IN THE SUPREME COURT OF FLORIDA

WILLIAM REAVES,

Petitioner,

vs. Case No. 02-15

MICHAEL MOORE,

Respondent.
_____/

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CELIA A. TERENZIO
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0656879
1515 N. Flagler Dive.
SUITE 900
WEST PALM BEACH, FL. 33409
(561) 837-5000

ATTORNEY FOR RESPONDENT

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PROCEDURAL HISTORY

The state would make the following addition to the procedural history. Currently pending before this Court is an appeal of the denial of Reaves motion for postconviction relief. Reaves v. State, Case No. 00-0840. The first issue on appeal involves a claim of ineffective assistance of trial counsel. Reaves contends that trial counsel failed to pursue as a defense at trial the claim that he was voluntarily intoxicated at the time of the crime. Had he adequately investigated the issue, he would have uncovered evidence in support of such a defense. Additionally such evidence would have forced the trial judge to allow the testimony of Dr. Weitz at the guilt phase.

The following symbols will be used: ROA denotes record on direct appeal; SROA denotes supplemental record on direct appeal; PC ROA denotes record on appeal from the denial of Reaves motion for postconviction relief, Reaves v. State, Case No. 00-0840.

REASONS FOR DENYING THE WRIT

ISSUE I

PETITIONER'S CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE VARIOUS PRESERVED ISSUES INCLUDING THAT TRIAL COURT ERRED IN PRECLUDING THE DEFENSE OF VOLUNTARY INTOXICATION THROUGH MENTAL HEALTH EXPERT MUST BE SUMMARILY DENIED AS THE CLAIM IS PROCEDURALLY BARRED AND WITHOUT MERIT

In this petition, Reaves advances several arguments in support of his claim that appellate counsel was ineffective. In response to Reaves' claims the state presents various arguments, chief among them is that the issues are procedurally barred. The state asserts that the following legal principles are germane to resolution of this petition.

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion. In evaluating an ineffectiveness claim, the court must determine whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Pope v. Wainwright, 496 So.2d 798, 800 (Fla.1986). See also Haliburton, 691 So.2d at 470; Hardwick, 648 So.2d at 104. The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. See Knight v. State, 394 So.2d 997 (Fla.1981). "In the case of appellate counsel, this means the deficiency

> must concern an issue which is error affecting the outcome, not simply harmless error." > Id. at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. See Medina v. Dugger, 586 So.2d 317 (Fla.1991); 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.").

Freeman v. State, 7761 So. 2d 1055, 1070 (Fla. 2000). Based on these stringent legal principles, it will become clear that Reaves will not be able to overcome the irrevocable procedural default attached to these claims. In that alternative, it will be clear that Reaves cannot meet his burden of establishing that appellate counsel was ineffective. All relief must be denied.

In his first sub-issue Reaves claims that appellate counsel failed to challenge on appeal the trial court's denial of motion to compel discovery of the victim's, Officer Razkowski personnel records. Although Reaves claims that the issue was preserved for appeal, the record emphatically proves otherwise.

During a pre-trial hearing, defense counsel argued that Officer Razkowski's personnel records may become relevant as they may shed some light on the officer's state of mind during the crime. The state objected arguing that the officer's state of mind was irrelevant in this case. (ROA Vol. I 169-174). The trial court made the following ruling:

> I am going to deny the defendant's

> motion to compel discovery, because number one, I do not believe it's material that's within the custody of the prosecution, and number two, before I determine whether it is in the quasi custody of the prosecution through another government agency encompassed within the Nineteenth Circuit, I want you to explore public records requirements, and in the event that all other avenues fail, pursuant to the statute, then I'll allow you to refile.

(ROA Vol.I 174)(emphasis added). Trial counsel did not pursue the options made available by the trial court. His inactivity caused this potential issue to be waived. Consequently the issue was not preserved for appeal. See Lopez v. State,696 So. 2d 725, 727 (Fla.1997) (failing to bring any additional matters to the trial court's attention regarding outstanding public records issues bars appellate review); Cf. Armstrong v. State, 642 So.2d 730, 740 (Fla. 1994)(failing to secure ruling from trial court on pending motion precludes review on appeal). Additionally, based on this scant record, appellate counsel would have been unable to demonstrate how Reaves was prejudiced by the court's ruling. Cf. Finney v. State 660 So. 2d 674, 684 (Fla. 1995)(("Without a proffer it is impossible for the appellate court to determine whether the trial court's ruling was erroneous and if erroneous what effect the error may have had on the result."). Appellate counsel was not ineffective for failing to raise this non-preserved issue. Rutherford v. State, 774 So. 2d 637, 646 (Fla. 2000).

