IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,669

ROBERT PATTON,

Appellant-Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee-Cross-Appellant.

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

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

ARGUMENT I -- ERRONEOUS SUMMARY DENIAL

A. REQUIREMENT OF AFFIDAVITS.

Below, the State argued that in order to warrant a hearing, Mr. Patton was required to not only allege facts, but also "includ[e] a proffer of evidence which is available to support the specific factual allegations" (Supp. PC-R. 517). In Valle v. State, 705 So. 2d 331 (Fla. 1997), the Court rejected this very argument, noting that "noting in the rule [3.850] requires the movant to attach an affidavit or authorizes a trial court to deny the motion on the basis of a movant's failure to do so." Id. at 1334. Here, however, the State was arguing that Mr. Patton's motion should be summarily denied to the alleged failure to "proffer evidence." This position is contradictory to Valle and Rule 3.850 itself.

In its Brief, the State acknowledges that below it argued that Mr. Patton's motion should be summarily denied as "a `proffer' of `available' evidence was necessary," but argues that because the prosecutor never mentioned the word "affidavit," the State did not assert an incorrect standard (Answer Brief at 12). This is a distinction without a difference. Under Rule 3.850, Mr. Patton was required to allege facts which, if true and not conclusively refuted by the record, would entitle him to relief, and thus an evidentiary hearing would be required. However, the State required that Mr. Patton "includ[e] a proffer of evidence

which is available to support the specific factual allegations" (Supp. PC-R. 517). This is the same thing as requiring an affidavit, and is contrary to the requirements of Rule 3.850, as the Valle Court observed.[1]

B. PREPARATION OF ORDER BY THE STATE.

Mr. Patton is not arguing that "the State cannot be involved in the litigation of a motion for post conviction relief until an evidentiary hearing is ordered" (Answer Brief at 15). What Mr. Patton is objecting to is the State's assumption of the position of both judge and prosecutor. For example, the State's brief argues that "an order denying post-conviction relief is not the same as a death sentence order" and thus it is not improper for a court to delegate responsibility to the State for preparing such orders (Answer Brief at 16).[2] Mr. Patton's argument is rather

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[1]That Mr. Patton's case "took place prior to Valle" (Answer Brief at 12), is correct. However, Valle simply elaborated on Rule 3.850; it did not set forth a new standard. Mr. Patton would note the irony of the State's position that it should not be held to the pre-Valle standard. Mr. Patton has argued, for example, that Groover v. State, 703 So. 2d 1035 (Fla. 1997), did not announce until after Mr. Patton's case was on appeal the requirement that amended Rule 3.850 motions be verified (Initial Brief at 25). Here, the State is arguing however that Mr. Patton should nonetheless be held to Groover's holding (Answer Brief at 18).

[2]The proposition that an order denying Rule 3.850 relief is not the "same" as a sentencing order is dubious. When the order "denies" relief, the State is free to argue that it is insignificant. But it is insignificant only to the State, not to the capital defendant. When Rule 3.850 motions are granted, the

that the *courts* have abdicated their responsibility to independently adjudicate these cases and instead delegate that responsibility to the State. It is for this reason that Mr. Patton has urged the Court to require lower court judges to prepare orders on capital postconviction motions in a manner similar to sentencing orders, that is, that such orders be prepared by the judges themselves, not the prosecutors. Due process is surely violated when judges, particularly over defense objection, allow the State to draft orders denying Rule 3.850 motions.

State does not take such a position toward the significance of such orders.

ARGUMENT II -- DENIAL WITH PREJUDICE

The State argues that Mr. Patton never filed an oath to any of his Rule 3.850 motions, and that the filing of the oath as to the second amended Rule 3.850 motion following the oral denial is legally insignificant (Answer Brief at 17). The State acknowledges that under Rule 3.850, Mr. Patton had until April 5, 1995, to timely file his motion (Answer Brief at 17 n.2). Mr. Patton, under threat of a death warrant by the Governor, filed his motion on June 8, 1994, nearly ten (10) months prior to the two-year deadline (Supp. PC-R. 7-170). A verification was later filed on February 9, 1995, as to the initial Rule 3.850 motion prior to the expiration of the two (2) year deadline (Supp. PC-R. 601-03). As this Court had not yet announced its ruling in Groover v. State, 703 So. 2d 1035 (Fla. 1997), Mr. Patton did not believe an amended Rule 3.850 needed to be verified when the original one had; nonetheless, following the Court's oral denial of the motion, Mr. Patton *did* file a verification to his amended Rule 3.850 motion (R. 457-58). This verification was filed nearly one year before the lower court entered a written order which indicated that Mr. Patton's Rule 3.850 motion had not been verified.

