IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-423
(Lower Court Case No. 81-19702)

ROBERT PATTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA

REPLY BRIEF

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REPLY TO ARGUMENT I

Like the trial court, the State's argument ignores many of the inconsistencies between the record in this case and the testimony of trial counsel, Ms. Lyons, at the evidentiary hearing. Contrary to the State's assertion these inconsistencies are glaringly present in Ms. Lyons' closing argument. The State fails to see how her closing argument was inconsistent with the goal of not presenting Mr. Patton as a druggie. As Mr. Patton argued to the trial court and in his initial brief to this Court, Ms. Lyons argued in closing that Mr. Patton "was someone who needed drugs and <u>was strung out on drugs</u> and was trying to buy drugs" (R. 1488). This is at odds with the strategy proposed by Ms. Lyons at the evidentiary hearing. These comments do not refer to "a kid who had a drug problem but [was not] a druggie" (R. 361).

The State argues that "defendant has not shown any additional investigation that counsel should have done." (Answer Brief of Appellant at 50). This is not the crux of Mr. Patton's claims of ineffective assistance of counsel. The record clearly shows that Ms. Lyons did do extensive investigation regarding Mr. Patton's history and mental health. Additionally, the record in this case since 1982 bears out a longstanding substance abuse history. Because of the

fact that she had done a extensive investigating and discovered a wealth of information regarding Mr. Patton's mental health and drug use, her failure to use this information was unreasonable. Much of her reasoning, and that of co-counsel Mr. Billbrough, is inconsistent with the presentation of evidence and argument at trial.

Additionally, both Ms. Lyons' testimony and the testimony of Bart Billbrough that the doctor they hired from Jackson Memorial Hospital was unable to provide any helpful information to the defense is inconsistent with Ms. Lyons' documentation in her file. As Mr. Patton argued in his initial brief, the doctor reported:

> The doctor stated that the drug Patton was referring to in the memo was Tuinal, a barbituate or 'downer'... The doctor concluded that by taking these pills intravenously, an average person would have been overdosed and asleep. The only [way] Patton could have sustained the intake of such an amount would have been to have had a high tolerance toward this drug...
>
> The doctor also stated that Patton also took some cocaine... The coke would act as a counter to the Tuinal that was taken...
>
> The doctor noted that the use of these drugs, such as cocaine, would have the effect of making a person somewhat paranoid...
>
> The doctor concluded that the drugs taken should give Patton at least the effect of being very drunk or intoxicated.

(PC-R2. 482-83)(Defense Exhibit N; Memo regarding meeting with Dr. Bauzer). This very clearly shows that Dr. Bauzer was able to provide information regarding the interaction of drugs Mr. Patton was taking at the time of the crime and the affect the drugs would have had on Mr. Patton's behavior and state of mind.

The State misunderstands Mr. Patton's argument with regards to the use of Dr. Krop during the guilt phase of trial to establish intoxication at the time of the shooting. Stating that Mr. Patton "contends that counsel could have presented the intoxication defense through the testimony of Dr. Krop based on hearsay," the State asserts that an "expert can only testify that a defendant was intoxicated if direct, non-hearsay evidence of the defendant's consumption of intoxicants is present." (Answer Brief of Appellee at 51). This is not an accurate representation of Mr. Patton's argument, nor an accurate representation of the principle set forth in the cases cited by the State. Holsworth v. State, 552 So. 2d 348, 352 (Fla. 1988 specifically states "expert testimony and opinion as to the effect of intoxicants on a defendant's mind are inadmissible absent some proof of ingestion other than the defendant's hearsay statements to the

expert.” (emphasis added). See also Cirack v. State, 201 So.2d 706, 708-10 (Fla. 1967); Johnson v. State, 478 So.2d 885, 886-87 (Fla. 3d DCA 1985); Jones v. State, 289 So.2d 725, 728-29 (Fla. 1979). In Holsworth, the basis for the experts opinion was appellant's out-of-court statement to the expert that he had been drinking alcohol, smoking marijuana, and taking PCP the night of the crime. The only other evidence in the record was another witnesses’ statement that she thought she smelled beer on appellant's breath. In Mr. Patton’s case there was independent evidence of Mr. Patton’s intoxication including Ms. Castle’s statement of Mr. Patton’s ingestion of drugs at 3:30 a.m., the syringes and drug paraphernalia found in the car Mr. Patton was driving and the documentation of fresh track marks. Dr. Krop relied on this direct evidence in determining that Mr. Patton’s intoxication resulted in poor judgment and lack of impulse control on the date in question. Further, Dr. Krop’s testimony regarding Mr. Patton’s long history of drug abuse would have refuted Ms. Lyons’ concerns that the jury would have seen Mr. Patton as a druggy caught up in the drug culture in Miami in the 1980's. Rather, the jury would have seen Mr. Patton as a person with a serious and uncontrollable drug problem which was the result of his abusive and turbulent upbringing.

