IN THE SUPREME COURT OF FLORIDA

JAMES D. FORD,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. SC-04-1611
	)	Lower Case No. 97-351-CF
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

DIRECT APPEAL OF DECISION
OF THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

Nature of the Case

This direct appeal arises out of the trial court's final order denying Appellant's Motion for Post-Conviction Relief following an evidentiary hearing. (III:359-377).

Course of the Proceedings

After a jury trial, Appellant was convicted of two counts of first-degree murder, one count of sexual battery, and one count of child abuse. (I:7). The jury recommended a sentence of death after hearing evidence in support of aggravating and mitigating circumstances. (I:7). The trial court concurred with the jury's recommendation and on June 3, 1999, imposed a sentence of death with respect to Appellant's dual first-degree murder convictions.[1] (I:7-24). This Court affirmed Appellant's convictions and sentences on direct appeal. See Ford v. State, 802 So. 2d 1121 (Fla. 2001), cert. denied, 535 U.S. 1103 (2002).[2]

On May 28, 2003, Appellant filed a Motion for Post-Conviction Relief ("Motion"). (I:1). Appellant's Motion alleged three (3) grounds for relief. (I:3-4). First, Appellant asserted that trial counsel pursued the defense of voluntary intoxication over Appellant's objection and without Appellant's permission or consent.[3] (I:3). Second, Appellant claimed that trial counsel waived Appellant's

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[1] 1. The trial court sentenced Appellant to 19.79 years imprisonment for the sexual battery conviction and five years imprisonment for the child abuse conviction. (I:35-36).

[2] 2. For an extensive discussion of the facts of the underlying case, together with an analysis of the aggravating and mitigating circumstances presented below, see this Court's opinion in Ford.

[3] 3. Appellant's first ground for relief alleged: "The attorneys representing me...pursued the defense and [j]ury [i]nstruction of voluntary intoxication over my

speedy trial rights over Appellant's objection and without Appellant's permission or consent.[4] (I:3). Third, Appellant alleged that trial counsel failed to present evidence showing that Appellant had a mental age of 14 years at the time of the crime.[5] (I:3).

In response, the State indicated that Appellant's Motion was timely. (I:51). However, the State alleged that despite its timeliness, Appellant's Motion was "inadequate to compel relief." (I:55). Nevertheless, the State responded that an evidentiary hearing was warranted for the purpose of resolving the factual allegations set forth in the Motion. (I:55-56).

Following several status conferences, an evidentiary hearing was ultimately conducted. (III:254). At the commencement of the evidentiary hearing, Appellant abandoned his third ground for relief. (III:256-257,259-262,345-351). Accordingly, the evidentiary hearing proceeded on the voluntary intoxication defense and speedy trial issues only. (III:257,262).

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objection and without my permission or consent." (I:3).

[4] 4. Appellant's second ground for relief alleged: "Over my objection and without my permission or consent[,] defense counsel waived my right to a [s]peedy [t]rial." (I:3).

[5] 5. Appellant's third and last ground for relief alleged: "Defense [c]ounsel failed to sufficiently present evidence from Dr. Mosman and Dr. Greer to support the fact that the Defendant's chronological age notwithstanding, that his mental age at the time of the crime was 14 years of age. Having the mental age of 14, [d]efense [c]ounsel should have argued that the [d]eath [p]enalty was not legally appropriate due to the Defendant's mental retardation. Mental retardation was not presented or requested as a mitigating factor in the Defendant's [p]enalty [p]hase. The Defendant's [c]ounsel failed to follow the correct procedure when a defendant is possibly mentally retarded by failing to have the [c]ourt [a]ppoint the [d]iagnosis and [e]valuation [t]eam of HRS to examine the Defendant pursuant to Florida Statute §916.11(1)(d)." (I:3-4).

Appellant, a 44 year-old, literate man with a tenth grade education, testified that prior to becoming involved in the underlying case, he had minimal experience with the legal system. (III:264-266). Appellant explained that his legal experience was limited to a hunting violation and a cattle rustling charge. (III:264-265). Accordingly, Appellant testified that he was not aware of his right to a speedy trial and, furthermore, that he did not possess any understanding of the voluntary intoxication defense. (III:266).

