IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-2217

DAVID WYATT JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT AND REPLY

ARGUMENT ONE

Trial counsel rendered ineffective assistance of counsel in the guilt phase of Mr. Jones= trial due to errors and omissions enumerated in Appellee=s Answer Brief (Pages 21-75).

1. Appellant=s claim that counsel was prejudicially ineffective for failing to strike Venireman Hyers.

Replying to Appellee=s re-characterization of the substantiation of Appellant=s claim, that counsel=s inability to articulate a strategic or a technical reason for failing to strike Veinirman Hyers from the jury upon Ms. Hyers= remarks regarding an inability to be objective because of exposure to news commentary, as a failure to satisfy the two prongs of the Strictland standard, Appellant contends that the Appellee has misconstrued Appellant=s argument. Appellant merely contended that trial counsel=s failure to have a strategy was presented as evidence relevant to and probative of Appellant=s contention that trial counsel=s performance fell below the Strictland standard. See Strictland v. Washington, 46 US 668 (1984). Conversely to Appellee=s apparent position, trial counsel=s testimony indicating a lack of a strategic or technical plan regarding the publicity issue constituted essentially un-rebutted evidentiary support for Appellant=s position that trial counsel=s performance was deficient in this regard. Therefore, rather than short-circuiting the regular the proper application of the Strictland standard, as Appellee would imply, Appellant merely argues that counsel=s lack of a credible explanation for actions taken, or not taken, on Appellant=s behalf, in fact, is credible evidentiary support for the

claim that counsel=s performance was deficient and that the Appellant was prejudiced by this deficiency. (AB at 21-22; IB at 39-40). Further, this testimony also serves to undercut the affirmability of the trial court=s conclusion of law on this case.

Appellee concedes that the potential juror Hyers told the prosecutor, who was questioning her, that she couldn=t put aside what she had read in the paper and could not render a fair and impartial verdict, effectively publishing her opinion to the entire jury pool. No objection was made. (TT. 146) Thus, not only did counsel fail to articulate a strategy, counsel failed to take any steps to insulate the integrity of the jury pool or to preserve this issue for direct appeal, Appellee=s Answer Brief specifically acknowledges by asserting the procedural bar. Alternatively, Appellee seems to suggest that failure to object was a fundamental error by so strenuously arguing that Appellate counsel should have raised the issue on appeal.

In his initial brief, Appellant was merely contending, by vigorously iterating counsel=s failure to address the issue of possible infection of the pool strategically or tactically, that counsel=s testimony is evidence of deficient performance. Further, the Circuit Court=s Order, in which the Hearing Court notes that Ms. Hyers Adidn=t recall her exposure to pre-trial publicity until later in *voir dire*@ (PCR.R.-II at 389) indicates that counsel=s failure to have a strategy regarding pre-trial exposure provided the trial court with a basis to deny this claim, although Appellant contests that denial.

Appellant further acknowledges that Ms. Hyers ultimately didn=t sit on the jury, but Appellant contends that counsel=s testimony, as cited, reveals a broader paucity of planning as such a tactical disregard for such an essential element of *voir dire* raises

legitimate concerns that, perhaps, broader and more damaging commissions or omissions by counsel prejudice Appellant=s prospects.

2. Appellant=s claim that counsel should have objected to Prosecutor=s *voir dire* examination and introduction of evidence in the guilt-phase that the victim was a mother whose death left three motherless children.

