IN THE SUPREME COURT OF FLORIDA

GARY LAWRENCE,
APPELLANT

CASE NO.: SC00-2290
LOWER TRIBUNAL NO.: 94-397CF

VS.

STATE OF FLORIDA,
APPELLEE

APPELLANT'S REPLY BRIEF

APPEAL FROM DENIAL OF 3.850 MOTION FOR POST CONVICTION RELIEF

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ISSUE I

THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING AS TO ISSUES INVOLVING INEFFECTIVE ASSISTANCE OF COUNSEL CONTRARY TO THE V, VI AND XIV AMENDMENTS TO THE UNITED STATES CONSTITUTION

(STANDARD OF REVIEW – INDEPENDENT STANDARD – 3.850 ALLEGATIONS NOT CONCLUSIVELY REBUTTED)

APPELLANT, GARY LAWRENCE rejects the State's analysis of Issue No. I that a 3.850 hearing was unnecessary. By its Order denying the 3.850, the trial court simply ruled that defense counsel Miller had done enough at trial. Appellant urges this court to find this issue must be resolved in an evidentiary hearing. This position is clearly supported by ***Freeman v. State***, **761 So. 2d 1055**

(Fla. 2000).

The State suggest that Appellant should have shown whether defense counsel could have obtained another expert. ***Gaskins v. State***, 737 So. 2d 509 (Fla. 1999) directly addresses this contention by holding there to be no requirement to allege names and identities of witnesses.

An evidentiary hearing is required.

ISSUE II

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S 3.850 INEFFECTIVE COUNSEL CLAIM BASED UPON COUNSEL'S CONCESSION OF GUILT IN BOTH GUILT AND PENALTY PHASES WITHOUT ON THE RECORD CONSENT BY DEFENDANT (CONTRARY TO DUE PROCESS AND ASSISTANCE OF COUNSEL PROVISIONS OF V, VI AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS 9 AND 16, FLORIDA CONSTITUTION)

(STANDARD OF REVIEW-INDEPENDENT STANDARD)

Appellant concede that Florida Law leans against him as to a concession of guilt argument. Appellant urges that constitutionally the law should lean in his direction with requirement of an on record waiver or acknowledgment of counsel's tactics. Otherwise, a not intellectually gifted defendant's testimony versus that of a learned trial counsel is tantamount to no standard at all. If the record is clear, then the problem is solved forever and should be constitutionally mandated.

There should be no difference in the law between concession of guilt as charged as opposed to concession of guilt to a lesser offense.

ISSUE III

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S 3.850 INEFFECTIVE COUNSEL CLAIM BASED UPON COUNSEL'S FAILURE TO ADEQUATELY ADVISE DEFENDANT OF HIS RIGHT TO TESTIFY AND FAILURE TO OBTAIN A RECORD WAIVER OF THIS RIGHT (VIOLATION OF V, VI AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION)

(STANDARD OF REVIEW-COMPETENT SUBSTANTIAL EVIDENCE-INDEPENDENT STANDARD)

Appellant's position here is the same as Issue II. The matter of defendant's testifying is particulary troubling when recollections of counsel and defendant must be had with nothing on the record.

Again, Appellant urges this court adopt a constitutional standard requiring an on the record waiver conducted by the trial judge.

ISSUE IV

THE COURT ERRED IN DENYING DEFENDANT'S 3.850 MOTION UPON GROUNDS THE PROSECUTION ENGAGED IN BURDEN SHIFTING ARGUMENT (INEFFECTIVE ASSISTANCE OF COUNSEL) IN THE PENALTY PHASE AND INDIRECT COMMENTS ON DEFENDANT'S FAILURE TO TESTIFY IN THE GUILT PHASE (UNITED STATES CONSTITUTION, ARTICLES V AND XIV, AMENDMENT SECTION 9, FLORIDA CONSTITUTION)

(STANDARD OF REVIEW – COMPETENT SUBSTANTIAL EVIDENCE – INDEPENDENT STANDARD)

The State seems to argue that because they had a strong case at trial that the prosecutor should thus be permitted to use "uncontroverted" as it applies to Defendant's statements. No one but defendant is capable of controverting his own statements. This issue calls for reversal because it hits squarely at the burden of proof standard. A prosecutor should not be excused for impropriety of argument because he may have a strong case.

ISSUE V

THE COURT ERRED IN FAILING TO GRANT DEFENDANT'S 3.850 MOTION TO REQUIRE CO-COUNSEL IN A DEATH PENALTY CASE (VIOLATION OF V, VI AND XIV AMENDMENTS OF THE UNITED STATED CONSTITUTION, SECTION 9 CONSTITUTION OF THE STATE OF FLORIDA)

(STANDARD OF REVIEW – ABUSE OF DISCRETION)

Florida law is against Appellant on this issue, but it seems that co-counsel should be a requirement in any death penalty case. It is simply not possible for one counsel to adequately work both guilt and penalty phases of a death case. Trial counsel never requested one. That seems to be ineffective assistance.

ISSUE VI

THE COURT ERRED IN IMPROPERLY

INSTRUCTING THE JURY ON THE AGGRAVATOR UNDER SENTENCE OF IMPRISONMENT – INEFFECTIVE COUNSEL (VIOLATION OF V, VI AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTION 9, FLORIDA CONSTITUTION)

(STANDARD OF REVIEW – COMPETENT SUBSTANTIAL EVIDENCE – INDEPENDENT STANDARD)

Defendant should not be presented to the jury as being under sentence of imprisonment without qualification that his release was lawful.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail to the Office of the BARBARA YATES, ASST ATTORNEY GENERAL, The Florida Capitol Building, Plaza Level One, Tallahassee, Florida

32399-1050, and The Office of the State Attorney, JOHN MOLCHAN, ASA, Santa Rosa County, P O Box 645, Milton, Florida 32572 this the _____ day of August, 2001.

_____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing APPELLANT'S REPLY BRIEF APPEAL FROM DENIAL OF 3.850 MOTION FOR POST CONVICTION RELIEF complies with Rule 9.100(1) and Rule 9.210(a)(2), FLORIDA RULES OF APPELLATE PROCEDURE, and that this Brief has been submitted in **Times New Roman 14-point font**.

_____
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