Appellant indicated that his mother retained Paul Sullivan, Esq. ("Attorney Sullivan") to represent him. (III:266). Sometime later, Paul Alessandroni, Esq. ("Attorney Alessandroni") joined as co-counsel. (III:266). Appellant indicated that after becoming aware of his right to a speedy trial, he discussed the matter with Attorney Sullivan. (III:267). Specifically, Appellant testified that he did not authorize Attorney Sullivan to waive his speedy trial right. (III:267). Appellant explained that he told Attorney Sullivan that he didn't want "any of [his] rights waived whatsoever." (III:267). However, this discussion occurred after a continuance had already been sought and granted.[6] (III:267).

Appellant eventually prepared and filed, on his own, a speedy trial motion. (III:269). Appellant explained that although he was not seeking to be tried within the 90 day demand period, he nevertheless wanted to be tried within the statutory time frame. (III:270-271,284). Appellant further explained that a speedy trial would have forced the State to provide discovery to his trial counsel in a more timely fashion. (III:271). Appellant also testified that if trial counsel had not waived his right to a speedy trial, the State may not have been able to present certain evidence, including inculpatory witness testimony and DNA evidence, at

[6] 6. It appears that trial counsel stipulated to a continuance of the case. (III:268).

trial. (III:275-276). Appellant's pro se motion was deemed a nullity in light of the fact that Appellant had counsel representing him. (III:269,284).

Appellant then instructed trial counsel to file a speedy trial motion. (III:270,284).[7] Trial counsel did so, after which Appellant became involved in a "heated argument" with them about the speedy trial issue. (III:272-273). Appellant testified that he initially refused to waive his speedy trial rights, but eventually acquiesced, telling trial counsel, "You just tell me what to say and I'll say it, but I don't like it and I didn't want to do it." (III:273). Appellant explained that when he went into the courtroom a few minutes after the "heated argument," he waived his speedy trial rights in front of the judge, although that was not his true desire.[8] (III:273-274). Appellant asserted that the waiver was not freely and voluntarily given. (III:276).

During cross examination, Appellant acknowledged that trial counsel had advised him that they needed additional time to prepare the case. (III:282). When trial counsel told Appellant that a continuance was necessary in order to prepare the case, Appellant initially did not object. (III:282-283). Apparently, Appellant had provided trial counsel with a list of witnesses he wanted to be called during the case, and trial counsel needed additional time to get the witnesses ready for trial. (III:287). Appellant also testified that he wanted the State to take whatever time was necessary to process the DNA results because he believed that the DNA evidence would be exculpatory. (III:288).

With respect to the voluntary intoxication defense, Appellant testified that he

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[7] 7. The trial court ultimately ruled that Appellant, through counsel, had previously waived his right to a speedy trial. (III:285-286).

[8] 8. Appellant seemed to indicate that the speedy trial issue was not raised on direct appeal. (III:286-287).

discussed the defense with Attorney Sullivan. (III:276). It was Appellant's understanding that the voluntary intoxication defense applied to the guilt phase of the trial. (III:277). Appellant testified that he did not give trial counsel permission to utilize the voluntary intoxication defense. (III:277-278). Appellant further testified that he specifically instructed Attorney Sullivan not to pursue the defense. (III:278). Appellant explained that he made this instruction on several occasions because in Appellant's mind, the voluntary intoxication defense acted as an admission. (III:279). However, although Appellant was present when trial counsel discussed the proposed jury instructions with the judge, Appellant did not voice any objections to the voluntary intoxication defense instruction because he was under the impression that the judge would decide that issue.[9] (III:280). During cross examination, Appellant conceded that trial counsel did not claim that he committed the crime at anytime during trial. (III:288). Following cross examination, Appellant rested. (III:290).

The State called Attorney Sullivan, Appellant's lead trial counsel, as its first witness. (III:290-292). Attorney Sullivan, a former assistant state attorney, testified that he had been practicing criminal defense in the Punta Gorda area since approximately 1991. (III:291-292). He had not tried a death penalty case before. (III:313). He indicated that he had been retained by Appellant's mother to represent Appellant. (III:292). Sometime later, Attorney Sullivan requested assistance from Attorney Alessandroni, given Attorney Alessandroni's experience handling first degree murder cases as an assistant state attorney and later as a criminal defense attorney. (III:292). Attorney Sullivan explained that he also retained a mitigation investigator, two psychologists, a psychiatrist, a crime scene

[9] 9. Appellant opined that the voluntary intoxication defense would confuse the jurors. (III:279).

expert, a medical examiner, and a DNA expert. (III:293-294).

