

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-2020

DOLAN DARLING A/K/A
SEAN SMITH

Petitioner,

v.

JAMES V. CROSBY, Secretary,
Florida Department of Corrections

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PROCECURAL HISTORY

The relevant facts were summarized by the Supreme Court of Florida in *Darling v. State*, 808 So. 2d 145 (Fla. 2003):

The victim in this case, Grazyna Mlynarczyk ("Grace"), was a thirty-three-year-old Polish female living illegally in the United States. The State's first witness, Zdzislaw Raminski (known as "Jesse"), had met the victim in Poland in 1990 or 1991. Grace and Jesse developed a personal relationship, which continued when Grace moved to Orlando on September 28, 1992.

Jesse owned and operated Able Transportation, which provided shuttle service to and from the airport, and Grace was employed part-time with this enterprise. The last time Jesse saw Grace alive was on the morning of October 29, 1996, at around 9:30. At that time she was wearing shorts and a small shirt, as she was doing laundry in a facility at her apartment complex. Jesse did not exit his vehicle when talking with Grace only briefly that morning. She told Jesse that she had an appointment with a gynecologist later that day. Jesse gave Grace an AmSouth Bank envelope containing three hundred dollars cash in payment for work she had performed for the company during the prior week. Jesse drove away from the apartment complex and proceeded to work. Jesse again spoke with Grace around 10:15 a.m. by phone, and she indicated that she was still doing laundry, and would call him after she returned from her doctor's appointment. Although Jesse continued to telephone Grace throughout the day, he was unable to reach her again. Around 4:10 p.m., Jesse called again and was still unable to reach Grace. He became concerned that she had not telephoned him after her doctor's appointment, so he returned to her apartment complex.

Upon arriving there, he was surprised to find that the blinds to Grace's apartment--which she never closed during the daytime--were closed. He used his key to enter the apartment, where he found a basket with laundry in the living room, and the door to the bedroom closed. He recalled seeing no disturbed objects in the apartment. Upon entering the bedroom, however, he found Grace. She was on her back on the floor, naked from the waist down, with her face near the bed and her legs inside the closet. When she did not respond to him, Jesse moved Grace to the bed, and discovered that she was cold, and had blood on her. He proceeded to call 911 for assistance and members of the fire department arrived shortly thereafter. They soon determined that Grace was dead.

Officers from the Orange County Sheriff's Office responded to the scene and secured items of evidence found in the bathroom, which included a lotion bottle, a pair of panties, and a pink throw pillow. The pillow had a blackened area and a gunshot hole through the sides. There was blood spatter on the door of the closet, and blood present in the closet area. Two AmSouth Bank envelopes were found which contained cash totaling approximately twelve hundred dollars and a shoe box was discovered which contained one thousand dollars. There was also a wallet which held fifty-eight dollars. Jewelry located in boxes appeared to be undisturbed.

An officer who had canvassed Grace's neighborhood to determine whether there were witnesses with information regarding the murder testified that he had contacted Darling on October 30, the day after the murder. Darling's apartment was located just north of Grace's apartment. In response to the investigating officer's inquiry, Darling had said that "he was working and didn't know

anything of the incident."

Dr. William Robert Anderson of the Orlando Medical Examiner's Office testified at trial. His testimony included a discussion concerning the "defect" in the pillow, particularly the "cloud of soot" from the "burning gun powder" left on the pillow as the "bullet comes out." The gun was fired at close range because he observed "in the victim only a small amount of soot material. But ... on the pillow there is a significant amount of that soot material." Dr. Anderson indicated that "the end of the weapon was up against that pillow ... fairly tightly." He also testified that the "defect in the middle is consistent with a bullet passing through ..., creating a tear." When the doctor first saw Grace, "[r]igor mortis was complete," and he estimated that she "was probably dead at least six hours from the time we saw her, which was about seven."

Dr. Anderson testified that the bullet entered "the right back of the head." Grace had an abrasion there "consistent with something having been up against the cloth transferring energy across to the skin and creating that." "That pillow" was consistent with the abrasion. The doctor found that Grace had "some vaginal injuries, but nothing that would make her bleed significantly." There was "[a] lot of bleeding ... inside the brain," but "she's gonna die pretty quick." He stated that "[c]onsciousness would probably not be more than a few seconds," and that "[s]he would have no motor activity" or any "ability to move anything at that point." The doctor stated that "the rapidity [with] which she dies" is "one of the reasons she probably didn't bleed."

The doctor stated that there was "seminal purulent" in Grace's vaginal area and bruising on the "back of the elbows ... consistent with some moving around." There was "a hemorrhage," which "means that took place when circulation was alive." The vaginal area abrasions were "consistent with vaginal trauma from penetration of some object, penial, digital, some other object." The doctor pointed out that the "tear of the labia majora, which is a very sensitive area" was "quite painful," adding: "This would not be consistent with consensual sex, in that the pain would interrupt the activity. It would be painful enough that consensual sex would not apply after that point." The doctor observed that "there wasn't anything in the labia that would explain those abrasions other than trauma." [FN1] The victim's "rectal area" had "some tears," which were caused by "[d]igital penetration, penial penetration, some trauma." The doctor opined that this, too, was painful. He further indicated that the "gunshot wound to the head with the injuries ... described" was the cause of Grace's death.

