

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-195

GUY RICHARD GAMBLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This brief is filed on behalf of the Appellant Guy Richard Gamble's in reply to the Answer Brief of Appellee, the State of Florida. Citations shall be as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "R ___" followed by the appropriate page numbers. The post-conviction record on appeal will be referred to as "PC-R ___" followed by the appropriate page numbers. The Initial Brief of Appellant will be referred to as "IB ___" followed by the appropriate page numbers. The Answer Brief of Appellee will be referred to as "AB ___" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained.

ARGUMENT I

TRIAL COUNSEL WAS INEFFECTIVE WITH RESPECT TO THE COLD, CALCULATED AND PREMEDITATED AGGRAVATOR

In its answer to the claim of Appellant that trial counsel was ineffective for his failure to object to the cold, calculated and premeditated aggravator, Appellee cites to Jennings v. State, 782 So.2d 853 (Fla. 2001) and notes that "[e]ven if the CCP jury instruction had been preserved for appellate review, Gamble would not have been entitled to any relief under Jackson because the facts, which were found by this Court, establish that this murder was cold, calculated and premeditated under any definition of that aggravating circumstance." (AB 17). Appellee also argues that "[trial] counsel is not required to predict evolutionary developments in case law. . ." (AB 15, FN 7) and that Appellant "[c]an show neither deficient performance nor prejudice. . ." (AB 19).

Appellee is correct in its presentation as to the authority under Jennings (and the other cases cited by Appellee) for this

Court to independently review and find that the facts of the case constituted CCP under any definition.

However, the fact remains that Appellee is incorrect in arguing that trial counsel did not anticipate the holding in Jackson v. State, 648 So.2d 85 (Fla. 1994) that the CCP instruction used at Appellant's trial "suffered from a 'constitutional infirmity'" in that it was "unconstitutionally vague." Gamble v. State, 659 So.2d 242, 244-45 (citations to Jackson omitted)(Fla. 1995).

As outlined in the Initial Brief, trial counsel did anticipate Jackson because he filed two separate pre-trial motions challenging the CCP statutes and instruction as unconstitutionally vague. (IB 9, 10). However, trial counsel failed to make the proper objection later in the trial and Appellant's Jackson claim, consequently, was found by this Court to be procedurally barred on direct appeal. Gamble, 659 So.2d at 244-45. Thus, this Court has already found trial counsel's performance to be deficient in this regard.

It is additionally argued that further reliance on Jennings by this Court ignores the jury finding requirements of Ring v. Arizona, --- U.S. ---, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Authority such as Jennings allowed this Court to decide factual matters on procedurally barred legal claims. Appellant's

Jackson claim would otherwise have resulted in a re-sentencing but for trial counsel's deficiencies. And Appellant's jury, never having made a factual finding subject to appellate review, was given an unconstitutional jury instruction on the CCP aggravator. Because of these circumstances, Appellant is entitled to collateral relief.

ARGUMENT II

THE GUILT PHASE NIXON/CRONIC CLAIM

The evidentiary court and Appellee miss the impact and meaning of the crucial wording used by trial counsel in his opening statement. Simply but significantly, trial counsel told the jury that the evidence would show that "[Co-defendant] then went through [the victim's] pockets, retrieved his keys and wallet, briefly went through that wallet and handed it to [defendant]." (R. 592). By conceding to the Appellant's participation in the robbery in this fashion, trial counsel was conceding to the felony murder component of the indictment.

Furthermore, this concession was not relative to "first degree murder" as the evidentiary court and Appellee repeatedly observe because Appellant was not charged with "first degree murder." Appellant was charged alternatively with premeditated first degree murder and felony murder. (R. 8). Consequently, no matter how many times trial counsel may have referred to

second or third degree murder, when he told the jury that his client took the victim's wallet from the co-defendant, he also told the jury that his client was guilty of robbery.

Lastly, for a client described by trial counsel as not knowing "the procedures or what was going on," (PC-R. 2420), it was hardly a knowing agreement as to strategy when Appellant testified that trial counsel's concession was "okay" "as far as I understood it." (PC-R. 2420). This amounts to a concession of felony murder by trial counsel without the proper agreement or approval by counsel's client. It is subject to the rulings of Nixon v. Singletary, 758 So.2d 618 (Fla. 2000) and United States v. Cronic, 466 U.S. 648 (1984) and relief should issue.

