wednesday, May 6, 1992. Said action resulted from the Governor's determination that no clemency would be extended to Nollie Lee Martin for the 1977 first-degree capital murder of Patricia Greenfield.

Martin filed a civil complaint in the Second Judicial Circuit in and for Leon County, Florida, on May 1, 1992, seeking a temporary injunction and stay of execution asserting he was denied a fair clemency consideration. The State filed a motion to dismiss the complaint and a hearing was set for May 4, 1992, at 3:00 p.m., before Circuit Judge Gary. After oral presentation, Judge Gary granted the State's motion to dismiss. This appeal follows.

On May 5, 1992, Martin's counsel submitted the attached letter (Appendix A), which reflects Martin has sought clemency once again, presenting additional evidence (all of which was made a part of Martin's latest Rule 3.850 motion).

ARGUMENT

WHETHER THE CLEMENCY PROCESS FAILED TO AFFORD MARTIN MINIMAL DUE PROCESS, NOTICE AND THE OPPORTUNITY TO BE HEARD

The Circuit Court granted the Defendants' motion to dismiss because Martin failed to state a cause of action upon which relief may be granted.[1] The granting of clemency is governed by Art. IV, Sec. 8, Constitution of Florida (1968) ". . . the governor may . . . with the approval of three members of the cabinet, grant full or conditional pardons . . . offenses." Martin suffers from a grave misperception that he is "entitled" to clemency - let alone clemency consideration. Albeit, Martin's argument entails both state and federal constitutional provisions, he fails to acknowledge that clemency is the exclusive right of the Executive; Sullivan v. Askew, 348 So.2d 312, 316 (Fla.1977) (prohibition against legislative encroachment

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[1] Enjoining the Governor regarding clemency will not stop the force and effect of the warrant that issued. Sec. 922.09, Fla.Stat., which requires that "the sentence shall not be executed until the Governor issues a warrant . . . and transmits it to the warden, directing him to execute the sentence at the time designated in the warrant," has nothing to do with the Executive's dispensing executive clemency. While the two functions routinely are considered together, there exists no "provision, mandate or right" that the Governor's execution of his statutory responsibility to sign a warrant is in any way tied to his clemency authority. See Jarvis v. Chapman, 159 So.2d 282 (Fla.1935). See also Sec. 922.14, Fla.Stat., which provides that "if a death sentence is not executed because of unjustified failure of the Governor to issue a warrant, or for any other unjustified reason, on application of the Department of Legal Affairs, the Supreme Court shall issue a warrant directing the sentence to be executed during a week designated in the warrant."

Moreover, Sec. 922.06, Fla.Stat., provides that a stay of execution "may be stayed only by the Governor or incident to an appeal." Martin's circumstances fall outside the provisions of the statute and he has not asserted anything to the contrary.

upon executive clemency power is equally applicable to the judiciary); Ex Parte White, 178 So.2d 876 (Fla.1938); Dugger v. Williams, 593 So.2d 180, 183 (Fla.1991), France v. State, 436 So.2d 428 (Fla. 5th DCA 1983); In re Advisory Opinion of the Governor, 334 So.2d 561 (Fla.1976), and as such, the courts may not "intrude on the proper execution of the executive power." In Bundy v. Dugger, 850 F.2d 1402 1423-1424 (11th Cir.1980), the court observed in similar litigation that Florida's clemency procedures do not create a liberty interest protected by the Fourteenth Amendment. Hewitt v. Helms, 456 U.S. 460 (1983). Moreover, "no specific substantive predicates govern this discretion." As observed in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.1978):

> Meachum [v. Fano, 427 U.S. 215 (1976)] indicates that the clemency decision of the governor and cabinet of Florida did not infringe or implicate any interest protected by the Due Process Clause. . . . This Court is not prepared to hold that in so choosing Florida's executive branch triggered the requirements of Fourteenth Amendment procedural due process. To hold otherwise would involve both the federal and state judiciaries in issues and discretionary decisions which, as Schick v. Reed, supra, intimates, are not the business of judges. . . .

Spinkellink v. Wainwright, 578 F.2d at 619.

Martin argued below that his counsel "was led to believe that the Florida Parole Commission would play no active role in the decision-making process in his case - specifically, that it would make no findings concerning the merits of his application and it would make no recommendations on whether to grant or deny clemency. Accordingly, he made no effort to advocate his case

with the Parole Commission. . . . Because the Parole Commission's findings and recommendation affected the outcome of his clemency proceeding, he was plainly harmed by the deprivation of notice and the opportunity to be heard before the Parole Commission." (Complaint, page 4) (emphasis added).

