

IN THE SUPREME COURT OF FLORIDA

CASE NO.SC01-836

JAMES E. HUNTER,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary,

Florida Department of Corrections,

Respondent,

and

ROBERT BUTTERWORTH,

Attorney General,

Additional Respondent.

REPLY BRIEF OF THE APPELLANT

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ARGUMENT I

THE APPELLEE IS INCORRECT IN ASSERTING THAT TRIAL COUNSEL DID NOT REPRESENT MR. HUNTER UNDER AN ACTUAL CONFLICT OF INTEREST

Appellee asserts that the lower court's finding that trial counsel was unaware that Mr. Cooley had been represented by the Public Defender's Office is supported by the record and that "Hunter's only reason for setting aside the factual determination of the trial court is because he has reached a different interpretation of the same testimony" (Appellee's Answer Brief at 13, 14).

Contrary to the assertions of Appellee, Mr. Hunter's contention that trial counsel Burden knew that the Office of the Public Defender previously represented Taurus Cooley is not based on a different interpretation of the same testimony, but rather, is based on specific testimony in the record which the lower court ignored. The essential fact the lower court ignored is the withdrawal of the Public Defender's Office from the representation of Taurus Cooley due to a conflict of interest relating to Mr. Hunter's case. The withdrawal occurred on November 4, 1992 after Assistant Public Defender Burden had been appointed to represent Mr. Hunter on the murder and robbery charges. Therefore, the Office of the Public Defender, by and through the actions of Assistant Public Defender Terry

Rowlinson, had knowledge of the conflict of interest in the representation of both Mr. Taurus Cooley and Mr. Hunter. When trial counsel Burden was questioned at the evidentiary hearing on this subject he stated “ if that happened someone would have told me. I just can’t believe that wouldn’t have been told to me” (PC-R 140). Both the lower court’s order and the Appellee’s Answer Brief are devoid of any reference to this critical testimony. The lower court ignored this critical testimony of Mr. Burden that someone would have informed him of the conflict under those circumstances. Thus, the lower court’s factual finding that Mr. Burden did not know of the prior representation of Mr. Cooley by the Office of the Public Defender is not supported by substantial and competent evidence in the record. Moreover, the lower court’s finding is also not supported by common sense. The Office of the Public Defender would not withdraw from representing Mr. Cooley due to a conflict with Mr. Hunter and then leave the lead trial attorney on Mr. Hunter’s case completely ignorant of that fact.

Furthermore, Mr. Burden’s knowledge of the conflict is imputed by operation of the law office theory. The application of the law office theory is a legal, not factual, determination and is subject to de-novo review by this Court. No deference is afforded the lower court. Stephens v. State , 748 So.2d 1028 (Fla. 1999). This Court has specifically held that the Public Defender’s Office is the

functional equivalent of a law firm. Bouie v. State, 559 So.2d 1113 (Fla. 1990).

Since Mr. Rowlinson and Mr. Burden worked for the same law firm (The Office of the Public Defender in and for Volusia County, Florida), Mr. Burden's knowledge of Mr. Rowlinson's representation and withdrawal from representation of Taurus Cooley is imputed as a matter of law.

Appellee relies on Macrae v. State, 510 So.2d 874 (Fla. 1987) to support his argument. Macrae is clearly distinguishable from the facts in Mr. Hunter's case as follows:

1. Unlike the witness in Macrae , Taurus Cooley is a listed victim and was an essential state witness against Mr. Hunter. In the briefs filed, the Attorney General referred to the witness in Macrae as "not a key witness in the sense of his testimony being crucial " (Brief for Appellee at 24, Macrae v. State , 510 So.2d 874 (Fla. 1987)). In contrast, Prosecutor Elizabeth Blackburn characterized Taurus Cooley as an important witness for the state (PC-R 181).

2. Unlike Macrae, the representation of Taurus Cooley by the Office of the Public Defender in and for Volusia County occurred during the discovery process of Mr. Hunter's case and continued until in very close proximity to Mr. Hunter's trial.

3. Unlike Macrae, in Mr. Hunter's case, the Office of the Public Defender

admitted it's knowledge of the conflict of interest between Taurus Cooley and Mr. Hunter by withdrawing from representing Mr. Cooley on felony case 92-31321 CFAES. This knowledge is imputed to counsel Burden as an Assistant Public Defender in the same office.

