IN THE SUPREME COURT OF FLORIDA

WILLIAM EARL SWEET,

Petitioner,

v. CASE NO. SC01-2867

MICHAEL W. MOORE, ETC.,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Michael W. Moore, Secretary of The Florida Department of Corrections, responds, by and through undersigned counsel, to Sweet's petition for writ of habeas corpus and states the following:

STATEMENT OF THE CASE AND FACTS

The facts of this case are set out in the opinion affirming Sweet's first-degree murder conviction and death sentence:

> On June 6, 1990, Marcine Cofer was attacked in her apartment and beaten and robbed by three men. She could identify two of the men by their street names. On June 26, 1990, she was taken by Detective Robinson to the police station to look at pictures to attempt to identify the third assailant. When Robinson dropped Cofer off at her apartment, William Sweet was standing nearby and saw her leave the detective. Unknown to Cofer, Sweet had previously implicated himself in the robbery by telling a friend that he had committed the robbery or that he had ordered it done. Cofer asked her next door neighbor, Mattie Bryant, to allow the neighbor's daughters, Felicia, thirteen, and Sharon, twelve, to stay with Cofer in her apartment that night. Mattie agreed, and the children went over to Cofer's apartment around 8 p.m.

> At approximately 1 a.m. that evening, Sharon was watching television in the living room of Cofer's apartment when she heard a loud kick on the apartment door. She reported this to Cofer, who was sleeping in the bedroom, but because the person had apparently left, Cofer told Sharon not to worry about it and went back to sleep. Shortly thereafter, Sharon saw someone pulling on the living room screen. She awakened Cofer. The two then went to the door of the apartment, looked out the peephole, and saw Sweet standing outside. Sweet called Cofer by name and ordered her to open the door.
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> At Cofer's direction, Felicia pounded on the bathroom wall to get Mattie's attention in the apartment next door, and a few minutes later Mattie came over. The four then lined up at the door, with Cofer standing in the back of the group. When they opened the door to leave, Sweet got his foot in the door and forced his way into the apartment. Sweet's face was partially covered by a pair of pants. He first shot Cofer and then shot the other three people, killing Felicia. Six shots were fired. Cofer, Mattie, and Sharon were shot in the thigh, ankle and thigh, and buttock, respectively, and Felicia was shot in the hand and in the abdomen.
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> Sweet was convicted of first-degree murder, three counts of attempted first-degree murder, and burglary. The jury recommended a sentence of death by a vote of ten to two, and the trial court followed this recommendation.

Sweet v. State, 624 So.2d 1138, 1139 (Fla. 1993), cert. denied, 510 U.S. 1170 (1994). In sentencing Sweet to death, the trial court found that four aggravators had been established (prior violent felony; committed to avoid or prevent arrest; committed during a burglary; and cold, calculated, and premeditated (CCP)) and that those aggravators outweighed the mitigation. (III 398-

409).[1]

Sweet raised six issues on direct appeal: 1) trial court did not conduct an adequate inquiry into whether Sweet wanted to represent himself; 2) trial court erred in admitting collateral evidence of the robbery of Cofer; 3) the facts did not support CCP; 4) the facts did not support the avoid arrest aggravator; 5) the facts did not support the prior violent felony conviction aggravator; and 6) trial court erred in imposing four fifteen-year minimum mandatory sentences for the noncapital convictions. This Court agreed with the last issue but affirmed as to all the others, id. at 1139-43, and affirmed Sweet's convictions and death sentence. Id. at 1143.

In 1995 Sweet filed a motion for postconviction relief and amended it in 1997, raising twenty-eight claims. Following the Huff[2] hearing, the circuit court denied twenty-four issues summarily and held an evidentiary hearing in January 1999 on the four remaining ineffective assistance claims. After that hearing, the circuit court denied relief.

Sweet appealed that denial to this Court, raising six claims: (1) counsel was ineffective during the guilt phase for

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[1] This reference is to volume III, pages 398-409 of the record on appeal of Sweet's convictions and sentence, Case No. 78629.

[2] Huff v. State, 622 So.2d 982 (Fla. 1993).

failing to investigate and present evidence of other suspects; (2) counsel was ineffective during the penalty phase; (3) the trial court erred in failing to consider the cumulative effect of newly discovered evidence concerning Sweet's innocence; (4) counsel was ineffective regarding Sweet's competency evaluation by a mental health expert; (5) the trial court erred in summarily denying claims related to trial counsel's ineffectiveness and the state's misconduct; and (6) the record on appeal was incomplete. This Court recently affirmed the circuit court's denial of postconviction relief. Sweet v. State, 27 Fla.L.Weekly S113 (Fla. January 31, 2002). The instant petition, raising three claims of appellate ineffectiveness and an alleged violation of Apprendi v. New Jersey, 530 U.S. 466 (2000), was filed at the end of December 2001.