In sub-issue B, the pith of petitioner's claim is that appellate counsel was ineffective for failing to challenge on

appeal the trial court's decision to preclude the guilt phase testimony of Dr. Weitz. Reaves argues that he was precluded from presenting, "any psychological testimony from Dr. Weitz as to intent related to intoxication defense at guilt phase." **Petition at 8.** Reaves contends this issue was fully litigated pre-trial and therefore was properly preserved for appellate review. Appellate counsel's failure to present this issue constitutes ineffective assistance of counsel on direct appeal. The state asserts that this issue must be denied for several reasons; (1) a variation of this identical claim, i.e., admissibility of Dr. Weitz's testimony at the guilt phase, was raised and rejected on direct appeal and therefore it is now procedurally barred; (2) a second variation of this claim, i.e., ineffective assistance of trial counsel for failing to present a voluntary intoxication defense through Dr. Weitz was raised and rejected in a motion for postconviction relief. Denial of that motion is currently pending before this Court in Reaves v. State, Case No. 00-0840 and therefore it is procedurally barred; and (3) this issue was not preserved for appellate review as the record conclusively demonstrates that trial counsel never requested that Dr. Weitz be allowed to testify regarding a defense of voluntary intoxication. The appellate record is very clear that voluntary intoxication was never considered a viable defense by trial counsel. Therefore appellate counsel could not have properly presented such an issue on appeal. For these reasons articulated more fully below, this petition must

be denied.

The record on appeal reveals after taking the deposition of potential defense witness Dr. Weitz, the state filed a Motion to Prohibit Testimony of Abnormal Condition Not Constituting Legal Insanity." (ROA Vol. IX 2577-2605). The state argued that Weitz's testimony amounted to nothing more than a defense of diminished capacity, a defense that is in admissible in Florida. At no point did Weitz opine that Reave was insane or intoxicated at the time of the crime. To the contrary Weitz stated that Reaves was sane. And Weitz refused to offer a diagnosis with regards to voluntary intoxication. (ROA Vol. X 1470-1533). In response to the state's argument, trial counsel argued that Dr. Weitz's testimony was centered around the defense of excusable homicide. This affirmative defense was premised upon a condition recognized as "Vietnam Syndrome." In proffering the testimony relating to this psychological phenomenon, Weitz explained that Reaves' prior experiences in Vietnam along with his chronic drug abuse impacted his perceptions to the extent that he could not exercise normal judgement. Reaves' inability to reflect upon his actions, his intense anger, rage and resentment culminated in the excusable homicide of Officer Razkowski. In essence Reaves shot the officer because Reaves believed his life was in danger. (ROA Vol. X 1471, 1501-1502).) The trial court granted the state's motion finding the defense of "Vietnam Syndrome" was akin to diminished capacity and therefore inadmissible. (ROA 1471-1474). This issue was raised on appeal. (See Initial brief on direct appeal at 46-51

Appendix A). This Court affirmed the trial court's ruling holding:

> Reaves argues that the trial judge erred when he refused to admit evidence of "Vietnam Syndrome" in the guilt phase of the trial to support his "excusable homicide" defense. (FN7) We find no error. We said in Bunney v. State, 603 So.2d 1270, 1273 & n. 1 (Fla.1992), that "evidence of certain commonly understood conditions that are beyond one's control ... should also be admissible" in the guilt phase of the trial; but "evidence relating to a general mental impairment or other esoteric condition" is not. There is no evidence in this record to support Reaves' assertion that "Vietnam Syndrome" is a commonly understood condition; it therefore was properly excluded in the guilt phase. We find, moreover, that even if this evidence's exclusion was error, it was harmless. There is no reasonable possibility that it would have affected the jury's verdict. State v. DiGuilio, 491 So.2d 1129 (Fla.1986).

