

IN THE SUPREME COURT OF FLORIDA

CURTIS WINDOM,

Petitioner,

v.

CASE NO. SCO2-2142

MICHAEL W. MOORE,
Secretary, Department of Corrections,
State of Florida,

Respondent.

RESPONSE TO PETITION FOR HABEAS CORPUS

AND

MEMORANDUM OF LAW

COMES NOW, Respondent, Michael W. Moore, Secretary of the Department of Corrections for the State of Florida, by and through the Attorney General of the State of Florida and the undersigned counsel, who answers the petition, and states:

I.

PRELIMINARY STATEMENT

Respondent denies petitioner is being illegally restrained and denies each and every allegation in the instant petition indicating in any manner that petitioner is entitled to relief from this Court.

II.

RELEVANT PROCEDURAL HISTORY AND FACTS¹

On November 22, 1993, Assistant Public Defender Christopher S. Quarles filed an 88 page brief on direct appeal of Windom's convictions and sentences. In this brief, appellate counsel raised the following thirteen claims:

I--THE PROSECUTOR'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO EXCLUDE MINORITIES FROM THE JURY DENIED WINDOM HIS RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II--THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE IRRELEVANT, PREJUDICIAL EVIDENCE OF A NONSTATUTORY AGGRAVATING FACTOR, SPECIFICALLY THE EFFECT OF THE MURDERS ON THE COMMUNITY'S CHILDREN.

III--THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE HEARING ABOUT COMPETENCY OF TRIAL COUNSEL.

IV--THE INTRODUCTION OF PREJUDICIAL AND UNNECESSARY PHOTOGRAPHS OF THE VICTIMS DENIED CURTIS WINDOM HIS RIGHT TO A FAIR TRIAL.

V--THE TRIAL COURT'S DENIAL OF APPELLANT'S ATTEMPT TO CALL SERGEANT FUSCO AS A WITNESS UNCONSTITUTIONALLY DEPRIVED WINDOM OF HIS RIGHT TO PRESENT HIS DEFENSE.

VI--THE INSTRUCTION ON REASONABLE DOUBT DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR TRIAL.

VII--THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED SPECIAL JURY INSTRUCTIONS AT THE PENALTY PHASE.

¹A more detailed factual and procedural history is contained in the State's initial brief before this Court on post-conviction review.

VIII--THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED SPECIAL JURY INSTRUCTIONS AT THE PENALTY PHASE.

IX--THE TRIAL COURT ERRED IN FINDING THAT THE CRIMES WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

X--THE TRIAL COURT ERRED IN FINDING THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR WHERE THE ONLY OTHER CONVICTIONS OF PRIOR FELONIES WERE CONTEMPORANEOUS TO THE MURDERS.

XI--THE TRIAL COURT IMPROPERLY REJECTED SUBSTANTIAL, COMPETENT, UNCONTROVERTED MITIGATING EVIDENCE BY UNJUSTIFIABLY GIVING THE MITIGATION LITTLE, IF ANY, WEIGHT.

XII--THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE.

XIII--CONSTITUTIONALITY OF SECTION 921.141, FLORIDA STATUTES.

The State submitted its answer brief on February 25, 1994. Appellate counsel filed a reply brief on March 15, 1994. This Court struck the aggravating factor of CCP relating to the murders of Mary Lubin and Valerie Davis, but otherwise affirmed Windom's convictions and sentences in its opinion issued on April 27, 1995. Windom v. State, 656 So. 2d 432 (Fla. 1995).

ARGUMENT

I, II.

WHETHER FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL WHERE THE STATUTE DEPRIVES HIM OF HIS RIGHT TO TRIAL BY JURY ON ESSENTIAL ELEMENTS OF CAPITAL FIRST DEGREE MURDER.

The decision in Apprendi v. New Jersey, 530 U.S. 466 (2000) and the recently decided case of Ring v. Arizona, 2002 WL 1357257 (U.S. June 24, 2002) do not provide any basis for questioning Windom's convictions or resulting death sentences.² This issue is procedurally barred as trial counsel did not lodge the specific constitutional objections below to Florida's capital sentencing statute that he posits here. See Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987)("[H]abeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial."). While Apprendi was not decided until after Windom's trial, this fact does not excuse Windom from raising the legal tenets and factual basis for his argument at trial below. In any case, Windom's argument that Florida's capital sentencing statute is invalid is without merit.