4. Unlike Macrae, Mr. Hunter has asserted specific instances of deficiency of counsel directly related to the conflict of interest. In Macrae, the Appellee stated that “there had been no allegation that counsel did or failed to do some act based on their offices representation of Walker” (Brief for Appellee at 24, Macrae v. State, 510 So.2d 874 (Fla. 1987)). In contrast, the specific instances of Burden's deficiencies were caused by the conflict and were specifically alleged by Mr. Hunter. Burden's deficiencies include his failure to question Taurus Cooley in pre-trial deposition about his recent and pending criminal charges and his failure to impeach Taurus Cooley at the trial by use of his recent and pending criminal charges. Counsel Burden had the opportunity to question Mr. Cooley concerning the facts and circumstances surrounding his May 11, 1993, felony convictions for fraudulent use of a credit card and possession of cocaine, his July 19, 1993, conviction for battery for which he was sentenced to seventeen days in jail, his July 28, 1992, possession of cannabis conviction, and his May 15, 1993, contempt of Court conviction for which he served fifteen days in jail. Counsel's failure to cross

examine Mr. Cooley concerning these recent and pending criminal charges is a deficiency in performance not present in Macrae. Since Mr. Cooley was prosecuted in Volusia County, and investigated by the same law enforcement agency which arrested Mr. Hunter, he had every reason to appease the state with his testimony. Due to the conflict of interest, counsel Burden was unable to demonstrate to the jury Mr. Cooley's interest in appeasing the state by testifying against Mr. Hunter.

Appellee's argument that Mr. Burden's alleged lack of knowledge of the prior representation of Mr. Cooley by the Office of the Public Defender negates the conflict of interest is inherently flawed and illogical. The proper method for analyzing this claim is to ask the simple question: Did counsel Burden have the ability to properly represent Mr. Hunter? The answer is **absolutely not**. Counsel Burden could not properly represent Mr. Hunter because he could not ethically impeach essential state witness and listed victim Taurus Cooley with his recent and pending criminal charges. With counsel Burden representing Mr. Hunter, it was ethically impossible for that critical information to come before the jury. Mr. Burden's state of mind or supposed lack of knowledge is of no consequence to this issue. It is the situation which creates the conflict, and it is not cured by the unprofessional ignorance of counsel.

Furthermore, the state does not come before this Court with clean hands concerning the conflict of interest. The Office of the State Attorney in and for Volusia County prosecuted Mr. Taurus Cooley. The state was under legal duty to provide the information of the recent and pending criminal charges against Taurus Cooley as exculpatory evidence under Brady. The evidence in this case further establishes that counsel Burden made a specific discovery demand for criminal history reports on all state witnesses (PC-R 146). The State provided nothing to Mr. Burden concerning Taurus Cooley. It is inequitable for the state to rely upon the supposed ignorance of counsel Burden as to the prior representation of Taurus Cooley by the Office of the Public Defender, when the state had the legal responsibility to provide that information to counsel Burden in the first place. Had either counsel Burden or the Office of the State Attorney acted in compliance with reasonable standards of professional conduct, Mr. Hunter would have been provided with conflict-free counsel.

As to the legal standard associated with deficiency of counsel relating to a conflict of interest claim, Appellee correctly cites Cuyler v. Sullivan, 446 U.S. 335 (1980). However, both the Appellee and the lower court erroneously conclude that because “other witnesses” identified Mr. Hunter as the person who possessed and fired the weapon during the robbery, then no deficiency of counsel occurred

(Appellee's Answer Brief p. 16). Both the lower court and Appellee improperly apply the Strickland outcome determinative standard to a conflict of interest claim. It is not necessary for Mr. Hunter to establish that, due to counsel's deficiency, there is a reasonable probability that the outcome of the case would have been different. Mr. Hunter must only establish a deficiency in performance of counsel. Although Mr. Hunter concedes that it is necessary to examine Mr. Cooley's testimony in context with other witnesses presented at trial in order to assess the deficiency of counsel's performance, this examination must be done under Cuyler not Strickland. As stated in the Initial Brief, both Mr. Howard and Mr. Troutman (the "other witnesses" referred to in the lower court's order), both professed serious doubts as to their ability to identify the shooter (Appellant's Initial Brief p. 35, 36). Since Mr. Cooley was the only eye-witness to see the shooter's face, his testimony was essential to the state, and the failure to adequately impeach him with his recent and pending criminal charges was a deficiency in performance of counsel under Cuyler.