PRELIMINARY STATEMENT

The issue of appellate counsel's ineffectiveness is raised appropriately in a petition for writ of habeas corpus. E.g., Downs v. Moore, 801 So.2d 906 (Fla. 2001); Happ v. Moore, 784 So.2d 1091 (Fla. 2001); Rutherford v. Moore, 774 So.2d 637 (Fla. 2000); Robinson v. Moore, 773 So.2d 1 (Fla. 2000); Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999). The standard for reviewing claims of appellate counsel's ineffectiveness is set

out in Strickland v. Washington, 466 U.S. 668 (1984). Under that case a habeas petitioner must demonstrate that appellate counsel's performance was deficient and that the deficient performance prejudiced the petitioner. Downs; Happ; Rutherford; Robinson; Teffeteller. Claims of appellate ineffectiveness, however, "may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion." Rutherford, 774 So.2d at 643; see Teffeteller, 734 So.2d at 1025 (habeas petitions are not to be used as a second appeal); Hardwick v. Dugger, 648 So.2d 100, 105 (Fla. 1994) (same); Parker v. Dugger, 550 So.2d 459, 460 (Fla. 1985) (same). Habeas claims that duplicate claims raised on direct appeal or a postconviction motion are procedurally barred. Rutherford.

Appellate counsel is not ineffective for failing to raise claims that were not preserved for review. Downs; Happ; Rutherford; Thompson v. State, 759 So.2d 650 (Fla. 2000). Moreover, as this Court stated previously: "Because of limitations of time, space, and human energy, a lawyer briefing an appeal must choose from all conceivable arguments those arguments most likely to bring about a favorable outcome." McCrae v. Wainwright, 439 So.2d 868, 870 (Fla. 1983); 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 impact of the stronger points."). Appellate counsel cannot be ineffective for failing to raise issues that have no merit. Downs; Rutherford; Teffeteller; King v. Dugger, 555 So.2d 357 (Fla. 1990); Suarez v. Dugger, 527 So.2d 190 (Fla. 1988); see also Freeman v. State, 761 So.2d 1055, 1069 (Fla.2000) (appellate counsel's "'deficiency must concern an issue which is error affecting the outcome, not simply harmless error'") (quoting Knight v. State, 394 So.2d 997, 1001 (Fla. 1981)). When an issue is raised on appeal, however, "counsel cannot be ineffective for failing to convince this Court to rule in appellant's favor." Freeman, 761 So.2d 1071; Swafford v. Dugger, 569 So.2d 1264, 1266 (Fla. 1990).

CLAIM I

Appellate counsel was not ineffective for failing to raise alleged improper influence on the jurors.

In this claim, Sweet argues that Rule Regulating the Florida Bar 4-3.5(d)(4) is unconstitutional and that collateral counsel has been rendered ineffective by that rule.[3] This claim is based on an incident at trial that was not raised on direct appeal.

[3] This claim was raised in Sweet's postconviction motion and rejected. (PCR IV 1085-86). "PCR IV" refers to volume IV of the record in Sweet's postconviction appeal, case no. SC00-1509.

There is no merit to this claim, however, and it should be denied.

After a break during the trial, two of Sweet's friends, Rachael Russell and Stacey Williams, told defense counsel that, while in the snack bar, they overheard a law enforcement officer say that Sweet was guilty in the presence of several jurors. (XXIV 572-73). The trial court questioned both Russell and Williams, and counsel for both sides questioned Williams. (XXIV 574-97). Thereafter, the court had the jurors returned to the courtroom and asked if any had heard a uniformed officer make a statement about Sweet's case in the snack bar.[4] (XXIV 600-01). When no juror responded affirmatively, the trial proceeded. (XXIV 601).

Sweet states that there is a "possibility" that constitutional error occurred (petition at 8) and later claims that his "jurors overheard police officers pronouncing [him] guilty." (Petition at 13). However, he ignores the fact that none of his jurors acknowledged hearing what Russell and Williams allegedly heard. Moreover, trial counsel did not object or move for a mistrial, obviously because he believed

[4] Sweet's comment (petition at 8) that the trial court "generally inquired" is misleading. The question asked by the court was very specific.

that no error had occurred. If counsel had raised this claim on appeal, it would have been held to have no merit. Appellate counsel is not ineffective for not raising nonmeritorious claims.

Sweet's real complaint is that "it should have been clear to appellate counsel that Mr. Sweet would wish to investigate this matter further in postconviction proceedings, and that he would be prevented from doing so by rules that prohibit interviewing jurors." (Petition at 9). Appellate counsel, however, has no duty to divine what issues postconviction counsel may wish to raise.

There is a "strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it." Baptist Hospital v. Maher, 579 So.2d 97, 100 (Fla. 1991); Kearse v. State, 770 So.2d 1119 (Fla. 2000). Sweet has made no prima facie showing that juror misconduct occurred, i.e., he has not shown that any juror found him guilty based on an officer's alleged statement instead of on the evidence presented at trial. This claim is nothing more than collateral counsel's complaint that he cannot conduct a fishing expedition among Sweet's jurors. See Arbelaez v. State, 775 So.2d 909, 920 (Fla. 2000).

