IN THE SUPREME COURT OF FLORIDA

RICHARD HAROLD ANDERSON,

Appellant,

v. Case No. 80,844

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Petitioner filed a Rule 3.850 motion to vacate urging some sixteen (16) separate claims for review. On this appeal he raises only nine (9) issues. Any claim presented below not urged here is deemed abandoned. Cf. Atkins v. Dugger, 965 F.2d 952, 955, fn. 1 (11th Cir. 1992); Doyle v. Dugger, 922 F.2d 646, 649 - 50, n. 1 (11th Cir. 1991); Duest v. Dugger, 555 So.2d 849 (Fla. 1990).

STATEMENT OF THE CASE AND FACTS

Appellant Richard Anderson was tried and convicted of first degree murder and sentenced to death. Direct appeal resulted in affirmance of the judgment and sentence. Anderson v. State, 574 So.2d 87 (Fla. 1991), cert. denied, ___ U.S. ___, 116 L.Ed.2d 83 (1991).

Thereafter, appellant filed a motion for post-conviction relief (PCR 8 - 43) which the trial court summarily denied (PCR 44).

This appeal follows.

SUMMARY OF THE ARGUMENT

I. The lower court did not err reversibly in denying post-conviction relief because of an alleged violation of Chapter 119. Much of that which was requested was not under the control of the state attorney. Appellant did receive some material from the state attorney.

II. The lower court did not err in failing to hold an evidentiary hearing as most of the issues presented were either procedurally barred or otherwise not cognizable collaterally. The ineffective assistance of trial counsel claim was easily resolvable without the need for an evidentiary hearing.

III. Trial counsel did not render ineffective assistance of trial counsel. Contrary to appellant's assertion, counsel was prepared to present mitigating evidence at penalty phase but was precluded by appellant. There is no violation of Ake v. Oklahoma, 470 U.S. 68 (1985). Trial counsel did not fall below Sixth Amendment standards by failing to object to the prosecutor's closing argument since he used it to his advantage, he is not charged with anticipating appellate decisions three years ahead of time and the comments of the prosecutor are a mere tautology.

IV. Appellant's complaint about the corpus delicti is barred; it was a question for direct appeal. This Court determined there was sufficient evidence to convict.

V. Appellant's attack on the CCP instruction is procedurally barred since not raised on direct appeal as required

by Florida law. His challenge to the pecuniary gain instruction is similarly barred; and it was not even raised in the motion to vacate.

VI. The complaint about improper prosecutorial argument and reliance on nonstatutory aggravating factors is barred; the claim is one for direct appeal.

VII. Appellant's assertion that the jury was misled by its sense of sentencing responsibility is procedurally barred as it was a question to be raised, if at all, on direct appeal.

VIII. The claim that the trial court refused to find mitigating evidence is now procedurally barred; it was an issue for direct appeal.

IX. Appellant's argument that the trial was fraught with procedural and substantive errors is a question to be asserted on a direct appeal and is procedurally barred from collateral consideration.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED REVERSIBLY IN DENYING POST-CONVICTION RELIEF BECAUSE OF AN ALLEGED VIOLATION OF CHAPTER 119.

In Hoffman v. State, ___ So.2d 17 F. Law Weekly S741 (Fla. 1992), this Court opined:

> The State complains that some of Hoffman's public record requests seek records from agencies that have had nothing to do with the judgment and sentence and over whom the state attorney has no control. We agree that with respect to agencies outside the judicial circuit in which the case was tried and those within the circuit which have no connection with the state attorney, requests for public records should be pursued under the procedure outlined in chapter 119, Florida Statutes. Because those requests will be made directly to such agencies, they will be in a position to raise any defenses to the disclosure which they may deem applicable. We recede from *Mendyk v. State*, 5932 So.2d 1076 (Fla. 1992), to the extent that it suggested a different procedure. At the same time, we encourage state attorneys to assist in helping defendants obtain relevant public records from such outside agencies so as to facilitate the speedy disposition of post-conviction claims.
>
> We emphasize, however, that all public records in the hands of the prosecuting state attorney are subject to disclosure by way of motion under Florida Rule of Criminal Procedure 3.850 even if they include the records of outside agencies. Likewise, the public records of the local sheriff and any police department within the circuit that was involved in the investigation of the case may also be obtained in the manner outlined in *Provenzano v. Dugger*, 561 So.2d 541 (Fla. 1990).