This Court has declined to invalidate Florida's capital sentencing law based on Ring. Bottoson v. State, 27 Fla. L.

²Ring was decided after the instant habeas petition was filed.

Weekly S891 (Fla. Oct. 24, 2002). In Barnes v. State, 794 So. 2d 590 (Fla. 2001), this Court found an alleged Apprendi³ error had not been preserved for appellate review. The United States Supreme Court has also held that an Apprendi claim is not plain error. United States v. Cotton, 122 S.Ct. 1781 (2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). These cases confirm that any possible constitutional violation under Apprendi is not "fundamental error" warranting judicial review of an unpreserved claim.

Even if Apprendi error could be deemed fundamental in some contexts, the present case does not provide the facts for such a conclusion here. Windom fails to acknowledge that, due to the existence of his "prior violent felony conviction" aggravating factor, the judge was authorized to impose the death penalty

³Ring is merely an extension of Apprendi. Clearly, the application of Apprendi was limited to (1) factual findings, other than prior conviction, (2) which increase the statutory maximum for a charged offense. Because the Arizona Supreme Court interpreted its law as prescribing only a life sentence upon conviction for first-degree murder, Ring, 122 S.Ct. at 2436; Ring v. State, 25 P.3d 1139, 1150 (Ariz. 2001), Ring fits squarely within the Apprendi holding, and thus, the Ring decision does not extend or expand the Sixth Amendment right at issue in Apprendi.

even if additional jury findings may be deemed necessary in the context of other cases. See Bottoson, 27 Fla. L. Weekly at S898; S900 (J. Shaw, concurring; J. Pariente, concurring). It is undisputed that Windom's judge properly found the existence of the prior conviction factor, and therefore no additional jury findings were required with regard to Windom's eligibility to receive the death penalty. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (prior conviction properly used by judge alone to enhance defendant's statutorily authorized punishment). Since the defect alleged to invalidate the statute - lack of jury findings to enhance the sentence - is not implicated in this case due to the existence of the prior convictions, Windom has no standing to challenge any potential error in the application of the statute on other facts. If Windom had no prior conviction, his sentence would still be constitutionally valid. According to Windom, Florida's capital statute is constitutionally flawed due to its failure to require that a "death qualifying aggravating factor" be alleged in the indictment and expressly found by a jury. This argument is premised on a fundamental misunderstanding of Florida law. In Ring, the United States Supreme Court applied Apprendi to invalidate Arizona's capital sentencing scheme, which required a judge, acting alone, to determine a capital defendant's

eligibility for the death penalty. In Florida, unlike Arizona, death eligibility is determined by the jury upon conviction for first degree murder. See Bottoson, 27 Fla. L. Weekly at S893; S902 (J. Quince, concurring; J. Lewis, concurring); Shere v. Moore, 27 Fla. L. Weekly S752, S754 (Fla. Sept. 12, 2002) (statutory maximum sentence for first degree murder is death); Mills v. Moore, 786 So. 2d 532, 538 (Fla.), cert. denied, 532 U.S. 1015 (2001) (same). Ring is not applicable in Florida because capital punishment is not an "enhanced" sentence for first degree murder; accordingly, no further jury findings are required.

Thus, Windom's argument that an aggravating factor must be alleged in the indictment and expressly found by a jury beyond a reasonable doubt is without merit, as the existence of an aggravating factor is a determination that concerns the defendant's selection for capital punishment, rather than his eligibility for the death penalty. Clearly, Ring does not require jury findings for sentencing, only for eligibility. As Justice Scalia stated, Ring "has nothing to do with jury sentencing." Ring, 122 S.Ct. at 2445. Apprendi and Ring involve the jury's role in determining death eligibility, but do not require that the actual selection of sentence be made by a jury. Quoting Proffitt v. Florida, 428 U.S. 242, 252 (1976),

Ring acknowledged that “[i]t has never [been] suggested that jury sentencing is constitutionally required.”⁴ Ring, 122 S.Ct. at 2447, n.4. Rather, Ring involves only the requirement that the jury find the defendant death eligible. That determination must be made by the jury, while the actual sentencing decision may constitutionally be made by the trial court. See Spaziano v. Florida, 468 U.S. 447, 459 (1984) (finding Sixth Amendment has no guarantee of right to jury trial on issue of sentence).