Rule 4-3.5(d)(4) prohibits such fishing expeditions and

serves vital governmental interests by protecting the finality of verdicts, preserving juror privacy, and promoting full and free debate during deliberations. See Tanner v. United Stated, 483 U.S. 107 (1986). It does not deny Sweet access to the courts because, as shown by the trial record, there is no merit to the basic complaint. Indeed, Sweet eventually recognizes this by claiming that the rule has prevented him "from investigating any claims of jury misconduct that may be inherent in the jury's verdict." (Petition at 20, emphasis supplied). Matters that inhere in a jury's verdict, however, cannot be reached, and interviewing jurors for that purpose is prohibited. See Devoney v. State, 717 So.2d 501 (Fla. 1998).

Moreover, ineffective assistance of collateral counsel is not a cognizable claim. Murray v. Giarratano, 492 U.S. 1 (1989); Pennsylvania v. Finley, 481 U.S. 551 (1987); Foster v. State, 27 Fla.L.Weekly S147 (Fla. February 14, 2002); Waterhouse v. State, 792 So.2d 1176 (Fla. 2001); Lambrix v. State, 698 So.2d 247 (Fla. 1996).

Sweet has failed to show that appellate counsel acted in a substandard manner that prejudiced him. This claim, therefore, should be summarily denied.

CLAIM II

Appellate counsel was not ineffective
for not raising a burden shift argument.

Sweet argues that counsel was ineffective for not arguing on appeal that the standard jury instructions impermissibly shifted to him the burden of showing that life imprisonment rather than death was the proper sentence.[5] (Petition at 21-25). Trial counsel, however, did not preserve this issue, and appellate counsel cannot be ineffective for failing to raise unpreserved claims. Moreover, this Court has repeatedly held that this claim has no merit. E.g., Rutherford, 774 So.2d at 644; Freeman, 761 So.2d at 1072. Appellate counsel also cannot be ineffective for not raising claims that have no merit. Sweet has not shown substandard performance that prejudiced him, and this claim should be denied.

CLAIM III

Counsel was not ineffective for not challenging on appeal the instruction on the avoid arrest aggravator.

Sweet next argues that appellate counsel was ineffective for not arguing that the avoid arrest aggravator instruction was inadequate.[6] (Petition at 26-28). Instructions on aggravators

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[5] This claim was raised in Sweet's postconviction motion and rejected. (PCR IV 1088).

[6] This claim was raised in Sweet's postconviction motion and rejected. (PCR IV 1078-1079).

must be challenged at trial to be preserved for appeal. E.g., Freeman, 761 So.2d at 1071. This claim was not preserved, however, and appellate counsel, therefore, cannot have been ineffective regarding it.

Moreover, the standard jury instructions are presumed to be correct. E.g., Downs v. State, 740 So.2d 506 (Fla. 1999). Sweet's jury was given the standard instruction on the avoid arrest aggravator (XXVIII 1272-73), and that instruction has not been declared invalid. The basic complaint about the instruction has no merit, and appellate counsel cannot be ineffective for not raising a nonmeritonous argument.

This claim, therefore, should be denied.

CLAIM IV

No Apprendi violation occurred.

In his last claim Sweet argues that his jury was not instructed to find beyond a reasonable doubt that the aggravators outweighed the mitigators before recommending that he be sentenced to death.[7] (Petition at 28-29). This claim is procedurally barred because Sweet has never raised it before. Moreover, Sweet recognizes that this issue has been decided adversely to him, but asks this Court to reconsider it based on

[7] This claim contains no allegation of appellate ineffectiveness.

Apprendi v. New Jersey, 530 U.S. 466 (2000). As Sweet acknowledges, however, this Court has held that Apprendi does not apply to Florida's capital sentencing. E.g., Bottoson v. State, 27 Fla.L.Weekly S119 (Fla. January 31, 2002); King v. State, 27 Fla.L.Weekly S65 (Fla. January 16, 2002); Mills v. Moore, 786 So.2d 532 (Fla. 2001); see also Brown v. Moore, 26 Fla.L.Weekly S742 (Fla. November 1, 2001); Mann v. Moore, 794 So.2d 595 (Fla. 2001). Sweet has presented nothing that mandates reconsideration, and this claim should be denied.

CONCLUSION

For the foregoing reasons the Respondent asks this Court to deny Sweet's petition for writ of habeas corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been furnished by U.S. Mail to John M. Jackson, Assistant Capital Collateral Counsel, Capital Collateral Regional Counsel, Northern Region, 1533-B South Monroe Street, Tallahassee, Florida 32301, this 25th day of February 2002.

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BARBARA J. YATES
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