Thus, pursuant to Hoffman, supra, any requests made to the Florida Parole Commission, the Orlando Police Department, the

Florida Department of Law Enforcement, the Pinellas County Sheriff's Office, the Pinellas County Clerk of Circuit Court, Pinellas County Office of State Attorney should be pursued under the procedure outlined in Chapter 119, Florida Statutes (the State Attorney for the Thirteenth Judicial Circuit has no control over these agencies).

To the extent that Anderson is now urging that the Hillsborough County State Attorney's Office failed to turn over its requested documents, suffice it to say that Anderson did not allege in his Rule 3.850 Motion to Vacate either that he requested or failed to receive desired material from the State Attorney (PCR 14 - 17). Certainly the trial court at the time of denial of the post-conviction motion on October 14, 1992 (PCR 44) was not put on notice of it. Any complaint thereafter, via rehearing motion or appellate brief, is untimely and does not alter the correctness of the trial judge's ruling.[1]

The lower court's order should be affirmed.

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[1] Indeed, according to appellant's own pleadings, files from the state attorney's office were collected on October 8, 1992, just six days prior to the trial court's order denying post-conviction relief (PCR 54).

ISSUE II

WHETHER THE LOWER COURT ERRED IN FAILING TO HOLD AN EVIDENTIARY HEARING.

The lower court correctly summarily denied relief in the instant case. Most of the claims raised on this appeal (e.g., Arguments IV - IX, infra), are legal issues that either were, could have been or should have been raised on direct appeal and are, therefore, not cognizable in a Rule 3.850 post-conviction proceeding. Raulerson v. State, 420 So.2d 567 (Fla. 1982); Booker v. State, 441 So.2d 148 (Fla. 1983); Palmes v. State, 425 So.2d 4 (Fla. 1983); Bundy v. State, 490 So.2d 1258 (Fla. 1986); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989); Melendez v. State, ___ So.2d ___, 17 F.L.W. S699 (Fla. 1992); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); Turner v. Dugger, __ So.2d ___, 18 F.L.W. S30 (Fla. 1992).

Appellant has raised a claim -- ineffective assistance of trial counsel -- which is cognizable on Rule 3.850 motion but the trial court correctly denied relief since the claim is easily resolvable without the necessity of an evidentiary hearing merely by review of the record.

See Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989); Puiatti v. Dugger, 58 So.2d 231 (Fla. 1991); Glock v. Dugger, 537 So.2d 99 (Fla. 1989). Merely chanting the mantra ineffective counsel does not suffice for a hearing[2] and as explained in Issue III,

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[2] Conclusory allegations that trial counsel was ineffective does not suffice for the granting of an evidentiary hearing. Kennedy v. State, 547 So.2d 912 (Fla. 1989).

infra, the claim that trial counsel was ineffective at penalty phase for not producing mitigating witnesses, for not using mental health witnesses and for failing to object to the prosecutor's closing argument is meritless by review of the original record alone.

Additionally, the trial court was correct in ruling that the pleading was deficient for failure to comply with the verification requirement. Gorham v. State, 494 So.2d 211 (Fla. 1986).

ISSUE III

WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT GUILT AND PENALTY PHASES.[3]

Appellant next contends that trial counsel rendered ineffective assistance in that (a) there was no adversarial penalty phase (b) ineffective presentation of mental health experts (c) the failure to object to the prosecutor's penalty phase argument at R 2223 - 33.[4]

(A) To the extent that Anderson may be attempting simply to repeat the unsuccessful issue urged on direct appeal on the waiver of mitigating witnesses, appellee will simply rely on this Court's prior ruling wherein the Court recited from the record and denied relief. Anderson v. State, 574 So.2d 87, 94 - 95 (Fla. 1991).

No reasonable contention can be made that trial defense counsel was unprepared to put on evidence because the record reflects -- and this Court's opinion articulates -- that counsel could call Dr. Robert Berland, appellant's parents William and

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[3] While appellant alludes to ineffective assistance at the guilt phase in his caption he makes no argument in the text of his argument and is, presumably, abandoned.

[4] It would also appear that appellant did not allege below counsel's alleged ineffectiveness with regard to (a) no adversarial penalty phase and (b) the mental health experts. If that is the case, he may not urge it now. Doyle v. State, 526 So.2d 909.

Helen Anderson, his brother and sister David Anderson and Vickie Barber, another sister, Griffin Simmons and witnesses Joyce Wilson and son Kyle Anderson (R 2167); 574 So.2d at 94.

Appellant criticizes counsel for not doing more when the court made inquiry of whether appellant was on any kind of drugs or medication. The instant trial occurred in February of 1988 and appellant chastises counsel for not knowing the law, referring to Klokoc v. State, 589 So.2d 219 (Fla. 1991), which was decided thirty-one months after the Anderson trial. In any event counsel was not ineffective.[5] See Pettit v. State, 591 So.2d 618 (Fla. 1982); Hamblen v. State, 527 So.d 800 (Fla. 1988).