Reaves v. State, 639 So. 2d 1, 4 (Fla. 1994). Since Reaves has already presented on direct appeal a challenge to the trial court's determination that Dr. Weitz's testimony was inadmissible, his attempt to revisit the issue is precluded. See Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989)("[H]abeas corpus petitions are not to be used for additional appeals on questions which ...were raised on appeal or in a rule 3.850 motion..."); Mann v. Moore, 26 Fla. L. Weekly S490, 492 n.10 (Fla. July 12, 2001)(same). Reaves' attempt to alter the grounds in support of his claim that Weitz's testimony should have been admitted does nothing to overcome the irrevocable bar. See Thompson v. State, 759 So. 2d 650, 657 n.6 (Fla. 2000)(holding that habeas petitions are not to be used to argue variations of issues already decided); State v. Riechmann, 777 So. 2d 342, 364 (Fla. 2000)(finding claim raised in habeas petition to

be procedurally barred as same issue previously rejected on direct appeal under different grounds).

A second procedural bar to litigation of this issue is the fact that yet another variation of this claim is currently before this Court in Reaves v. State, Case No. 00-0840. On February 15, 1999, Reaves filed a motion for postconviction relief alleging that Jay Krischner, as trial counsel, was ineffective for failing to pursue a voluntary intoxication defense at the guilt phase. Had he investigated the possibility of raising such a defense, he would have uncovered evidence to corroborate same. Presentation of such evidence would have resulted in the admissibility of Dr. Weitz testimony. (PC ROA Vol. IV 453-620). The trial court summarily denied this claim ruling that there was no evidence available to support of a defense of voluntary intoxication. (PC ROA Vol. VII 1092). Reaves appealed that ruling to this Court. The issue has been fully briefed, oral argument was conducted on June 7, 2001 and it is pending resolution. This petition constitutes Reaves third attempt to review the admissibility of Dr. Weitz's testimony. Relitigation is not permitted. See Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla.1987) ("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material."); Demps v. Dugger, 714 So. 2d 365, 368 (Fla. 1998)(same).

And finally irrespective of the two irrevocable procedural defaults attached to this claim, the issue has no merit. Simply

stated, appellate counsel cannot be faulted for failing to argue that the trial court erred in precluding trial counsel from presenting a voluntary intoxication defense through Dr. Weitz because the record on appeal did not support such a theory. Reaves attempt to argue that the issue of voluntary intoxication was preserved for appellate review is a complete distortion of what transpired at trial.[1]

As noted above, during litigation of the state's motion *in liminie*, it was clear that Krischner was prepared to present an affirmative defense that Officer Razkowski was killed because Reaves feared for his own life. In other words the killing was in self defense. As Weitz put it Reaves was in "survivor mode." Clearly such a defense cannot be consistent with one of voluntary intoxication. To the contrary, Reaves attempted to argue that the killing although intentional was a horrible mistake. A mistake induced by the ravaging experiences of Vietnam and chronic drug abuse. Consequently Reaves' claim that this record supported an appealable issue centered on voluntary intoxication is simply false.

Not only is this record void of any consideration towards presentation of voluntary intoxication, it is abundantly clear that

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[1] It must be noted that, Reaves' assertion that the record below supports an appealable claim that Weitz was improperly precluded from testifying regarding a voluntary intoxication at the guilt phase is in complete contradiction to the argument Reaves has pending before this Court in Case No. 00-0840. Therein, Reaves is attacking trial court's performance because he <u>did not</u> attempt to present a guilt phase defense voluntary intoxication through Dr. Weitz.

trial counsel had absolutely no intention of pursuing a voluntary intoxication defense. Krischner made it clear that the purpose of Weitz's testimony was to bolster the affirmative defense of excusable homicide and that voluntary intoxication was not a defense in this case. (ROA Vol. X 1469-1474, Vol. XX 2906-2910 2982-2984)). Dr. Weitz stated in his deposition and in his proffered testimony that voluntary intoxication was not a component of his findings or expert opinion. (ROA Vol. X 1517-1518, PC ROA Vol. VIII 1368, 1374-1374, 1378) To suggest that trial counsel was formulating a voluntary intoxication defense and that such a defense was to be presented through Dr. Weitz had it not been for the trial court's ruling is simply not supported by the record. Appellate counsel could not have successfully argued that issue on appeal in this case. Consequently, Reaves cannot establish that his appellate attorney, Jay Krischner was ineffective for failing to pursue an issue that was clearly not preserved for appeal. See Robinson v. Moore, 773 So. 2d 1, 4 (Fla. 2000)(finding that appellate counsel is not ineffective for failing to raise an issue that was not preserved for appeal); Johnson v. Singletary, 695 So. 2d 263, 266-267 (Fla. 1996)(same); Rutherford v. State, 774 So. 2d 637, 646 (Fla. 2000)(same).