With respect to the voluntary intoxication defense, Attorney Sullivan testified that the voluntary intoxication defense would help in both the guilt and penalty phases of the trial. (III:296-297,324-325). He explained that the evidence indicated that Appellant had consumed two large glasses of whiskey on the day of the crime. (III:296-297). On top of that, Appellant may have also consumed beer at the crime scene. (III:297). Attorney Sullivan explained that the voluntary intoxication defense was not used as an admission; rather, the voluntary intoxication defense was used to argue that Appellant was simply incapable of committing the crimes.[10] (III:298,324). It was also intended to be used as a foundation for the penalty phase. (III:324-325).

When asked what he remembered discussing with Appellant about the voluntary intoxication defense, Attorney Sullivan testified that he didn't know. (III:297). Attorney Sullivan explained that he didn't recall any objections from Appellant with respect to the voluntary intoxication defense, although he did recall Appellant privately denying that he was drunk on the day of the crime. (III:297,303,322-323). He further explained that he could not recall any details of any of the conversations he had with Appellant concerning this matter because "it just wasn't that big of an issue." (III:297-298). Attorney Sullivan did, however, agree that in light of Appellant's steadfast denial that he had committed the crimes, his "hands were somewhat tied" in preparing such an affirmative defense.

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[10] 10. Attorney Sullivan testified: "I think you [the assistant state attorney] had argued to the jury that [Appellant] had carefully planned everything out and set up the whole murder throughout the course of the morning, seemed to be the State's argument. And we were arguing that he didn't do that and that he – one of the reasons he didn't do it was because he was too impaired to have done all that." (III:298).

(III:298,300-301). At no time did Attorney Sullivan remember Appellant instructing him not to pursue the voluntary intoxication defense. (III:322).

With respect to the speedy trial issue, Attorney Sullivan testified that he met with Appellant before seeking the initial continuance. (III:303). Attorney Sullivan explained that there was no way the defense could have been ready for trial and that a continuance was necessary in order to prepare the case properly. (III:303-305). Appellant did not voice any objections to trial counsel's advice about the continuance. (III:304). Attorney Sullivan recalled going "round and round about the speedy trial rules" with Appellant. (III:306). Pursuant to Appellant's request, Attorney Sullivan filed a speedy trial motion, arguing that speedy trial had expired. (III:306). However, because speedy trial had previously been waived via the initial continuance, the trial court denied the motion. (III:306-307). According to Attorney Sullivan, the initial waiver of speedy trial was necessary in order to prepare the case for trial. (III:307).

During cross examination, Attorney Sullivan testified that after the initial continuance had been granted, Appellant instructed him not to waive any of Appellant's rights. (II:313). Attorney Sullivan acknowledged that Appellant may not have realized that his speedy trial rights were being waived in conjunction with the initial continuance. (III:313-314). Appellant appeared to experience difficulty understanding legal concepts. (III:319). Attorney Sullivan did not file a demand for speedy trial, despite Appellant's desire for him to do so. (III:315). Attorney Sullivan explained that he talked Appellant out of filing such demands. (III:316-317). Lastly, Attorney Sullivan did not have any recollection of the "heated argument" meeting that Appellant testified had occurred shortly before the trial court considered trial counsel's speedy trial motion. (III:319-320). Attorney Sullivan indicated that perhaps he should not have waived Appellant's speedy trial rights. (III:320-321).

The State then called Attorney Alessandroni, a general master and practicing criminal defense attorney. (III:327). Attorney Alessandroni explained that he became involved in the case as co-counsel in light of his experience. (III:328-329). With respect to the voluntary intoxication defense, Attorney Alessandroni indicated that one of the experts opined that Appellant may have been under the influence at the time of the crime. (III:330). Specifically, the expert opined that Appellant may have experienced an alcohol blackout, due in part to his diabetic condition. (III:330). Attorney Alessandroni did not recall obtaining Appellant's consent to use the voluntary intoxication defense, although he did recall advising Appellant that such a defense may be beneficial. (III:330-333). Given Appellant's repeated denials that he had been involved in the crime, the voluntary intoxication defense was used to argue that due to Appellant's intoxication, Appellant could not have committed the crimes. (III:331). When trial counsel discussed this strategy with Appellant, Appellant denied that he was intoxicated on the date of the crimes, but nevertheless appeared to agree with the strategy. (III:332-333,338-339). According to Attorney Alessandroni, Appellant never forbade him from using the voluntary intoxication defense. (III:339).