In addition, even if an aggravating factor is construed to determine eligibility rather than selection, the suggestion that it must be charged in the indictment has no basis in law. This claim has been repeatedly rejected. See Hildwin v. State, 531 So. 2d 124, 128 (Fla. 1988) (rejecting claim that Florida law makes aggravating factors into elements of the offense so as to make the defendant death-eligible), aff’d., 490 U.S. 638 (1989); Lightbourne v. State, 438 So. 2d 380 (Fla. 1983) (aggravating circumstances do not need to be charged in indictment). In addition, United States Supreme Court precedent does not support Windom’s position. Hurtado v. California, 110 U.S. 516 (1984)

⁴See Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding that “[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury’s recommendation and trusts the judge to give it the proper weight.)

(holding there is no requirement for an indictment in state capital cases). Apprendi did not address the indictment issue. Apprendi, 530 U.S. at 477, n.3. Ring similarly did not address the issue, and although Ring, in part, overruled Walton v. Arizona, 497 U.S. 639 (1990), this claim was rejected by this Court prior to Walton being decided and does not, in any way, rely on Walton for support. Therefore, Ring does not compel further consideration of this issue.

Thus, Windom's death sentence satisfies the Sixth Amendment as construed in Ring. His prior violent felony convictions permitted the judge to impose a capital sentence, even without jury involvement. In addition, by returning a unanimous recommendation for death, his jury necessarily found beyond a reasonable doubt that at least one statutory aggravating factor existed. Ring merely requires a jury, rather than a judge acting alone, make the determination of certain factors and that those factors be established beyond a reasonable doubt. These requirements have been met in this case. The jury was instructed that the aggravators had to be proven beyond a reasonable doubt. Following the instructions, Windom's jury recommended a death sentence, 12-0. Clearly, aggravation was proven beyond a reasonable doubt. See Hildwin v. Florida, 490 U.S. 638 (1989) (holding that where jury made a sentencing

recommendation of death it necessarily engaged in the fact finding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved). Because the finding of an aggravating factor clearly authorized the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense is fulfilled.

Windom's speculation that the jury may have disagreed as to which aggravating factors existed, or disregarded the instructions to consider aggravating factors, is unwarranted. Jurors are presumed to follow the court's instructions, and jurors are not required to agree on different theories of liability. See Schad v. Arizona, 501 U.S. 624 (1991) (jury need not agree on alternative theories of prosecution).

In conclusion, aggravating factors in Florida are not elements of the offense, but are constitutionally mandated capital sentencing guidelines. Florida's capital sentencing scheme affords the sentencer the guidelines to follow in determining the various sentencing selection factors related to the offense and the offender by providing accepted statutory aggravating factors and mitigating circumstances to be considered. Given that a defendant faces the statutory maximum sentence of death upon conviction of first degree murder, the

employment of further proceedings to examine the assorted "sentencing selection factors," does not violate due process. The plain language of Apprendi and Ring establishes that those cases come into play when a defendant is exposed to a penalty exceeding the maximum allowable under the jury's verdict. Because Windom was death eligible upon conviction, Ring does not invalidate his death sentence or render Florida's sentencing scheme unconstitutional.

**III.
WHETHER MR. WINDOM WAS DENIED THE RIGHT TO
EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT
APPEAL? (STATED BY RESPONDENT).**

Windom alleges that he was denied the right to effective representation on direct appeal because counsel failed to raise several potential issues of prosecutorial misconduct on direct appeal. The State disagrees.

A. Preliminary Statement On Applicable Legal Standards

A state criminal defendant is entitled under the Due Process Clause of the Fourteenth Amendment to the effective assistance of counsel on direct appeal. Evitts v. Lucey, 469 U.S. 387 (1985). Of course, the proper test of attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 668 (1984). The two prong test for ineffective assistance established in Strickland requires a

defendant to show deficient performance by counsel and that the deficient performance prejudiced the defense. If a claim of ineffectiveness can be disposed of on the prejudice prong, there is no need to consider the deficiency prong. Strickland, 466 U.S. at 697; Provenzano v. State, 616 So. 2d 428, 432 (Fla. 1993). Prejudice is only established with a showing that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364 (1993).