Next Reaves attempts to relitigate a second issue adversely decided on direct appeal, i.e., the admissibility of Eugene Hinton's prior statements. On appeal counsel argued that trial counsel should have been allowed to present to the jury Hinton's prior consistent statements in an attempt to impeach his trial

testimony from a prior trial.[2] This Court determined:

> Reaves argues to this Court that several statements made by Hinton, under oath, prior to his 1987 trial testimony, (FN4) were inconsistent with his 1987 trial testimony and should have been admitted pursuant to section 90.806, Florida Statutes (1991). (FN5) We agree that Hinton's prior inconsistent testimony should have been admitted, but we find that the trial court's exclusion of the testimony was harmless error. Hinton's inconsistent statements pertained to details and did not repudiate the significant aspects of his testimony.

Reaves, 639 So. 2d at 4-5. Reaves contends that the erroneous exclusion of Hinton's prior statements would not have been considered harmless by this Court had counsel focused his argument on the importance of Hinton's prior statements regarding Reaves' chronic drug history as corroboration for the defense of voluntary intoxication. Given that the admissibility of Hinton's statements have already been addressed by this Court on direct appeal relitigation is precluded. Mann, 26 Fla. L. Weekly at S492 n.10; Parker, 550 So,2d at 460.

Additionally even if appellate counsel should have made this argument, the results of the proceedings would not have changed. Reaves' chronic history of drug abuse is not probative of his of his intoxication at the time of the offense. Furthermore, Hinton

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[2] Hinton's prior trial testimony was read into the record at the re-trial based on Hinton's unavailability. Reaves v. State, 639 So. 2d 1, 3 (Fla. 1994).

consistently stated in those prior statements that Reaves was not drunk and he knew what he was doing at the time at the time of the murder. (SROA 38, 74-75). Had this Court been asked to review this issue and make a harmless error determination based on this new argument, the results of the proceedings would not have changed. Hinton's prior statements would still be considered insignificant by this Court. Appellant's claim of ineffective assistance of counsel must fail. Cf. Arbeleaz v. State, 775 So. 2d 909, 914 (Fla. 2000)(rejecting claim that counsel was ineffective for failing to present history of epilepsy since such evidence did not establish that defendant had seizure at the time of crime).

In sub-section C, Reaves argues that appellate counsel did not sufficiently argue that the trial court erred in rejecting various mitigation centered around appellant's chronic history of abuse. As conceded by Reaves, appellate counsel did challenge the trial court's sentencing order regarding both statutory and non-statutory mitigation. Reaves, 639 So. 2d at 6. A review of the appellate brief demonstrates that counsel argued february 25, 2002 that Reaves drug history along with his combat experience did significantly alter his behavior. (See appendix A at 84). Reaves attempt to reargue that issue again is procedurally barred. Mann, 26 Fla. L. Weekly at S492 n.10; Parker, 550 So,2d at 460.

In conclusion this entire issue must be denied as it is nothing more than an attempt to relitigate issues adversely decided to his cause. In the alternative, Reaves' primary argument regarding counsel's failure to challenge the trial court's alleged

refusal to allow an intoxication defense is without merit as the issue was never presented below. All relief must be denied.

ISSUE II

REAVES' CLAIM THAT APPELLATE COUNSEL FAILED TO RAISE OTHER RULINGS ON DIRECT APPEAL IS LEGALLY INSUFFICIENT AS PLED

In a three sentence argument Reaves argues that appellate counsel failed to "preserve defense counsel objection as to use of prior grand theft conviction and conspiracy to commit robbery conviction as prior violent felonies under Fla, Stat. 921.141(5)(b). **Petition at 36.** The state asserts that this issue is not properly presented in this brief and it must be denied. Mere reference to other pleadings below does not properly present an issue for review in this Court. Duest v. State, 555 So.2d. 849, 852 (Fla. 1990)(finding appellate issue waived for review when appellant merely references pleadings below)' Knight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990)(same); Roberts v. State, 568 So. 2d 1255, 1260(Fla. 1990)(same). This issue must be deemed waived.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for writ of habeas corpus.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

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CELIA A. TERENZIO
Assistant Attorney General
Fla. Bar No. 0656879
1515 N. Flagler Dr.
Suite 900
West Palm Beach, FL 33401
(561) 837-5000

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to William Hennis, Esq., Office of the Capital Collateral Regional Counsel, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301, this 25th day of February, 2002.

_____
CELIA A. TERENZIO
Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2 (d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Appellee herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
Celia A. Terenzio
Assistant Attorney General