The remedy for an alleged failure to verify a Rule 3.850 motion is dismissal without prejudice. Here, Mr. Patton did submit a verification to his amended Rule 3.850 motion. The argument that Mr. Patton "did nothing to correct the error until after the

claim was denied" (Answer Brief at 19), is refuted by the record. Following the oral denial, he submitted a verification. Almost a year later, the lower court entered its written order, which is the dispositive event, not the oral denial. The State's attempt to distinguish Jewson v. State, 688 So. 2d 968 (Fla. 1st DCA 1997), is unavailing. Jewson stands for the proposition that a technical violation of Rule 3.850 can be cured even after the court has entered a written order denying relief. Here, Mr. Patton cured the alleged deficiency before the written order was entered. Thus, the denial with prejudice was erroneous, and that part of the order should be reversed.

ARGUMENT III -- PUBLIC RECORDS

Appellee argues that a procedural bar as to Mr. Patton's claim that the lower court's *in camera* inspection was insufficient (Answer Brief at 19-20). This argument is unavailing. On numerous occasions this Court has addressed a capital defendant's claim that the lower court's *in camera* inspection of withheld records was insufficient and that the records should be disclosed. See, e.g. Ragsdale v. State, 720 So. 2d 203 (Fla. 1998); Lopez v. State, 696 So. 2d 725 (Fla. 1997). Here, the lower court conducted an *in camera* inspection of numerous documents withheld by the State Attorney's Office and ruled that they did not constitute public records and thus refused to disclose them to Mr. Patton (T. 35-36). On appeal, Mr. Patton has challenged that ruling. This is no different than Ragsdale and Lopez.

Appellee states that "the documents at issue were sealed, and are available for this Court's review, although Appellant is apparently not desirous of such review" (Answer Brief at 21). Mr. Patton, by raising the issue, is obviously "desirous" of such review. Mr. Patton acknowledges that in his Initial Brief, he stated that "the status of these records is unknown; by separate motion, Mr. Patton is seeking to have the records transmitted to the Court" (Answer Brief at 9 n.12). After checking the file, the undersigned has realized that no such motion was filed, and therefore it is being submitted with the instant brief. Mr.

Patton requests that the Court, upon review of these records, order them to be disclosed to Mr. Patton, and that Mr. Patton be given a reasonable opportunity to amend his Rule 3.850 motion. Lopez. Relief is warranted.

ARGUMENT IV -- PRETRIAL AND GUILT PHASE INEFFECTIVENESS

A. FAILURE TO MOVE FOR CHANGE OF VENUE.

Despite acknowledging that there was a significant amount of publicity surrounding this case, including newspaper articles which "recounted the factual circumstances of the murder and arrest, related the evidence seized during search warrants, and reported the circumstances of the competency hearing" (Answer Brief at 23), the Appellee's position essentially is that counsel reasonably arrived at a strategy decision not to seek a venue change because "there were no grounds for a change of venue" (Answer Brief at 23). This argument fails to accept Mr. Patton's allegations as true. While understandably not mentioning the fact that the State below argued that "a strategy sometimes has to be assumed" (T. 306), the fact remains that this type of fact-based determination cannot be properly made absent an evidentiary hearing. See, e.g. Thomas v. State, 634 So. 2d 1157 (Fla. 1st DCA 1994) (inappropriate to find that defense counsel's actions were tactical absent an evidentiary hearing); Davis v. State, 608 So. 2d 540 (Fla. 2d DCA 1992) (same).

The Appellee's argument that there were "no grounds" for a venue change also fails to account for the fact that Mr. Patton's trial was held during a period of civil unrest in Miami, a matter that surely affected Mr. Patton's right to a fair and impartial jury. As alleged in Mr. Patton's Rule 3.850 motion:

> It is particularly important to note the

> atmosphere of the community in Miami at the time of trial in 1981. Riots had been prevalent in those days with racial tensions at an all time high. Two days after Mr. Patton's arrest for killing a black police officer the sentence came down in the Lonnie James Walker case. The Walker case involved the murder of a white police officer, Carl Mertes, by a black man. Mr. Walker claimed self-defense in that he was being beaten by the white police officer. He received a conviction of second-degree. In an effort to appear that minority cases were prosecuted more severely, Mr. Patton's case became the backlash case to appease the racial tensions in the community. Logic dictates that the state's political efforts to seek death in this case were racially motivated. Therefore, the importance of seeking a change of venue to a less volatile area was critical. Counsel failed to request a change.

(Supp. PC-R. 241-42).