As to the issue of the "rule of automatic reversal" and its applicability to Mr. Hunter's conflict of interest claim, appellee inexplicably states:

To the extent that Hunter argues that he should have the benefit of the rule of automatic reversal, such argument is inapplicable to this case. Despite Hunter's protestations, this "conflict" issue was raised for the first time on

collateral attack, and the fact that trial counsel was also appellate counsel does not change the outcome because counsel could have sought to withdraw at any time.

(Appellee's Answer Brief p. 17).

This argument is spurious. The fact that counsel Burden did not withdraw from the direct appeal is precisely the reason why the rule of automatic reversal should be applied to Mr. Hunter's case. The only reason the conflict issue was not presented in the direct appeal is that the same conflicted counsel, Mr. Burden, represented Mr. Hunter on the direct appeal. Thus, Mr. Hunter could not have raised the conflict issue on direct appeal because he had no knowledge of it and he was being represented by the counsel who was the subject of the conflict. Mr. Hunter should not be punished in these circumstances. The rule of automatic reversal must be applied to his case.

ARGUMENT II

APPELLEE IS INCORRECT IN ASSERTING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO USE PHOTOGRAPHIC EVIDENCE AT MR. HUNTER'S TRIAL

Appellee asserts that the failure to use photographic evidence at Mr. Hunter's trial was not ineffective assistance of counsel because "the testimony at trial was that, at the time of arrests, Hunter was wearing a white shirt, and, co-

defendant Boyd was wearing a red shirt” (Appellee’s Answer Brief at 23).

Appellee further relies upon the lower court’s order on this issue which states:

Defendant further claims that although the evidence showed that he was wearing a white shirt at the time of arrest, the information that co-defendant Boyd was wearing a red shirt at the time of arrest was never given to the jury. This is rebutted by the record. Co-defendant Pope testified at trial that Defendant was wearing a white shirt , see generally Appendix A, and also stated that one of the co-defendant’s , which included Boyd, was wearing a red shirt. See *id.* at 795. In addition, the Court finds that this argument merely restates the argument that these photo’s would have presented a better identity issue to the jury. As demonstrated by defense counsel’s closing argument, the jury was presented with this exact issue, i.e., that Defendant was wearing a white shirt while the shooter was wearing a red shirt. See generally Appendix B. Thus, this claim is legally insufficient as Defendant has not shown any actual prejudice.

(PC-R 1886).

In support of the above finding that co-defendant Pope testified that Mr. Boyd was wearing a red shirt, and Mr. Hunter was wearing a white shirt, the lower court attached Mr. Pope’s trial testimony. An examination of the testimony reveals that the lower court’s findings concerning Mr. Pope’s testimony are not supported by substantial and competent evidence.

Q. Wasn’t Mr. Hunter wearing a white shirt and white pants, Florida Gator’s on it?

A. Not really.

Q. What was Mr. Hunter wearing that night?

A. That shirt he had on?

Q. Was it a white shirt?

A. I don't know if it was white or whatever.

Q. Think back the best you can.

A. I can't tell. Probably had some white in it.

Q. Did anybody there wear a red shirt that you remember?

A. One of my co-defendants had a red shirt, but I don't know who had it on.

Q. You don't remember now?

A. No.

Q. And Mr. Hunter was wearing a white shirt with Florida Gators written across the front?

A. I don't know. One of the co-defendants had on a Florida Gator shirt.

Q. That was Mr. Hunter?

A. Eric had one too. I think they both changed shirts. I don't remember.

Q. So now they could have switched shirts?

A. Could have.

Q. Did they do that in your presence, did they switch

shirts in your presence? Did you see them switch shirts anytime that night?

A. Yeah, I think it was earlier, after we left Deland, trying on shirts.

Q. So they switched shirts between Deland and Daytona Beach?

A. Right.

Q. So which shirt was Mr. Hunter wearing?

A. I don't know what shirt Mr. Hunter was wearing. I can't recall.

Q. What shirt was he wearing when he was stopped by the police?

A. A white shirt when he was stopped by the police.

Q. So James was wearing a white shirt with Florida Gators when he was stopped by the police in Ormond Beach; is that correct?