Counsel was not apathetic but he did correctly recognize that ultimately the decision was that of Mr. Anderson who bears the ultimate consequence of whether or not to call witnesses.

(B) Appellant next cites Ake v. Oklahoma, 470 U.S. 68 (1985), which held that an indigent criminal defendant was entitled to the assistance of a psychiatrist when sanity at the time of the offense is in question. Anderson's sanity at the time of the offense has never been in issue, trial counsel requested and the court granted the appointment of confidential

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[5] Counsel is not required to anticipate future appellate decisions. Elledge v. Dugger, 823 F.2d 1439, 1443 (11th Cir. 1987); Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990). In any event, Klokoc does not constitute the kind of law mandating that all trial counsel do what was done there; if it did, Pettit would have yielded a different result.

expert Dr. Harry Krop (R 2801 - 2802) and indeed trial defense counsel was prepared to call Dr. Berland to testify at penalty phase when appellant decided that he did not want such witnesses called:

> "The Defendant: I would rather not have any witnesses testify on my behalf that you mentioned or that could, in fact, be called."

(R 2169)

There simply is no Ake problem and counsel cannot be deemed constitutionally deficient by the client's insistence not to put on witnesses. See Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985); Agan v. Dugger, 508 So.2d 11 (Fla. 1987).

(C) Appellant next contends that trial counsel fell below Sixth Amendment adversarial standards in failing to object to the prosecutor's closing argument during penalty phase at R 2223 - 33. Apparently, the singular argument which Anderson now deems offensive is the remark at R 2232 - 33:

> "Yes, 25 years is a long time. Not as long as Robert Grantham will be dead. Life, it's a long time.
>
> Mr. Ober will tell you, yes, it is a long time, but it's life. He'll still get up every morning, see the sun come up, have friends, read books, get letters and visits from his family. It's life. Something that he denied Robert Grantham. Something he stole from Robert Grantham. And we still don't know where Robert Grantham is.
>
> * * *
>
> Some people, I submit to you, by their course of conduct in the things they do, in fact, forfeit their right to live. And the death penalty is appropriate to protect society from them. Enough is enough. . . . "

It is true that defense counsel did not object to this prosecutorial argument. But the record also reflects that defense counsel utilized the prosecutor's argument to his own advantage. Announcing that he "echoed" the prosecutor's call to let the punishment fit the crime, trial counsel noted that life imprisonment was not an insignificant penalty for a thirty-nine year old defendant who when he becomes parole-eligible at age sixty-four knows the parole authorities would also consider his 1974 conviction and that society would be protected by his "being locked in a cage for the rest of his life" (R 2251 - 53).

And what precedent was available to inform trial counsel (and for that matter, the prosecutor) that the comments were arguably improper?[6] Anderson cites Jackson v. State, 522 So.2d 802 (Fla. 1988) which was decided on February 18, 1988, the same day closing arguments were made in the instant case. Not only could trial counsel be unaware of Jackson but also the conviction and sentence of death were affirmed in Jackson and while the Jackson court held that the trial court should have sustained a defense objection and given a curative instruction a unanimous Court opined:

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[6] Appellant also cites Bertolotti v. State, 476 So.2d 130 (Fla. 1985) for the general unremarkable proposition that argument should not be used to inflame the minds and passions of the jurors but that decision gave no notice that the type of argument used by the prosecutor sub judice fell into that category. Whatever improper comments may have been made in Bertolotti did not prevent his subsequent execution.

"We do not, however, find the misconduct here to be so outrageous as to taint the validity of the jury's recommendation."

(522 So.2d at 809)

It was not until over three years after the instant trial that this Honorable Court first reversed a conviction for the seemingly tautological prosecutorial observation that homicide victims can't see the sun rise while prisoners can in Taylor v. State, 583 So.2d 323 (Fla. 1991). And the issue had not been free of dispute since the state was arguing as late as 1991 in Taylor that the prosecutor's comment had been approved in Hudson v. State, 538 So.2d 829 (Fla. 1989) a post-1988 affirmance of a capital case.

Trial counsel could justifiably believe that the prosecutor's comments that living people are alive and dead people aren't " . . . appear to reflect common knowledge and are probably the sentiments of a large number of people." Breedlove v. State, 413 So.2d 1, 8, n. 11 (Fla. 1982) and he was not deficient in failing to anticipate Taylor three years in advance and in using the prosecutor's argument to his own advantage.