FN1. Dr. Anderson stated that he had "seen many, many sexual assault victims that don't have ... defense wounds...." He observed, further, that in "[t]he majority of the cases of sexual battery ... they don't put up a struggle."

Photographs and records of fingerprints found in Grace's apartment were developed and submitted to a comparison expert. A photograph of fingerprints from the lotion bottle was developed, and admitted into evidence as Exhibit 14. At trial, the State's expert in the detection, enhancement, and recording of fingerprints opined that the fingerprint on the lotion bottle had been there for less than one year. The State's expert in the area of

fingerprint comparison compared the fingerprints on Exhibit 14 with fingerprints obtained from Darling. He testified at trial that he found a print on the lotion bottle which matched that of Darling's right thumb.

Additionally, David Baer, a Senior Crime Laboratory Analyst with FDLE, testified that the DNA in the semen sample from the victim matched the DNA from Darling's blood sample.

The jury found Darling guilty of capital murder and armed sexual battery.

Darling raised eleven points on direct appeal. He claimed that the trial court reversibly erred in:

- (1) denying Darling's motion for judgment of acquittal;
- (2) admitting DNA evidence;
- (3) not allowing defense counsel to comment on the State's failure to exclude other suspects;
- (4) limiting Darling's voir dire examination during jury selection;
- (5) denying Darling's requested instruction regarding circumstantial evidence;
- (6) precluding defense counsel's rebuttal closing argument where the State had waived its closing argument;
- (7) refusing to allow Darling to argue residual doubt as a mitigator; and
- (8) denying Darling's requested special penalty phase jury instructions.

Additionally, Darling asserted that:

- (9) the absence of a complete record on appeal deprived him of adequate appellate

review;

(10) his death sentence is disproportionate;
and

(11) his death sentence violates the Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (Dec. 24, 1969) (the "Vienna Convention").

Darling v. State, 808 So. 2d 145 (Fla. 2003).

This Court affirmed the convictions and sentences. Darling filed a petition for writ of certiorari in the United States Supreme Court which was denied October 7, 2002. *Darling v. Florida*, 537 U.S. 848 (2002). Darling filed a Motion for PostConviction Relief on September 22, 2003, raising thirty-eight (38) claims:

- (1) State agencies withheld public records;
- (2) Counsel was ineffective for allowing Juror Wilson to serve on the jury;
- (3) Counsel was ineffective for failing to object to a fingerprint on a lotion bottle;
- (4) Counsel was ineffective in the penalty phase for failing to ensure adequate mental health exam and present mental health mitigation;
- (5) The jury was misled by comments and instructions which diluted their sense of responsibility;
- (6) Jury instructions limited mitigation; counsel was ineffective;
- (7) The prosecutor made improper closing remarks; counsel was ineffective;
- (8) The jury was told a death recommendation was

- required; counsel was ineffective;
- (9) Counsel failed to obtain an adequate mental health evaluation in violation of *Ake v. Oklahoma*;
 - (10) Cumulative effects of ineffective assistance of counsel and erroneous trial court rulings;
 - (11) Newly discovered evidence;
 - (12) The State withheld material evidence;
 - (13) Counsel was ineffective in voir dire;
 - (14) Improper prosecutor arguments; counsel was ineffective;
 - (15) Counsel was ineffective for failing to investigate and present mitigating evidence;
 - (16) Darling is innocent of the death penalty;
 - (17) Darling was absent during critical stages of the trial;
 - (18) Penalty phase instructions shifted the burden; counsel was ineffective;
 - (19) Jury instruction on expert testimony was erroneous; counsel was ineffective;
 - (20) Jury instructions on aggravating circumstances erroneous; counsel was ineffective;
 - (21) The State introduced nonstatutory aggravating factors; counsel was ineffective;
 - (22) Jury was misled by comments and instructions that diluted its sense of responsibility; counsel was ineffective;
 - (23) Darling could not interview jurors; counsel was ineffective;

- (24) The prosecutor overbroadly and vaguely argued aggravating circumstances; counsel was ineffective;
- (25) Electrocution is cruel and unusual;
- (26) Florida's death penalty is arbitrary and capricious;
- (27) Darling was prejudiced by pre-trial publicity; counsel was ineffective;
- (28) The trial court erred in finding mitigating circumstances;
- (29) The sentencing order does not reflect an independent weighing;
- (30) The record on direct appeal was incomplete;
- (31) Excessive security measures or shackling; counsel was ineffective;
- (32) The judge and jury relied on misinformation; counsel was ineffective;
- (33) Jury instruction on majority vote of jury was erroneous; counsel was ineffective;
- (34) Darling's death sentence is predicated on an automatic aggravating circumstance; counsel was ineffective;
- (35) *Ring v. Arizona*;
- (36) Counsel was ineffective for failing to request an instruction and present evidence of parole ineligibility;
- (37) Counsel was ineffective for failing to hire experts and challenge scientific findings of FDLE regarding DNA;
- (38) Darling's trial was fraught with error.