A. Right.

Q. And that was minutes before this alleged shooting took place, wasn't it?

A. Before the shooting took place or after?

Q. Minutes afterwards?

A. Right.

Q. Did Mr. Hunter have on the same shirt on all that time?

A. The Florida Gator shirt, yeah.

Q. The white shirt?

A. Yeah

The above testimony clearly demonstrates Mr. Pope's considerable uncertainty concerning the color shirts each of the co-defendants was wearing. He does not state, as was asserted by Appellee in their inaccurate and misleading brief, that "Hunter was wearing a white shirt, and co-defendant Boyd was wearing a red shirt" (Appellee Answer Brief at 23). In reality, Mr. Pope testifies with great inconsistency as to his memory of what shirt Mr. Hunter was wearing and at no time states that co-defendant Boyd was wearing red shirt. His only reference to Mr. Boyd is that he may have been wearing a shirt like Mr. Hunter's.

The uncertainty of the above testimony magnifies the essential nature of the photographs taken by Officer McLean. These photographs are not subject to a witness's faulty memory or motivation to lie. These photographs unequivocally show Mr. Hunter wearing a white shirt and Mr. Boyd wearing a red shirt. There was no need to rely upon the inconsistent and incomplete statements of Mr. Pope (who had been given a deal by the state). Counsel had the golden opportunity to establish through color photographs taken by a law enforcement officer, that Mr. Hunter wore different clothing than the shooter and that Mr. Boyd wore the

clothing of the shooter. This evidence would not have been cumulative; it was essential to Mr. Hunter's defense. It conclusively proved that Mr. Hunter was not the shooter. Mr. Hunter's trial counsel was ineffective for failing to use the photographs on Mr. Hunter's behalf.

ARGUMENT III

APPELLEE IS INCORRECT IN STATING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER COMMENTS BY THE PROSECUTOR IN REFERRING TO MR. HUNTER IN CLOSING ARGUMENT AS A "VULTURE" AND A "PREDATOR"

Appellee asserts that counsel's failure to object to reference to Mr. Hunter as a "vulture" and a "predator" was not ineffective assistance of counsel (Appellee Answer Brief p. 26). Appellee relies upon the finding by the lower court that, although the comments bordered on improper, they are distinguishable from those made in Ross v. State, 726 So.2d 317 (Fla. 2nd DCA 1998) (PC-R 1822).

Both the lower court and the Appellee are incorrect in finding distinction between the comments by the prosecutor in the Ross case, and those made by the prosecutor in Mr. Hunter's case. In Ross, the court found defense counsel was ineffective for failing to object to comments by the prosecution that defense witnesses were "pathetic", "ridiculous", "inappropriate", "insulting to the

intelligence”, “totally incredible”, and who just “flat out lied.” Ross at 318. The defendant’s testimony was characterized by the prosecutor as “preposterous”, “nonsense”, and “bologna”. Id. These comments are not distinguishable from those made by the prosecutor in referring to Mr. Hunter as a “vulture” and a “predator”. If anything, the comments made by the prosecutor in Mr. Hunter’s case were far more inflammatory and improper.

Appellee also asserts that this claim is “procedurally barred because it was not raised at trial and on direct appeal” (Appellee’s Answer Brief p. 27). Contrary to the assertions of Appellee, ineffective assistance of counsel claims for failure to object to improper comments by the prosecutor are properly brought in post - conviction actions . Rachel v. State , 780 So.2d 192 (Fla. 2nd DCA 2001); Mannolini v. State, 760 So.2d 1014 (Fla. 4th DCA 2000).

In addition to the legal inaccuracy, Appellee’s assertion that this claim is procedurally barred because it was not raised on direct appeal is completely inequitable. The trial counsel who failed to object, George Burden, is also the appellate counsel who drafted the direct appeal. Appellee would have this Court find that Mr. Hunter is procedurally barred on this claim because the appellate counsel failed to raise an ineffective assistance of counsel claim against himself. The argument by Appellee is patently unjust, leaving Mr. Hunter to bear the

burden of the state's impropriety and counsel's ineffective assistance at trial and direct appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **REPLY BRIEF OF THE APPELLANT** has been furnished by United States Mail, first Class postage prepaid, to all counsel of record on this 1st day of August, 2001.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing **REPLY BRIEF OF APPELLANT**, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

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