The State claims that the "use of testimony by Ms. Castle and Dr. Krop's testimony about a history of drug abuse would not be sufficient to establish an intoxication defense." (Answer Brief of Appellee at 52). Relying on Linehan v. State, 476 So. 2d 1262 (Fla. 1985), the State argues "evidence of [intoxicant] consumption prior to the commission of the crime does not mandate, by itself, the giving of jury instructions with regard to voluntary intoxication." The State overlooks the fact that an involuntary intoxication instruction was requested by Ms. Lyons, granted by the trial court and the jury was so instructed. (R. 436). Therefore, the jury was confronted with a voluntary intoxication instruction without any evidence, but the few inferences made during cross examination of state witnesses, to support a finding under that instruction. Contrary to the State and Ms. Lyons' assertions, these few inferences left the jury with the impression that Ms. Lyons claims to have been trying to avoid: Mr. Patton was a"druggy." Had the jury received an explanation of Mr. Patton's drug use and the effect the drugs had on his behavior, the jury would have reasonable doubt as to Mr. Patton's mental state at the time of the shooting.

Christina Castle was able to testify that Mr. Patton had consumed drugs and was very high in the early morning hours of

September 2, 1981. The State claims that she could not have shown that Mr. Patton was intoxicated at the time of the crime. This is complete speculation. Ms. Lyons had an expert from Jackson Memorial Hospital who, based on the memorandum in Ms. Lyons own file, was able to testify regarding the affects of the drugs Mr. Patton was consuming. The State further overlooks that Ms. Castle's information that he was using drugs in the hours leading up to the crime is bolstered by the fact that he was in possession of drug paraphernalia, was attempting to sell a gun to buy more drugs when he was stopped by Officer Broom and the jail reports indicating he had fresh track marks when booked into the jail. This evidence would have given the jury abundant support to consider voluntary intoxication.

The State asserts that "attempting to present testimony from witnesses such as Mark Castle to show that Defendant was intoxicated at the time would have resulted in the disclosure of harmful evidence." (Answer Brief of Appellee at 53). Mark Castle is the only witness the State can point to that would have provided this harmful evidence. In fact, the same claim cannot be made regarding Christina Castle because Ms. Lyons' did call her as a witness at the penalty phase of Mr. Patton's original trial. Also, the two people who were riding in the

car with Mr. Patton the morning of the crime testified on behalf of the State. Although the State points out that both men indicated Mr. Patton was not intoxicated, Ms. Lyons' failed to adequately cross-examine and impeach these witnesses. At trial, Ms. Lyons highlighted the police discovering and impounding evidence of drug paraphernalia in the stolen Volkswagen. However, she failed to establish that the paraphernalia belonged to Mr. Patton. The passengers in the car, Leroy Williams and Henry Butler could have established this if adequately cross-examined. Furthermore, these witnesses were obviously lay persons, not experts in drug use, who were not well acquainted with Mr. Patton.

With regard to the insanity defense, again Mr. Patton is not claiming that there was a lack of investigation on the part of defense counsel. Rather, Mr. Patton's argument is that given the extensive support in the record for an insanity defense, counsel's decision to forgo the use of this defense was unreasonable.

While the State understands Mr. Patton's argument to be that the trial court should not have considered the opinions of Drs. Mutter, Jacobson, Jaslow and Herrera because they did not evaluate Mr. Patton for sanity, this is not entirely accurate. Although the trial court may have requested a full

forensic evaluation pretrial, which was to include a sanity evaluation, it is clear from the doctors reports that an adequate evaluation was not done. None of the doctors had any information regarding Mr. Patton's state of mind at the time of the crime. Mr. Patton did not discuss the facts surrounding the shooting of Officer Broom with these doctors. Dr. Mutter had very little information from Mr. Patton regarding the day of the incident and had no report by Mr. Patton of the events immediately surrounding the crime. Mr. Patton pointed out in his initial brief that Dr. Jacobson stated in his report **"I do not have any information from him which would describe his thinking, his behavior, or his mood at the time of the alleged offense"** (PC-R2. 247)(emphasis added). Dr. Jaslow claimed to need **"additional objective material from other sources to give a more valid opinion concerning his present mental state and that which was present at the time of the alleged offenses"** (PC-R2. 255)(emphasis added). Dr. Herrera, likewise, had no information as to Mr. Patton's state of mind at the time of the offense. Therefore, it is Mr. Patton's claim that these doctors could not have adequately evaluated Mr. Patton for sanity since they were by their own admissions lacking the necessary information to do so.