The Supreme Court recognized that "since time beyond memory" experienced advocates "have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). The failure of appellate counsel to brief an issue which is without merit is not a deficient performance which falls measurably outside the range of professionally acceptable performance. See Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986), cert. denied, 481 U.S. 1059 (1987). Moreover, an appellate attorney will not be considered ineffective for failing to raise issues that have little or no chance of success. Engle v. Duggar, 576 So. 2d 696 (Fla. 1991). Finally, appellate counsel is "not ineffective for failing to raise issues not preserved for appeal." Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991).

B. Analysis Of Petitioner's Claims

At the outset, the State notes that defense counsel filed an 88 page brief raising thirteen separate allegations of error. Windom has not shown that any of the additional claimed errors are stronger or more viable than the claims raised by appellate counsel on direct appeal. Nor can he show that the result of his direct appeal is unreliable or unfair based upon appellate counsel's alleged deficiencies. Consequently, he has failed to establish his appellate counsel provided ineffective assistance.

I. Prosecutor Implying Personal Knowledge Of Windom's Violent Propensities

Windom maintains that during cross-examination of Jack Lockett the prosecutor impermissibly insinuated that he had personal knowledge of evidence not admitted at trial. The comment at issue came as the result of the prosecutor attempting to test the opinion of witness Lockett that he did not know Windom to be a "violent person." (TR. 327). Leinster was able to bring that observation out over the State's objection during cross-examination in the guilt phase. On re-direct, the prosecutor sought to test that opinion by asking him about any acts of violence he was aware of between Windom and his girlfriend. (TR. 330-331). The entire comment was, as follows: "Mr. Leinster knows this is an argument with his girlfriend." (TR. 331). Leinster objected and moved for a

mistrial after telling the jury, "I don't know any such thing." (TR. 331). The prosecutor was upset because witness Lockett left the jury with the "false" impression that Windom has never been violent. (TR. 334).

The trial court provided a curative instruction to the jury with Leinster's blessing, advising the jurors: "Please disregard of (sic) the comments that the lawyers make to each other between themselves. That is inappropriate and I have asked them to stop that. We are only concerned about this trial." (TR. 335). Ultimately, on re-direct, Lockett reaffirmed his view that he had never seen Windom get into a violent situation. (TR. 336). However, Lockett did state that he had seen Windom get into an "argument." (TR. 336).

A review of the trial transcript reveals that this issue was insignificant and the trial court cured any potential prejudice with an instruction. Moreover, the prosecutor only insinuated that Windom had an "argument" with his girlfriend. Even if Leinster knew this to be true, an argument among boyfriend and girlfriend is hardly the type of prejudicial disclosure that would warrant the severe sanction of a mistrial. Raising this issue on direct appeal would only serve to dilute the more substantial allegations of error raised by appellate counsel. See Atkins v. Dugger, 541 So. 2d 1165, 1167 (Fla. 1989) ("Most

successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the stronger points"). Appellate counsel was not ineffective in failing to raise this inconsequential issue on direct appeal.

II. The Prosecutor's Guilt Phase Closing Argument

Windom next asserts that counsel was ineffective for failing to raise allegations of error surrounding the prosecutor's closing argument. Windom has failed to establish either deficient performance or resulting prejudice based upon the complained of comments in closing.

First, the State notes that the prosecutor's comment regarding the testimony of Dr. Kirkland was not preserved for review by an objection below. It is well established that counsel will not be deemed ineffective for failing to raise claims pertaining to prosecutorial arguments which were not objected to at trial. Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993); Kelley v. Dugger, 597 So. 2d 262, 263 (Fla. 1992); Medina v. Dugger, 586 So.2d 317, 318 (Fla. 1991)(appellate counsel is "not ineffective for failing to raise issues not preserved for appeal"). Appellant's invocation of the term "fundamental" error to circumvent the procedural bar is

unavailing in this case. In order to constitute fundamental error, the prosecutor's statements had to "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991)(quoting Brown v. State, 124 So. 2d 481, 484 (Fla. 1960)). The complained of comments in this case clearly do not meet this standard. See Sims v. State, 681 So. 2d 1112, 1116-17 (Fla. 1996)(claimed errors when prosecutor referred to defendant as a liar, accused defense counsel of misleading the jury, and bolstered his attacks on Sims' credibility by expressing his personal views and knowledge of extra-record matters, not properly before the Court on appeal without an objection)(citing Craig v. State, 510 So. 2d 857, 864 (Fla. 1987, cert. denied, 484 U.S. 1020 (1988))).