After an evidentiary on certain claims, the trial court

denied relief. An appeal from that order is pending before this Court in Case No. SC05-2020.

ARGUMENTS

CLAIM I

WHETHER DARLING WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND ACCESS TO THE COURTS IN A PRIOR FELONY CONVICTION IS PROCEDURALLY BARRED AND NOT PROPERLY RAISED BEFORE THIS COURT.

The issue Darling raises is whether counsel in another case, Case No. CR96-13626, Ninth Judicial Circuit Court for Orange County, was ineffective. Darling acknowledges that he filed a Rule 3.850 motion in that case, relief was denied, and he appealed to the Fifth District Court of Appeal.

This Court does not have jurisdiction to review this issue which involves an entirely separate case. The only connection to this case is that the taxi robbery was used as a prior violent felony aggravating circumstance. Even if this Court had jurisdiction, this issue is procedurally barred since it was ruled on by Judge MacKinnon and the appeal dismissed by the Fifth District Court of Appeal. Furthermore, the issue is time barred since the plea to the taxi robbery was in 1997. The issue is also barred because it was not raised in the Rule 3.851 motion in this case. Last, the issue was raised on appeal from the order denying relief in the Rule 3.851 proceeding which is pending before this Court. This issue was not properly raised

in the Rule 3.851 proceeding. Even if it were, habeas corpus petitions are not to be used for additional appeals on questions which could have been or were raised on appeal or in a rule 3.850 motion. *Rodriguez v. State*, 30 Fla. L. Weekly S385, 398 n.16 (Fla. May, 26 2005); *Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994). Last, this issue has no merit. The evidence in the taxi robbery case was overwhelming. Darling was arrested with the gun in his pocket with which he shot the taxi driver, the taxi driver survived and testified in the penalty phase of this case, and Darling confession. In fact, Judge MacKinnon found the evidence overwhelming in denying the Rule 3.850 motion in this case.

CLAIM II

**WHETHER DARLING RECEIVED EFFECTIVE
ASSISTANCE OF APPELLATE COUNSEL.**

The issue Darling raises was addressed by this Court on direct appeal and has no merit. Darling has failed to show that any motion which appellate counsel failed to argue has merit. When analyzing the merits of the claim, "the criteria for proving ineffective assistance of appellate counsel parallel the *Strickland* standard for ineffective trial counsel." *Rutherford*, 774 So. 2d at 643 (quoting *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985)). Thus, this Court's ability to grant habeas relief on the basis of appellate counsel's

ineffectiveness is limited to those situations where the petitioner establishes first, that appellate counsel's performance was deficient and second, that the petitioner was prejudiced because appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *See id.* "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to present the meritless issue will not render appellate counsel's performance ineffective." *Rutherford*, 774 So. 2d at 643 (quoting *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994)). Moreover, appellate counsel is not required to present every conceivable claim. *See Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points."). *Davis v. State/Crosby*, 30 Fla. L. Weekly S709, 719 (Fla. Oct. 20, 2005).

CLAIM III

EXECUTION BY LETHAL INJECTION IS NOT CRUEL AND UNUSUAL PUNISHMENT

This Court has repeatedly rejected this claim as being

without merit. See *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000) (holding that execution by lethal injection is not cruel and unusual punishment); *Provenzano v. State*, 761 So. 2d 1097, 1099 (Fla. 2000) (holding that execution by lethal injection is not cruel and unusual punishment); *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005); *Robinson v. State*, 30 Fla. L. Weekly S576 (Fla. July 7, 2005).

CLAIM IV

**WHETHER DARLING IS COMPETENT TO BE EXECUTED
IS NOT REVIEWABLE AT THIS TIME SINCE THERE
IS NO ACTIVE DEATH WARRANT.**

Darling alleges no facts in support of this allegation, nor did he offer any support of this claim at the trial court. In fact, he even concedes that this claim is not ripe for consideration at this time. (Habeas petition at 14). See *Thompson v. State*, 759 So. 2d 650, 668 (Fla. 2000); *Provenzano v. State*, 751 So. 2d 37 (Fla. 1999); Fla. R. Crim. P. 3.811(d). This claim has no merit. *Johnson v. State*, 804 So. 2d 1218, 1225-1226 (Fla. 2001).

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court deny habeas corpus relief.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **David Hendry and Mark Gruber**, CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, this _____ day of January, 2006.

Assistant Attorney General

CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.

Assistant Attorney General