ISSUE IV

WHETHER THE ALLEGED FAILURE TO PROVE CORPUS DELICTI OF MURDER IN THE FIRST DEGREE WAS FUNDAMENTAL.

In Claim VIII, below, appellant argued that the state had failed to prove the corpus delicti of murder in the first degree. This was a question to be urged, if at all, on direct appeal and appellant is procedurally barred from asserting it collaterally.

Additionally, appellee notes that this Court on direct appeal ruled:

> "We have reviewed the record and find substantial competent evidence to support the conviction of first degree murder."
>
> (574 So.2d at 94)

Thus, even if reviewable, the claim is meritless.

ISSUE V

WHETHER APPELLANT'S DEATH SENTENCE WAS TAINTED BY INVALID JURY INSTRUCTIONS AND BY IMPROPER APPLICATION OF STATUTORY AGGRAVATING CIRCUMSTANCES.

Appellant next argues that the jury was improperly instructed on the cold, calculating and premeditated aggravating factor.[7] This was a claim to be urged on direct appeal and as this Court well knows the issue was not urged on direct appeal. Anderson v. State, 574 So.2d 87 (Fla. 1991). The claim is procedurally barred.

Appellant also attempts in this claim to raise ab initio a challenge to the pecuniary gain aggravating instruction -- a claim not presented below. This is impermissible. Doyle v. State, 526 So.2d 909 (Fla. 1988). It too would be barred as an issue for direct appeal only.

Appellant also alludes to Richmond v. Lewis, 506 U.S. ___, 121 L.Ed.2d 411 (1992), a decision which avails him naught. There the Supreme Court held that improper weighing of an unconstitutionally vague aggravating factor in Arizona capital sentencing was held not to be cured by state appellate review

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[7] This claim was raised as Claim XI, below. The direct appeal record also reflects that trial counsel objected to the "CCP" aggravator (R 2213). Trial counsel submitted several written requested jury instructions but none related to the CCP aggravating factor.

No instruction on the "HAC" aggravating factor was given (R 3005 - 3007) and consequently, there is no violation of Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (1992).

where the concurring state judges did not reweigh the remaining factors. Richmond does not assist Anderson because on his direct appeal no Justice of this Court engaged in an improper reweighing. Anderson's procedural default in failing to raise the issue on appeal remains in effect.

ISSUE VI

WHETHER THE PROSECUTOR'S ALLEGED IMPROPER COMMENTS AND ARGUMENTS, THE INTRODUCTION AND RELIANCE ON NONSTATUTORY AGGRAVATING FACTORS RENDERS THE CONVICTION AND DEATH SENTENCE UNCONSTITUTIONAL.

In Claim III, below, appellant presented the claim that the prosecutor's inflammatory and improper comments and argument and introduction of and court's use of nonstatutory aggravating factors was improper. These arguments were appropriate for urging on direct appeal; the may not be considered via Rule 3.850 and are procedurally barred.

ISSUE VII

WHETHER THE JURY WAS MISLED BY COMMENTS AND INSTRUCTION WHICH DILUTED ITS SENSE OF SENTENCING RESPONSIBILITY.

Appellant next contends that the jury was misled by comments and instruction which unconstitutionally diminished their sense of responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985).[8] But the failure to object at trial and to urge the claim on direct appeal constitutes a procedural bar precluding review. Dugger v. Adams, 489 U.S. 401, 103 L.Ed.2d 435 (1989). See also cases cited in Issue II, supra.

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[8] This was raised as Claim XV below.

ISSUE VIII

WHETHER THE TRIAL JUDGE REFUSED AND FAILED TO FIND MITIGATING EVIDENCE.

Appellant urged this as Ground XIII, below. This claim is procedurally barred as it is an issue to be raised if at all, on direct appeal, not via post-conviction relief. As this Court well knows from Anderson's direct appeal the trial court found a single mitigating factor. Anderson v. State, 574 So.2d 89, 90 (Fla. 1991).

ISSUE IX

WHETHER THE TRIAL PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS.

Appellant contends that the trial court proceedings were fraught with error.[9] Naturally, he does not specify them. In any event, post-conviction relief is unavailable since Rule 3.850 is not a second appeal. Blanco v. Wainwright. Whatever complaints appellant may have had with his trial he should have urged on direct appeal and may not be the subject of relitigation now.

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[9] This was urged as Claim XVI, below.

CONCLUSION

Based on the foregoing facts, arguments and citations of law the judgment and sentence of the lower court should be affirmed.

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, this 11th day of March, 1993.

OF COUNSEL FOR APPELLEE