With respect to the speedy trial issue, Attorney Alessandroni testified that by the time he became involved in the case, speedy trial had already been waived via a continuance stipulation. (III:334-335). He further explained that anytime a continuance was sought in Appellant's case, the continuance was necessary in order to prepare Appellant's defense. (III:335). Although Appellant expressed some disagreement about the continuances, he ultimately agreed to the continuances after learning that trial counsel needed additional time to prepare. (III:335-336,341). Attorney Alessandroni indicated that there was never a time when Appellant outrightly insisted on proceeding to trial. (III:336).

During cross examination, Attorney Alessandroni testified that he recalled

the "heated argument" meeting. (III:341-342). He explained that at the end of the meeting, Appellant reluctantly agreed to a subsequent waiver of his speedy trial rights. (341-342). Attorney Alessandroni reiterated that there would have been no way to prepare Appellant's case within the statutory speedy trial time frame. (III:342-343).

Following Attorney Alessandroni's testimony, the State rested. (III:344).

Disposition

In an order rendered on July 14, 2004, the trial court denied Appellant's Motion. (III:359-377). Applying the Strickland[11] standard, the trial court found that Appellant's trial counsel were not deficient and that Appellant was not prejudiced. (III:374). The trial court held that the voluntary intoxication issue was moot since such a defense was not allowed during the guilt phase of the trial. (III:374-375). The trial court also held that the continuances, together with the accompanying waivers of speedy trial, were necessary in order for Appellant's trial attorneys to render effective assistance of counsel. (III:375). In short, the trial court found trial counsels' requests for continuances to be reasonable under the circumstances. (III:375-376).

Appellant timely appealed on August 11, 2004. (III:378).

[11] 11. Strickland v. Washington, 466 U.S. 668 (1984).

ISSUE PRESENTED

I. WHETHER THE TRIAL COURT'S FINDING THAT APPELLANT'S TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO THE VOLUNTARY INTOXICATION DEFENSE ISSUE IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE?

II. WHETHER APPELLANT'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY WAIVING APPELLANT'S RIGHT TO A SPEEDY TRIAL?

SUMMARY OF THE ARGUMENT

The trial court's finding that Appellant received effective assistance of counsel is not supported by competent, substantial evidence in the record. With respect to the voluntary intoxication defense issue, the trial court denied Appellant's claim on the ground that it was moot. Specifically, the trial court found that it did not permit voluntary intoxication as a defense during the guilt phase of the trial. Not only is the trial court's finding in this regard not supported by competent, substantial evidence, the evidence introduced below affirmatively proves that the voluntary intoxication defense was utilized during both phases of the trial. Both Attorney Sullivan and Attorney Alessandroni testified that the voluntary intoxication defense was used during the guilt phase of the trial in an attempt to convince the jury that Appellant could not have committed the crimes as alleged by the State because Appellant was too intoxicated. Accordingly, Appellant's claim in this regard is not moot.

With respect to the speedy trial issue, the evidence below indicates that Appellant instructed trial counsel not to waive any of his rights. However, trial counsel did so. The error is especially obvious given the fact that Appellant had limited experience with the legal system and, according to trial counsel, could not easily grasp legal concepts. Anytime Appellant raised this issue with trial counsel, he was coerced into "waiving" his rights. As a result of the waiver, Appellant was precluded from seeking a discharge under the speedy trial rule, the State was permitted to prepare its case better, and Appellant was precluded from raising the speedy trial issue on direct appeal. The waiver of speedy trial was especially prejudicial given the fact that it permitted the State to analyze and test the inculpatory DNA evidence. Accordingly, trial counsel rendered ineffective assistance of counsel by waiving Appellant's right to a speedy trial. This Court should therefore reverse the trial court's holding in this regard.

ARGUMENT

I. THE TRIAL COURT'S FINDING THAT APPELLANT'S TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO THE VOLUNTARY INTOXICATION DEFENSE ISSUE IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

A trial court's findings following an evidentiary hearing on a post-conviction motion alleging ineffective assistance of counsel must be supported by competent, substantial evidence. Schwab v. State, 814 So. 2d 402, 408 (Fla. 2002)(citing Stephens v. State, 748 So. 2d 1028 (Fla. 1999)). The evidence must appear in the record. Id. In the case at bar, the trial court found:

> "The gravamen of this claim is that [Appellant] did not agree to allow counsel to assert a voluntary intoxication defense, or otherwise authorize its use. The Court finds the testimony to be quite clear. While there was testimony from [Appellant] that he did not agree to allow counsel to assert voluntary intoxication as a defense, this Court did not permit it as a defense in the guilt phase of the trial. Therefore, that aspect of the claim is moot. In addition, any assertion of intoxication by counsel was only brought forward during the penalty phase of the trial and that is the only instance when a jury instruction was provided on that point..." (III:374).

