IN THE SUPREME COURT OF FLORIDA

JERMAINE FOSTER,

Appellant,

vs. CASE NUMBER SC03-1331

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

SUPPLEMENTAL BRIEF OF APPELLANT

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DESIGNATIONS IN BRIEF

R	REFERS TO RECORD ON APPEAL
SR	REFERS TO SUPPLEMENTAL RECORD

PROCEDURAL HISTORY

The Appellant, JERMAINE FOSTER, upon denial of his Motion for Post Conviction Relief, appealed several issues to this Court including the denial of the trial court of his requested amendment of his Motion for Post Conviction Relief on the basis of potential racial bias or prejudice on the part of defense counsel. This Court heard oral arguments and remanded the matter to the trial court for an evidentiary hearing on the issue of potential racial bias or prejudice. An evidentiary hearing was held on January 20 and 21, 2005 at this Court's direction. On March 4, 2005, the trial court entered its order denying the Amended Motion to Vacate Judgment of Conviction and Sentence (SR52-60).

FACTS PERTAINING TO THE ISSUES ON REMAND

During the discovery stages of this matter leading up to the original evidentiary hearing, post-conviction counsel spoke with Ms. Janet Vogelsang, a clinical social worker retained by trial counsel to prepare a social evaluation/assessment of the Appellant for use during the mitigation phase of the Appellant's trial. In January, 2002, Ms. Vogelsang provided post-conviction counsel with an Affidavit which was attached to Appellant's Motion to Amend his Motion for Post-Conviction Relief (R 442-449). In the Affidavit, Ms. Vogelsang advised that during her preparation that trial counsel did not provide her with necessary materials she needed to investigate and render an opinion. Ms. Vogelsang continued with her work, but believed her opinion was incomplete. She further states that at a meeting with attorney Don Smallwood, when she asked for materials and discussed mitigation, he stated "…that mitigation would not matter and that the defendant was just another nigger who was going to get the death penalty anyway and that the jury does not listen to mitigation." (R 448). In the Affidavit, Ms. Vogelsang also stated that defense counsel refused to permit her to use visual aids to illustrate her testimony. She testified that this

overall conduct of defense counsel made her testimony and presentations to the jury ineffective and incomplete.

At the evidentiary hearing held on January 20 and 21, 2005, the Appellant put on Ms. Vogelsang to testify and the State called a cumulative number of witnesses including judges and people in the community to say that Mr. Smallwood was not racially biased or prejudiced although not one of them could name any person in the community with whom they had discussed either attorney's reputations in the community for racial bias or truth and veracity.

Ms. Vogelsang is a qualified expert in the area of mitigation (SR 95-103, 107-108). She provided defense counsel with a list of the information she needed (SR 112, Exh. 2) to perform her tasks. She stated she did not receive the materials she needed. Although it is true that every piece of material requested may not always be obtained, there were important deficiencies that counsel did not seem to grasp (SR 136). She believe it was more of an attitude of what good is mitigation as opposed to outright racial prejudice, but that it all played a part in what she believed was an insufficient and ineffective presentation to the jury in the mitigation phase.

ARGUMENT

Will we ever know if the statement attributed to Mr. Smallwood was uttered or not? One person, a qualified, experienced witness, who has rendered opinions in many cases in this state and many others, says it was made. Yet on the other hand, we have respected members of the community who say he never would say it and would never say anything like it. Even Ms. Vogelsang testified there was no pervading aura of racial bias or prejudice. There was just the one comment. Yet in her mind, it was the overall attitude of counsel (SR 136) coupled with the racial comment that made the statement important to her. The State, at the evidentiary hearing, argued the statement was never made and intimated that Vogelsang herself was playing the race card to benefit the Appellant. The State further argued, and the Court, in its order, stated Vogelsang should have reported the incident and did not.

"In reviewing trial court's ruling on an ineffective assistant claim, (this court) defers to findings of fact based on competent, substantial evidence and independently review deficiency and prejudice as mixed questions of law and fact." Davis v. State, 872 So 2d 250 (Fla. 2004) and Gore v. State, 846 So 2d 461 (Fla. 2003). In Davis, this court had a hard record in voir dire of defense counsel showing and admitting to his own

prejudice. This prejudice was coupled with counsel's failure to put on any defense in the guilt phase and his further failure to call witnesses in the penalty phase who were, this Court believed, good mitigation witnesses and Davis's only mitigation witnesses.

This type of on the record prejudice is easy to determine, as going to the heart of the issue of racial bias or prejudice. We do not have that "on the record" reliability in this case.

When looking at the allegations of Ms. Vogelsang, the Appellant would ask that the court look at the question what does she have to attain or gain by making such a statement. She has none. There is no evidence that she is some type of activist or anti-death penalty foe who would do or say anything to derail the death penalty.