Regarding the Appellee=s argument that the Prosecutor=s remarks to the jury emphasizing the victim-impact evidence, that the victim was a mother and that the victim=s death left three motherless children, and the emphasis of this fact to the jury un-necessarily and improperly inflamed the jury and emphasized the victim impact aspect of the crime. Appellee, like the Hearing Court, appears to argue that the Prosecutor=s remarks were mere clarifications or bland factual assertions of limited impact. Appellee sets out the Prosecutor=s arguments and the contested statements in italics as though mere replication removes their inflammatory sting. However, Appellee=s characterization of the remarks as bland facts are not supported by the cases cited, as those cases address trial counsel=s which Appellee=s contents are analogist addressed incidences an objection to the Prosecutor=s remarks. There a proper objection has been taken and the issue has been raised on direct appeal. See Davis v. State, 698 So 2nd 1182, 1190 (Fla. 1997); Farina v State, 679 So 2nd 1151, 1154 (Fla. 1996); Franqui v. State, 699 So 2nd 1312, 1320 (Fla. 1997); and Cummings v State, 715 So. 2nd 944, 948 (Fla. 1998). Appellant=s counsel, in the instant case, did not object. Thus, Appellee is able to rely upon the absence of said objection to emphasize or argue the innocuous nature of the Prosecutor=s remarks. Although this argument avoids the heart of the Appellee=s claim, which is that counsel should have objected and contended that the remarks are, in fact, inflammatory. The

context of the remarks indicates that the Prosecutor was not making off the cuff or accidental statements and that he was making these statements explicitly because of the inflammatory aspect inherent in them. Thus, the Answer Brief does not refute Appellant=s primary contention, which is that the introduction this of victim-impact evidence is objectionable, that Counsel could and should have objected to the introduction of this evidence, the failure to object constitutes ineffective assistance of Counsel.

Finally, Appellant does concede that, in light of Florida v. Nixon, 543 US 175 (2005), Strictland probably applies rather than Cronic, as Appellant initially argued. See, United States v. Cronic, 466 U.S. 648 (1984). However, Appellee has over- analyzed his citation to Ring v. Arizona, 536 U.S. 584 (2002). Appellant admits that his citations lack of specificity certainly invited such analysis. Nevertheless, Appellant was merely characterizing the effect of the introduction of the inappropriate victim-impact evidence, considered *sui generis,* as non-statutory aggravating evidence, improperly presented and, thus, Askewering@ the 8th Amendment considerations addressed by Ring. Appellant=s claim, however, should be considered under Strictland and the contention is that counsel could and should have objected to the Prosecutor=s improper statements.

Further, context indicates that the Prosecutor=s remarks were intentional and part of a strategy to introduce the improper evidence. The Hearing Court held that it was the failure by trial counsel to object which bars the claim at the present time, thus applying the proper standard if, from Appellant=s point of view, reaching a result that is not supported by the evidence. Thus, counsel=s failure to object continues to prejudice the Appellant. Appellee=s final contention is that these remarks merely constituted the distinguishing of

Abiological facts@ from Avictim-impact evidence@. However, the repetition of the remarks indicate a plan. In any case, Appellee is again unable to cite the hearing record for trial counsel=s specific strategy or tactic in failing to object. Here, Appellee does not seem to be implying, as before, that Appellant has unreasonably equated a lack of strategy or tactical plan with deficient performance.

3. Claim that the Counsel was ineffective in addressing the issue of medication administered to the Appellant during trial.

Replying to Appellee=s contention that Appellant failed to meet some initial burden regarding the precise nature of the dosing of the Appellant with medication at trial, Appellee has apparently over looked the record evidence and the testimony that, at trial, counsel requested an instruction to the jury that the Appellant was on psychotropic medication (ROA-II pp. 338-339). As the hearing court noted in its Order, the parties agreed that the instructions would be given prior to the commencement of the testimony (TT. 512-514; PCR. R-II p. 396-399). The claim, thus, is that the instruction was not given until the State had commenced its Case-in-Chief. The hearing court apparently found this harmless. Although the court failed to provide a credible explanation for this finding. Thus, Appellant=s argument, citing Dr. Lipman=s extensive testimony and Mr. Bowden=s testimony, is that Appellant=s addictions to drugs and his life-long affliction with mental illness are at the heart of the entire case and that this is the reason that Counsel=s failure to secure a timely instruction and to alert and educate the jury as to the extent and nature of these problems was prejudicial to the outcome of the case. Appellee=s argument, decrying the absence of jailhouse dosage records, does not squarely address the substance of the claim, and, in any case, surely does not refute it. Finally, the Motion quoted in Appellee=s

answer appears to supply all of the dosage information that Appellee has spent several pages lamenting the absence of and denouncing the Appellant=s claim on the basis of. (AB p. 41)

4. The claim that Trial Counsel was ineffective for failing to present proper expert testimony on the issue of premeditation and for the purpose of mitigation.