However, the foregoing finding is not supported by competent, substantial evidence in the record.

To the contrary, the competent, substantial evidence indicates that the voluntary intoxication defense was indeed argued during the guilt phase of the trial. For example, Attorney Sullivan testified that the voluntary intoxication defense was beneficial during both phases of the trial. Indeed, Attorney Sullivan explained that the voluntary intoxication defense, although not used as an admission, was utilized in an attempt to convince the jury that due to Appellant's

intoxication, Appellant could not have committed the crimes in the manner alleged by the State. The testimony of Attorney Alessandroni echoed that of Attorney Sullivan. That is, both attorneys testified that the voluntary intoxication defense was raised during both phases of the trial.

The trial court's finding that voluntary intoxication was not permitted as a defense during the guilt phase of the trial is simply not supported by the evidence in the record, let alone competent, substantial evidence. Instead, the evidence adduced by both Appellant and the State illustrates that the voluntary intoxication defense was used during the guilt phase of the trial. Accordingly, Appellant's claim in this regard is not "moot," as alleged by the trial court. Because the trial court's finding with respect to the voluntary intoxication defense issue is not supported by competent, substantial evidence, the trial court's holding that Appellant did not receive ineffective assistance of counsel is in error, warranting reversal.

II. APPELLANT'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY WAIVING APPELLANT'S RIGHT TO A SPEEDY TRIAL.

Ineffective assistance of counsel occurs when trial "counsel's representation [falls] below an objective standard of reasonableness based on prevailing professional norms" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Schwab, 814 So. 2d at 408 (citing Strickland, 466 U.S. at 688, 694). A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." Id. The failure to file a demand for speedy trial or to seek a discharge following the expiration of the speedy trial period may constitute ineffective assistance of counsel under the Strickland analysis. See Burke v. State,

855 So. 2d 207 (Fla. 1st DCA 2003) and Brown v. State, 829 So. 2d 975 (Fla. 1st DCA 2002). See also Ryland v. State, 880 So. 2d 816 (Fla. 1st DCA 2004). Indeed, prejudice is demonstrated by showing that the failure to move for a speedy trial resulted in: precluding the defendant's discharge; allowing the state additional time to prepare its case; and precluding the speedy trial issue from being raised on direct appeal. Burke.

It is undisputed that trial counsel waived Appellant's right to a speedy trial by seeking the initial continuance. By doing so, the State was presented with additional time to prepare its case, including the DNA evidence, which the trial court correctly found to be "clearly inculpatory." Although the trial court found that Appellant thought that the DNA evidence would be exculpatory, this finding does not weaken Appellant's claim in this regard because the burden to prove guilt remained with the State. By waiving speedy trial, trial counsel allowed the State the additional time it needed to put together a stronger case against Appellant. Indeed, the State did not introduce any testimony showing that it would have been fully prepared for trial if the case had been tried within the statutory time frame, an assumption upon which the trial court's holding is predicated.

Furthermore, Attorney Sullivan conceded that Appellant had difficulty understanding legal principles. Appellant testified that he had limited experience with the legal system and, therefore, he was not familiar with his right to a speedy trial. Both Attorney Sullivan and Attorney Alessandroni testified that the State's case against Appellant was strong. Certainly, the State's case against Appellant would not become weaker over time. Lastly, Appellant himself testified that he repeatedly instructed trial counsel not to waive any of his rights. Trial counsel did so anyway, and when Appellant did not agree, the evidence shows that they coerced him into agreeing. Even Attorney Sullivan seemed to concede that perhaps he should not have waived Appellant's right to a speedy trial.

Given the foregoing, it is clear under the circumstances that despite the trial court's factual findings in this regard, trial counsel rendered ineffective assistance of counsel by waiving Appellant's right to a speedy trial. Consequently, this precluded Appellant from seeking a discharge, allowed the State additional time to prepare its case (including the crucial DNA evidence), and prevented Appellant from raising the speedy trial counsel on direct appeal. Given the foregoing, the trial court's ruling that the waiver of speedy trial was reasonable under the circumstances should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's findings and ruling below and hold that trial counsel rendered ineffective assistance of counsel to Appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Carol M. Dittmar, Esq., Office of the Attorney General, 3507 East Frontage Road, #200, Concourse Center 4, Tampa, Florida 33607 via U.S. mail this _____ day of July, 2005.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing Initial Brief has been prepared with Times New Roman 14 point font.

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