ARGUMENT III

THE PENALTY PHASE NIXON/CRONIC CLAIM

The Appellant has previously conceded that Nixon v. Singletary, 758 So.2d 618 (Fla. 2000) spoke only to concessions of guilt as charged during opening argument (IB. 19). However, while Nixon indicates that defense counsel's opening argument admission of guilt as charged is per se ineffective assistance of counsel in the absence of the defendant's consent to such strategy, Appellant urges the Court to find that penalty phase concessions that contradict guilt phase arguments, as here in Appellant's case, are also entitled to the per se

ineffectiveness of counsel analysis of Nixon and Cronic, supra.

Again, second chair trial counsel told the jury during the penalty phase closing argument “[I]t was committed for financial gain, there’s no question about that, it was a robbery. Guy Gamble was involved in that robbery. You have heard all the testimony.” (R. 1816-17); that “[W]e’re talking about somebody who was killed during the commission of a robbery and Guy Gamble was involved in that robbery. He was involved in planning that robbery. That’s not in dispute and never has been.” (R.1819); that “. . . [t]he evidence in this case, listen to Guy’s statement, what he said, he intended to rob him, he never meant to kill him . . . It was as a result of and part of a robbery and that’s part of the pecuniary gain. That’s been proven. Nobody is going to tell you there are no aggravators in this case. It is aggravated because it was for financial gain. Try to think about what murder can there be where there wasn’t something aggravating.” (R. 1820-21).

The second chair’s penalty phase concessions damaged any “degree of credibility” with the jury because the second chair’s concessions amounted to a direct contradiction of the guilt phase counsel’s arguments. Both trial counsel pursued a legally unsound theory that could not fall under the guise of a legitimate trial strategy. Adams v. State, 727 So.2d 997 (Fla.

2d DCA 1999). Because of trial counsels' deficient legal strategy, this case was nothing more than a plea to first degree felony murder with a given aggravator rather than a true adversarial contest. The deficient legal strategy in conceding to felony murder by reason of participating in the robbery and the resulting prejudice in presenting the jury with the related aggravator of pecuniary gain meets both prongs of Strickland v. Washington, 466 U.S. 668 (1984), and requires collateral relief.

ARGUMENT IV

TRIAL COUNSEL WAS INEFFECTIVE DUE TO INEXPERIENCE AND INADEQUATE PREPARATION FOR TRIAL.

In his Initial Brief, Appellant noted that his trial counsel denied the potential for conflict among the co-defendants' trial counsel, admitted to participation in a robbery and therefore felony murder in the guilt phase and admitted to pecuniary gain in the penalty phase. (IB. 25). The Appellee ignores this reference to deficient performance and prejudice and simply agrees with the evidentiary court denying relief.

In the order denying postconviction relief, the evidentiary court made reference to and relied on the testimony of lead trial counsel that he "had available to him and did consult with other veteran and highly experienced attorneys in the Public Defender's Office. (Hr'g Tr. at 75.)." (PC-R. 1222). Appellee reminds this Court that "[e]very experienced trial defense

attorney once tried his first criminal case," citing to Cronic, 104 S.Ct. 2039 at 2050. (AB. 29).

What the evidentiary court and Appellee ignore is the unreliability of trial counsel's testimony about consulting with others in his office, specifically in reference to his chief assistant. (PC-R. 2445-46). Trial counsel's evidentiary hearing testimony was contradicted by that of the chief assistant who testified, pre-trial, that he had "no contact with this case whatsoever" except for covering an afternoon's worth of depositions. (R. 1880-81). It was clear error for the evidentiary court to rely only on trial counsel's testimony and to ignore that of the chief assistant. Having contradictory sworn testimony about the attorneys' preparation for the trial casts doubt on the reliability of the other evidentiary hearing testimony regarding counsels' strategy. Such an error is not entitled to deference and is the reason the Appellee did not address the chief assistant's testimony. Trial counsel were, in fact, inexperienced and ineffective; relief should have been granted on this claim due to the resulting prejudice to Appellant. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the lower court improperly denied

Rule 3.850 relief to Guy Richard Gamble. This Court should order that his conviction and sentence be vacated and remand the case for such further relief as the Court deems proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of the Appellant has been furnished by U.S. Mail, first class postage prepaid, to Kenneth S. Nunnelley, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118-3951 and Guy R. Gamble, DOC# 123096; Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this ____ day of February, 2003.

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Fla.R.App.P. 9.210 that the foregoing Reply Brief of the Appellant was generated in Courier New 12-point font.

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