Appellee=s citation to Pietri v. State, 885 So. 2nd 245 (Fla. 2004), which relies specifically upon Spencer v. State, 842 So. 2nd 62 (Fla. 2000), is inapposite on the admissibility of expert testimony in the guilt phase, because, in Pietri and Spencer, they claim that such testimony should have been presented was denied in post conviction because there was no evidence that the Defendant was impaired at the time of the offense. See also Henry v. State, 862 So. 2nd 679, 683 (Fla. 2003). The instant case is clearly distinguishable. Appellant was impaired, very impaired. Further, in spite of Appellee=s apparent puzzlement, the relevance of the Appellant=s incompetency to stand trial in 1986 is that Appellant=s mental illness, drug addiction and the relationship between these two afflictions is powerful evidence of the continuity of Appellant=s impairment and support for the credibility of the expert=s testimony. This Court=s ruling on direct appeal is cited by Appellee as an alleged bar, but it is further not dispositive because that ruling was not informed by the full record now before the Court. See Jones v. State, 748 So. 2nd 1017 N.3. Appellant agrees that Counsel does not have a duty to Ashop around,@ for expert testimony. See Reviera v. State, 859 So. 2nd 495, 504 (Fla. 2003). However, undoubtedly he does have duty to Ashop some@ and to, at a minimum, mine the vein that a proper investigation has opened. Further, this is not a case in which counsel sought expert testimony on addiction but was repulsed or dissuaded by negative findings or harmful

opinions. In fact, to the contrary, Counsel=s addiction witness, weak as he was, simply did not show up for the trial.

Appellant argued the record extensively in the initial brief on this claim and will not Acut and paste@ at this point, but, in specific reply to Appellee, to assert, that the extensive mitigation which Appellee attempts contends this Court should not consider, would have been available to counsel and could and should have been presented to the jury, certainly in the penalty phase, if counsel were to fulfill its duty to educate the jury under the Lockett edict -- that the jury know the human being that they are being asked to sentence to death. Further, although the Spencer line of cases that Appellee cites on the issue of an impairment bar to the element of premeditation in first degree murder are not factually on all-fours with the instant case. Appellant does acknowledge that, even where the expert testifies as to the inability to form the requisite intent, there is a paucity of cases in which the court has sustained a Strictland challenge in the guilt-phase of the trial. However, that cannot be said of the impact of such evidence in the penalty-phase and Appellant maintains that the mitigation which was presented at the hearing, and which could have been presented at the trial was as powerful as any mitigation evidence which this court has considered in the cases upon which relief was granted. See eg Rutherford v. State, So. 2nd (Fla. 2003).

5. The Claim regarding the Prosecutor=s implication that a sexual battery occurred from the Acondition in which the body was found@

Replying to Appellee=s apparent consternation that a claim of ineffectiveness can arise from what Acounsel did not do as well as what he did do@ (AP. 55) and that individual claims are necessarily analyzed in the context of the total case before the court, Appellant

confirms that, indeed, the Trial Court erred in failing to find that Counsel was prejudicially ineffective in failing to object to the Prosecutor=s remarks and argument contending that a non-charged sexual battery occurred. The prosecutor=s actions, referring in opening statement to the victim=s jean=s being down and the victim=s buttocks and pubic area being exposed, and in his closing argument asking the jury rhetorically why the victims pants were unbuttoned (thus implying the answer to the rhetorical question is that she was sexually battered or raped) and his elicitation on direct examination of the FDLE Crime Lab analyst that a mixture of DNA, as was found in this case, between the perpetrator in the victim, commonly suggests that sexual intercourse took place, reveal a vigorous and effective prosecutorial strategy only lamely countered by defense counsel by the meek cross examination of the analyst. Further, there is no testimony that indicates that the jury was, in fact, aware that no sexual battery took place. See, eg, Walls v. State, No. SC 03-633 (Fla. 2006).