Martin's appeal is groundless. The "report" of the three Parole Commissioners who conducted Martin's hearing for the Executive Clemency Board is the report contemplated pursuant to Rule 7(a), Rules of Executive Clemency. "A report of the Commission's investigation, including a transcript of the statements or testimony shall be provided to the Governor and members of the Cabinet. . . . Along with the report, the Governor or any member of the Cabinet may request a recommendation from the Commission." (Rule 7(a)).

The Parole Commission members who conducted Martin's hearing recorded their individual thoughts regarding Martin's presentation for clemency. This in no way changed the complexion of the non-adversarily clemency proceeding into an adversarily one. Martin notes that the interviews were conducted in the same fashion as previous clemency interviews. At the interview, however, he learned through discussions with the Commissioners that "each would given their 'impressions' to the Governor."[2] Once Martin's counsel, Richard Burr, "uncovered" this departure from what he knew to be the "normal practice", he took no action to seek clarification or provide additional information to the

[2] See both Jennifer L. Greenberg's and Mr. Burr's affidavits dated April 30, 1992, and May 1, 1992, respectively.

Parole Commission members who conducted the interview or the Governor and Cabinet. He has pointed to no specific fact or argument that he would have made if he had only "known".

The Governor and Executive Clemency Board may either accept, reject or consider in part or completely these impressions. As observed in Bundy, 850 F.2d at 1424, "[T]he clemency rules do not require the Governor to make any factual findings in order to deny clemency to a capital defendant." Moreover, while the Executive Clemency Board has chosen to set out operating rules, Rule 2, Rules of Executive Clemency (1986), ". . . nothing contained herein can or is intended to limit the authority given the Governor or the Cabinet in the exercise of this constitutional prerogative." See also Rule 2, Rules of Executive Clemency (1992).

Martin's assertion of harm resulting from this process is bottomed on the notion that counsel would have "advocated meaningfully for clemency" with the Parole Commission "if he had been given notice that the Commission would be making a recommendation." Significantly absent from Martin's assertion of harm is any revelation as to what more he would have offered to the Parole Commission that he did not offer to the Governor and other members of the Executive Clemency Board who have the constitutional prerogative to decide clemency.[3]

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[3] Martin sought a temporary injunction or stay of execution in order that he might be afforded "the careful review which his cause deserves and a fair opportunity to present his case. . . ." The Governor has declined to grant any relief via clemency. The likelihood of obtaining a more careful review is not the issue. At no time prior to the denial of clemency did Martin or his counsel voice any concerns that the process was not being

Martin did not demonstrate harm because nothing bars him from seeking further audience with the Governor and Executive Clemency Board for clemency. Rule 17, Rules of Executive Clemency (1986), and Rule 17, Rules of Executive Clemency (1992), provide that the Governor or any member of the Cabinet may propose a case for clemency at any time without going through the Parole Commission interviews ". . . [A]ny such case may be acted upon by the Governor with the approval of three members of the

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conducted in a careful review. Martin has produced neither reason nor case authority to support his claim that he has been deprived of some "constitutional right." His reliance on the decision in Dugger v. Williams, 593 So.2d 180 (Fla.1991), is odd. In Dugger v. Williams, the Florida Supreme Court held that the 1986 change in Sec. 944.30, Fla.Stat., did not relieve the Department of Corrections from its responsibility of notifying the Executive Clemency Board that a capital defendant had completed ten years incarceration without any disciplinary reports and that said inmate had made a satisfactory adjustment. The issue discussed by the specially concurring opinion addressed whether an ex post facto issue was raised, not a due process claim, which is the argument tendered by Martin. The Court majority held:

> . . . On its face, the statute does no more than direct DOC to recommend a commutation of sentence. This is entirely within the legislative prerogative since DOC was created by the legislature. §20.315, Fla.Stat. (Supp.1990). The executive still retains full discretion, subject only to its own Rules of Executive Clemency and the state constitution to accept or reject the recommendation. . . .

593 So.2d at 183.

Cabinet and nothing contained herein shall limit the exercise of that power." (emphasis added).[4]

CONCLUSION

WHEREFORE, based on the foregoing, Appellee requests this Honorable Court deny any and all requested relief.

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 hand delivery to Mr. Richard Burr, Esq., 99 Hudson Street, Suite 1600, New York, New York 10019, this 5th day of May, 1992.

CAROLYN M. SNURKOWSKI
Assistant Attorney General

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[4] Indeed, Martin has, via letter dated May 5, 1992, sought further clemency consideration.