Given these circumstances, an evidentiary hearing is warranted to determine whether trial counsel had a reasonable strategy decision for not seeking a change of venue. It is insufficient for the State to simply assume there was one and to assume that such a decision was reasonable without the benefit of an evidentiary hearing. Reversal for a hearing is thus warranted.

B. VOLUNTARY INTOXICATION.

Appellee reasserts the argument made below, that "the defendant has never been able to proffer how much or what drugs he had ingested, or that he was intoxicated at the time of the offense" (Answer Brief). These statements reflect a failure to

accept the allegations in Mr. Patton's Rule 3.850 as true. In his motion, Mr. Patton alleged not only that expert testimony was available to establish that at the time of the offense Mr. Patton suffered from acute and chronic polydrug intoxication (PC-R. 216), but also that in the weeks leading up to the offense he was "on a cocaine, marijuana, heroin, and alcohol binge" and "[o]n the day of the offense, Mr. Patton had been drinking alcohol with his friends and taking `speedballs' intravenously" (PC-R. 219). For the State to argue that Mr. Patton failed to allege what drugs he had ingested or that he was intoxicated at the time reflects a failure to accept these allegations as true. Lightbourne v. Dugger, 549 So. 2d 1362 (Fla. 1989).

The State's brief further fails to acknowledge the fact that at Mr. Patton's resentencing, expert testimony established that Mr. Patton was not only intoxicated at the time of the offense, see Initial Brief at 36 n.24 (discussing testimony of Dr. Krop), but also that Mr. Patton was *insane* at the time of the offense (Id.). None of this information was presented at trial, however, due to counsel's unreasonable and prejudicial omissions. Notably, the State does not contest that an intoxication defense would have been inconsistent with the theory of defense, nor could it, since defense counsel conceded to the jury that Mr. Patton shot Officer Broom.[3] As the State conceded below, trial

[3]Moreover, as the State acknowledged below, "the trial judge instructed the jury on voluntary

counsel "argued that the situation involved split-second decisions on the part of the defendant, that he was someone who needed drugs, was strung out on drugs and was trying to buy drugs" (Supp. PC-R. 522). Defense counsel conceded all the material elements of the State's case against Mr. Patton except for his ability to form specific intent because she asserted that he was intoxicated. However, defense counsel failed to present any of the amply available evidence to support her assertion. An evidentiary hearing is warranted.

Appellee argues that "the theory of intoxication was rejected . . . based upon the unequivocal testimony of two eyewitnesses, who were continuously with the defendant for the period of 2-2 1/2 hours immediately prior to the crime" (Answer Brief at 25). However, these witnesses, who testified for the State, were not experts on the effects of intoxicating substances on a brain-damaged individual; that these witnesses allegedly did not see Mr. Patton using drugs in the immediate time leading up to the shooting in no way negates that Mr. Patton was in fact intoxicated due to the long-term binge he had been experiencing, as well as the speedballs and alcohol he had used on the day of

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intoxication although there was no evidence of the amount of drugs consumed by the defendant preceding the homicide of Officer Broom" (Supp. PC-R. 522). The fact that the jury was instructed on a defense for which no evidence was presented makes counsel's omissions even more unreasonable. An evidentiary hearing is clearly warranted.

the offense. The State below acknowledged that the evidence of Mr. Patton's intoxication was "not uncontradicted" (Supp. PC-R. 520), meaning that it was a disputed issue. However, trial counsel failed to adequately and effectively present available information which would have established a viable intoxication defense. An evidentiary hearing is warranted, as the files and records do not conclusively rebut Mr. Patton's allegations.

ARGUMENT V -- RESENTENCING INEFFECTIVENESS

A. FAILURE TO ENSURE A FAIR AND IMPARTIAL JURY AND JUDGE.

The Appellee presumes that the sole basis for Mr. Patton's argument is that the jury was made aware of the prior jury's vote. However, Mr. Patton also alleged an even more egregious and fundamental constitutional error--that trial counsel unreasonably failed to move for a mistrial when it became apparent that the jury was improperly reading newspaper accounts of the trial and then clearly were lying about the issue during a voir dire. In his amended Rule 3.850 motion, Mr. Patton clearly set forth the factual basis of his claim:

> At resentencing, not only was the court biased in favor of the state, but the jury engaged in misconduct so egregious that Mr. Patton could not receive a fair and impartial resentencing: Jurors admitted reading a newspaper account of the case during the trial. The article divulged the previous jury's sentence of death which was overturned by the Florida Supreme Court. After questioning by the court, it was obvious that at least four jurors were lying about their exposure to the article. Juror Shaw had the newspaper article in the jury room and admitted reading the article. Juror Stowe also admitted reading the article and discussed it with Jurors Jackson and Gong (who later became the foreman of the jury). Jackson denied reading the article but stated that [Juror] Kirschner discussed it on the elevator. Kirschner then denied discussing the article. Juror Jay said he was aware of the article (R. 1105-1130). At least six jurors (one half of the entire panel) were named has having exposure to the newspaper article, two of which obviously lied about their activities. One of the jurors, foreman Gong, was a former U.S. Attorney who knew the

> consequences of perjuring himself in court and the consequences of tainting the jury with outside information. Incredibly, defense counsel raised on objection and failed to move for a mistrial. The trial court likewise failed to sua sponte declare a mistrial when it was clear that the jury had been compromised.

(Supp. PC-R. 254-55) (emphasis added). An evidentiary hearing is clearly warranted on the issue of trial counsel's failure to request a mistrial when it became clear that the jury had been improperly reading news accounts of the trial, and that jurors were clearly lying about the matter.

Because jurors were not telling the truth about who had seen and discussed the newspaper article, any reliance by the State on the argument that "every juror stated that the article would not affect their decision herein" cannot withstand any scrutiny (Answer Brief at 49-50). That defense counsel may or may not have "wanted the jurors to know" about the prior jury vote does not vitiate the underlying constitutional violation here--that the jury had been reading newspapers and that jurors were not telling the truth about their exposure to the newspaper article. Mr. Patton certainly did not acquiesce to not seeking a mistrial on this issue, for, as Appellee acknowledges, "[d]efense counsel did not request a mistrial" (Answer Brief at 50). Clearly an evidentiary hearing is warranted.

ARGUMENT VI -- THE BRADY AND GIGLIO VIOLATIONS

Mr. Patton's Rule 3.850 alleged that the jury did not know that when Mr. Patton was arrested, a white paper with powder and yellow pills were confiscated from him in a pack of Winston cigarettes and suspected as narcotics. Mr. Patton alleged that the State withheld this report, or in the alternative ineffective assistance of counsel (Supp. PC-R. 247-48).

In its brief, the Appellee argues that a State's discovery response in fact indicated that the disputed report was disclosed to the defense (Answer Brief at 56-57). However, as noted in Mr. Patton's brief, the only matter attached to the State's response as Exhibit 8 was a discovery response referring to "Evidence and Property Receipts" -- this document lists generally "Evidence and Property Entry of items taken from Robert Patton" as being disclosed to the defense (Supp. PC-R. 578). See Initial Brief at 53-54). Mr. Patton further alleged that the documents attached to the State's response failed to specifically identify which items were turned over; no mention was made specifically of the cigarette pack with white paper and yellow pills. See Supp. PC-R. 570-78). In the State's response to Mr. Patton's motion it only argued that "police reports" were provided to trial counsel in discovery and referred to the attachments which, as noted above, did not specifically include the disputed report (Supp. PC-R. 534).

Mr. Patton must acknowledge, however, that Appellee's

assertion that the appellate record reflects an inventory of discovery received by trial counsel which does list the disputed property receipt is accurate (Answer Brief at 57).[4] Thus, as to the Brady and Giglio aspects of this claim, the lower court's finding that the files and records refute the allegation is correct (Supp. PC-R. 643). Mr. Patton does continue to assert that trial counsel did not use this important evidence at trial, and thus counsel's representation was prejudicially deficient.

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[4]Mr. Patton's counsel had not previously seen this document. Obviously had counsel known about the document, a Brady allegation would not have been alleged.

ARGUMENT VII -- COMPETENCY

The lower court denied this claim as legally insufficient (Supp. PC-R. 643).[5] However, on appeal, the State argues that this claim is procedurally barred (Answer Brief at 59). The State should not be heard to complain about the lower court's merits ruling, as the State drafted the order. See Argument I. This claim is clearly not procedurally barred. Mason v. State, 489 So. 2d 734, 736 (Fla. 1986). As to the merits of the claim, Mr. Patton relies on his Initial Brief and the allegations in his amended Rule 3.850 motion.

REMAINING ARGUMENTS

Mr. Patton relies on his Initial Brief and his pleadings below to rebut the remaining arguments set forth by Appellee.

CONCLUSION

Mr. Patton submits that relief is warranted in the form of a new trial and/or a new sentencing proceeding. At a minimum, an evidentiary hearing should be ordered.

[5]This claim appeared as Claim IX in Mr. Patton's amended Rule 3.850 motion (Supp. PC-R. 277 *et. seq.*).

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 2, 1999.

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