Appellant contends, as in his initial brief, that the hearing court=s finding that the Trial Counsel had a strategy not to object to the prosecutorial plan to introduce a sexual battery or rape without an evidentiary basis of any kind is not supported by the record.

The Appellee attempts to argue that the pertinent statements about sexual battery were simply that, statements that are not evidence of a plan. The hearing court however, acknowledges that counsel had a plan and specifically addresses the alleged defense strategy. Thus, the Appellee=s appellate protestations to the contrary are not convincing. However, by silence, Appellee does, at least, arguably, seem to concede that there was insufficient evidentiary basis for the sexual battery argument, as Appellee seems to be

contending that the Prosecutor was not even really making that argument. However, a fair consideration of the prejudicial impact (which is why the Prosecutor made the suggestions that a rape occurred) of a rape undercuts the credibility of the hearing court=s finding of the effectiveness of Counsel=s strategy. Moreover, the court=s holding simultaneously mitigates against the Appellee=s casual dismissal of the Prosecutor=s obvious purpose and intent in raising the sexual battery or rape sub-issue, when no such heinous crime was charged. Appellant would respectfully suggest that a claim of rape must be the single most inflammatory allegation or statement that a Prosecutor in a case of this kind, could make when it is his intention to elevate an already terrible killing to the level of a case in which the death sanction can be imposed. However, if a rape is not charged, it is difficult to comprehend why counsel would ever permit it to be alleged. Trial counsel=s testimony, adopted by the hearing court, is simply not credible. After all, there was a time in the United States and in this State when a rape conviction, standing alone, could carry the death penalty. Appellee, like trial counsel and like the hearing court, too easily dismisses the grievous impact of this allegation. It is incumbent upon the State to either charge rape, if it intends to argue that a rape or sexual battery occurred, or to not make the argument. For defense counsel to sanction such an argument based on a strategy that it can deny, that a non-charged crime occurred is the height of either arrogance or foolishness or, most likely both.

6. Claim 6, 7, 8, 9, 10.

Appellant will rely on the argument he has set forth in his initial brief on these claims as further reply would amount to re-argument.

ARGUMENT II

ISSUE II

Whether the Trial Counsel rendered prejudicially ineffective assistance of counsel in the penalty phase.

1. Failure to present expert witnesses for mitigation.

Appellant will reply on the argument set forth in the initial brief and those set forth in his reply to Claim 4 in Argument 1, supra.

2. Appellant=s claim that Trial Counsel was prejudice and ineffective for failing to object to the Prosecutor=s opening argument in the penalty phase.

The Prosecutor in his opening statement argues that presenting evidence regarding drug use, the fact that he was using crack cocaine, Appellant was making an Aexcuse@ for the crime. Appellee, suggests that Prosecutor could reasonably believed that the defense was going to be drug addiction, as that was the defense for the guilt-phase. Presenting mitigation, however, is not an affirmative defense. In calling mitigation Aan excuse,@ the prosecutor essentially mis-characterizes the nature of mitigation and of the penalty-phase. Thus, Appellee will reply on the arguments set forth in the initial brief and, additionally, contends that Appellee=s characterization of the prosecutor=s statements in the Answer do not satisfactorily state an alternative reasonable interpretation of the prosecutor=s remarks. A more reasonably interpretation of the remarks is that the prosecutor is asking the jury to disregard drug abuse evidence, as the presentation of an Aexcuse@ for the crime, thus urging the jury to disregard unrebutted mitigation evidence presented to them.

3. The claim that counsel rendered ineffective assistance by failing to present testimony of lay witnesses.

Appellant will rely upon the argument and analysis made in the initial brief on this claim.

CONCLUSION

Based upon the foregoing, Appellant requests that this Court grant him the relief sought in the initial brief and for such other relief as this Court deems proper.

CERTIFICATE OF TYPE SIZE, STYLE, AND SERVICE

The undersigned Counsel of record hereby certifies that a true copy of the foregoing Reply Brief of the Appellant has been reproduced in 12-point universal type font that is not proportionally spaced; further, a true copy has been furnished by Federal Express overnight delivery to Assistant Attorney General Cassandra K. Dolgin.

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