Although the State claims that the testimony of Ms. Lyons and Mr. Billbrough was that Dr. Toomer was asked to evaluate Mr. Patton's sanity at the time of the offense, the record does not definitively bare this out. While Ms. Lyons' file details the work she did on Mr. Patton's case and the numerous conferences she had with experts and attorneys, including Dr. Toomer, there is no documentation of her request to Dr. Toomer to conduct a sanity evaluation. In a memorandum from Ms. Lyons files, she details a conversation with Dr. Toomer regarding his findings. At no point in this memorandum is it mentioned that he evaluated Mr. Patton's sanity at the time of the offense, nor did it give his conclusions as a result of such an evaluation (PC-R2. 365-66, Defense Exhibit B and C).

In 1982, Dr. Toomer testified that he evaluated Mr. Patton and was asked to render an opinion regarding whether he had the ability to conform his conduct to the requirements of the law, and secondly, whether or not he was under the influence of extreme emotional disturbance at the time of the incident ®. 1633). Again in 1989, in his pretrial deposition, and on both direct and cross examination, Dr. Toomer testified that the purpose of his evaluation, including the evaluation in 1981, was to determine if there were any mitigating circumstances with regard to the offense (R2. 2709). Ms.

Lyons' testimony at the evidentiary hearing, was that she was sure she did ask Dr. Toomer to conduct a sanity evaluation but could not recollect the specifics of doing so (PC-R2. 354, 364). Certainly, Dr. Toomer's recollection in 1982 and 1989 would be more accurate than Ms. Lyons' memory almost twenty years later.

Finally, on the issue of counsel's failure to present an insanity defense, the State asserts that counsel cannot be deemed ineffective because presentation of the insanity defense would have opened the door to Mr. Patton's own statements that he was feigning mental illness, as well as the reports of Drs. Mutter, Jacobson, Jaslow and Herrera that he was malingering. However, Ms. Lyons testified that had she had an expert who could explain the malingering, she would have considered presentation of the insanity defense. The State overlooks that Ms. Lyons did in fact have an expert to refute the malingering. Dr, Toomer was able to explain to Ms. Lyons that the "faking" was symptomatic of Mr. Patton's underlying mental disorder. This explanation is detailed in a memo entitled "SUMMARY OF INTERVIEW WITH DR. TOOMER." (See Defense Exhibit C). The State fails to address this inconsistency in Ms. Lyons' testimony. Additionally, in 1989 Dr. Krop testified consistently with Dr. Toomer on the issue

of malingering, specifically stating that this is a feature of Mr. Patton's personality disorder (R2. 2523-24).

Both the State and the trial court have overlooked many of the inconsistencies between Ms. Lyons evidentiary hearing and the overall record in this case. As such, Mr. Patton contends that he has proven trial counsel's unreasonableness in failing to present the defenses of insanity and intoxication.

REPLY TO ARGUMENT II

As Mr. Patton pointed out in his initial brief, Mr. Patton is only seeking to question the jurors regarding any extraneous bias they may have possessed. Contrary to the State's assertion, Mr. Patton's inquiry falls outside the realm of prohibited juror testimony. Mr. Patton does not contend that any juror was unqualified to serve or engaged in any misconduct. Nor does Mr. Patton's request involve inquiring into the jury's mental process in reaching a verdict.

Citing this Court's opinion remanding for an evidentiary hearing, the State claims that this Court did not intend for the issue of voir dire regarding mental illness to be considered as a separate claim. However, this Court's opinion very clearly states the claim as one of ineffectiveness for failing to question the jury regarding mental illness. The Court did not specify that the claim should only be explored in terms of an insanity defense. Questioning the jury venire about their beliefs regarding legal insanity and mental illness, while such questions may overlap, would not be the same. Ms. Lyons presented evidence of mental illness during the penalty phase, therefore she was ineffective for failing to question jurors as to their biases pertaining to mental

illness. Mr. Patton must be afforded the opportunity to prove prejudice.

Counsel's decision to forgo an insanity defense was unreasonable. As a result Mr. Patton must prove prejudice and has been denied the opportunity to do so by the trial court's denial of his request to interview jurors. Mr. Patton is further being denied his opportunity to prove prejudice, where counsel did present mental health mitigation during the penalty phase. As such, Mr Patton has been denied his right to a full and fair evidentiary hearing.

CONCLUSION

Based upon the record and the arguments presented herein, Mr. Patton respectfully urges the Court to reverse the lower court and vacate his judgments of conviction and sentence of death.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Sandra Jaggard, Office of the Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33131 on March 12th, 2003.

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CERTIFICATE OF FONT

This brief is typed in Courier New 12 point font.

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