In any case, the prosecutor's summary of Dr. Kirkland's testimony, was, generally speaking, largely accurate. Dr. Kirkland did not diagnose Windom with any major mental disorder. Given the facts related to him in a question by the prosecutor, Dr. Kirkland admitted that the conduct itself did not suggest Windom was incapable of intending his actions. (TR. 590). Moreover, given the fact the jury was directed (TR. 650,

669-777)⁵ to use their own recollection of the trial testimony, it cannot be said such comments, even if overstated, rise to the level of error, let alone fundamental error.

On the remaining allegations Windom simply points to brief statements made by the prosecutor and alleges that the record does not support the statements. See Duest v. Dugger, 555 So. 2d 849, 851-852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived"). Assuming that such brief reference preserves the issue for review in this pleading, the State notes that these comments were not preserved for appeal by an objection below. Consequently, appellate counsel cannot be faulted for failing to raise such claims on appeal.

As for the prosecutor's statement regarding Windom waiting for victim Mary Lubin, this was a fair inference from the evidence. Windom knew that she worked a very short distance from Valerie's home. Windom could have fairly assumed that she

⁵Not only did the jurors receive an instruction prior to the argument, but during the argument the jury received the admonition to use their own recollection of the facts over that provided by the attorneys. "...As I said before, what the attorneys say is not evidence. So, if you recall it to be different, then as a group you recall it the way you remember, not the way the lawyers remember it." (TR. 670).

would come home after learning her daughter had been shot. In any case, defense counsel effectively addressed the prosecutor's assertion in his closing argument: "Mary Lubin. Mr. Ashton says that he waited for Mary Lubin to come to that street corner. How in the world would he know that Mary Lubin is coming looking for him? This as another completely accidental meeting." (TR. 681). Windom has failed to demonstrate his appellate counsel should have raised such a meritless issue on direct appeal.

III. Penalty Phase Closing Argument

The State notes the complained of penalty phase closing argument was not preserved for appeal by an objection below. As such, appellate counsel cannot be deemed ineffective for failing to raise the issue on direct appeal.

In any case, the portion of the prosecutor's argument claimed as error was not improper. The prosecutor was simply addressing the instructions and the fact the jury had heard very little of the defendant's background or character. (PP. 87-88). This did not constitute an impermissible burden shifting argument, but was simply a fair comment on the state of the evidence. Indeed, trial defense counsel's tactical decision kept out most of the evidence relating to Windom's background, which of course, included the fact that he was a successful cocaine dealer at the time he committed the murders. Instead,

defense counsel focused on the evidence indicating that these murders were committed in some type of emotional frenzy and they were clearly out of character with his normal, non-violent character.

Even assuming the argument was somehow improper, failing to raise this issue on appeal did not render the result of Windom's direct appeal unfair or unreliable. If the prosecutor's comments in this case were deemed to be improper, such comments are not reversible error, let alone fundamental, where the remarks did not become a feature of the trial. There is no question that the same result in the penalty phase would obtain even without the complained of comments. Windom murdered three people and attempted to murder a fourth, the jury's penalty phase vote was 12-0. See generally Sims v. State, 602 So. 2d 1253, 1257 (Fla. 1992) (rejecting claim of ineffective assistance of counsel for failure to object to Golden Rule violation), cert. denied, 506 U.S. 1065 (1993); Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (prosecutor's penalty phase closing argument not egregious enough to warrant new sentencing).

IV. Cumulative Error

As noted above, the asserted comment errors were either not improper or they were so inconsequential that they could not

have any impact upon guilt or penalty phases. Consequently, Windom's cumulative error allegation must fail. Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998)(where claims were either meritless or procedurally barred, there was no cumulative effect to consider).

WHEREFORE, based on the foregoing arguments and authorities, the instant Petition for Writ of Habeas Corpus should be summarily denied on the merits.

Respectfully submitted,

RICHARD E. DORAN
ATTORNEY GENERAL

SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Westwood Center, Suite 700
2002 North Lois Avenue
Tampa, Florida 33607-2366
(813) 801-0600
(813) 356-1292 (Fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Jeffrey M. Hazen, Assistant CCRC - N, 1533-B South Monroe Street, Tallahassee,

Florida 32301, on this ____ day of January, 2003.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

COUNSEL FOR RESPONDENT