The trial court, in its order of denial, at page 5 states, "Furthermore, there had also been a recent incident in Osceola County in which a group of African Americans kidnapped a group of Hispanics, creating an atmosphere of tension." This statement is attributed to attorney Kelley as a reason for a change of venue. What Mr. Kelley referred to was this case itself (SR 348). There was no new incident that counsel was aware of relative to racial tension. The trial court concluded, at page 6 of its order, that the statement was not made at all, then goes on to say "well if it was

made, it's all right as Mr. Smallwood was only expressing his concern." This reasoning is fatally flawed. If the trial court can state that the statement was made, then it must be connected to counsel's performance and intertwined in that performance. It is this subjective thought process in coordination with what was actually done in mitigation that must be reviewed. "A racially or religiously bias individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well prevent him from making decisions based solely on the facts and the law…" U.S. v. Heller, 785 F 2d 1524 (11th Cir. 1980) and Davis supra. Although Heller deals with juror statements and racial comments by jurors, as most cases do, it brings one to the heart of the issue. We cannot tolerate a statement such as this or even an attitude of "what good will it do". That is what we have to be concerned about. There are believed to be no cases where comments made by counsel out of the courtroom led to a reversal or an affirmance of a post conviction relief request. The Davis case is believed to be one if not the only case on racial remarks by an attorney, most, if not all, cases deal with comments of jurors during deliberations which obviously affect the outcome of a trial and cast doubt on a verdict.

This Court has, in Davis, strongly reaffirmed the principle that racial prejudice has no acceptable place in our justice system. Also citing Powell

v. Allstate Ins. Co., 652 So 2d 354 (Fla. 1998) for the position that "The founding principle upon which this nation was established is that all persons are initially created equal and are entitled to have their human dignity respected. This guarantee of equal treatment has been carried in explicit provisions of our federal and state constitutions…" "The necessity of vigilance against the influence of racial prejudice is particularly acute when the justice system serves as the mechanism by which a litigant is required to forfeit his or her life" Davis, supra. Further, in Robinson v. State, 520 So 2d 1, (Fla. 1998). This Court emphasized that the risk of racial prejudice infecting a criminal trial takes on greater significance in the context of a capital sentencing proceeding.

The Appellant is well aware of the long line of cases which dictate that the appellate courts must give deference to the trial court in weighing the credibility of witness Demps v. State, 462 So 2d 1074 (Fla. 1985), Marquard v. State, 850 So 2d 417 (Fla. 2003), Evans v. Thornton, 30 Fla. L.Weekly D 700 (Fla. 4th DCA 2005); but in order to give deference to the trial court, its hearing must be based on substantial and competent evidence. There was no substantial or competent evidence by the State that the statement was not made. The State stands on the testimony of Smallwood. But, this case really comes down to a credibility issue between Mr.

Smallwood and Ms. Vogelsang. The trial judge knows Smallwood; it is not going to cast him aside in favor of an outsider. Yet it is the outsider who has absolutely nothing to gain by her assertions. Smallwood, if the judge rules he made the statement, loses everything. Of course he is going to deny having made such a statement.

The trial record establishes that a powerful and formidable defense was not mounted for the Appellant. No experts were called on his behalf until the penalty phase. At the original evidentiary hearing, Dr. Lipman established a viable defense for the Appellant, yet it was not even explored by counsel. Trial counsel knew of the drug and alcohol use by the Appellant and they were aware of his mental deficiencies. There was no defense raised except lack of intent as weak as it was; and in the penalty phase instead of using professional prepared visual aids, they decided to use a hand written chart condensed by counsel. The words chosen by Vogelsang and uttered by Smallwood "…that it doesn't matter anyway" give clear meaning to the lack of interest of counsel, especially in mitigation. The Appellant believes that the words of trial counsel affected his performance, clouded his judgment and diminished his resolve to represent the Appellant as an advocate and truly tested the State's case.

The Appellant would argue that the words of counsel establish his ineffectiveness and the racial overtones establish the prejudice dictated in Strickland v. Washington, 466 U.S. 669 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

CONCLUSION

The Appellant is well-aware as argued to the trial court, that this type of claim is a swearing contest. The accused denies the statement was made and the accuser says it was. The real issue here is whether, after it was made, did it affect counsel's performance, especially in the penalty phase? Was the mitigation presented enough? Was it adequat4e? If an attorney does not believe mitigation will do no good, then he is more apt to ignore important facets of mitigation and guilt as well.

It is the Appellant's contention that the statement was made and that it had an effect on the overall view and presentation of the entire case on behalf of the defendant. Therefore the defendant should, at least, be afforded a new sentencing hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Scott Browne, Attorney General's Office, 3507 E. Frontage Rd., #200, Concourse Center 4, Tampa, FL, 33607 this ____day of June, 2005.

_____

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CERTIFICATE OF COMPLIANCE

I HEREBY CERITFY that the foregoing complies with the font requirements, Times New Roman, Pitch 14, of Florida Rule of Appellate Procedure 9.210(a) (2).

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