IN THE SUPREME COURT OF FLORIDA

ROBIN LEE ARCHER,

Petitioner,

vs. CASE NO. SC05-696

JAMES V. CROSBY, JR.,
Secretary, Dept. of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW JAMES V. CROSBY, Secretary, Florida Department of Corrections (hereafter, the State), by and through undersigned counsel, and hereby responds as follows to Archer's Petition for Writ of Habeas Corpus.

STATEMENT OF THE CASE

Archer's appeal from the denial of postconviction relief is pending in this Court (Case No. SC04-451). The State's Answer Brief in that case sets out a detailed procedural history and statement of facts, which will not be repeated herein. In his habeas petition, Archer raises two claims of ineffective assistance of appellate counsel.

PRELIMINARY DISCUSSION OF APPLICABLE LAW

There are a number of well-settled principles applicable to habeas corpus proceedings filed in this Court. The State will discuss them at this juncture and then elaborate to the extent necessary in its responses to specific claims.

First, this Court has repeatedly stated that capital habeas corpus proceedings were not intended as second appeals of issues which could have been or were presented on direct appeal or in a rule 3.850 proceeding. E.g., Jones v. Moore, 794 So.2d 579 (Fla. 2001); Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999); Hildwin v. Dugger, 654 So.2d 107, 111 (Fla. 1995); Hardwick v. Dugger, 648 So.2d 100, 105 (Fla. 1994); Scott v. Dugger, 604 So.2d 465, 470 (Fla. 1992); Medina v. Dugger, 586 So.2d 317 (Fla. 1991).

"Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel." Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000) (emphasis supplied). To prevail on such a claim, a defendant must show that his attorney's performance was professionally deficient and that he was prejudiced by that deficiency. See Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. Dugger, 523 So. 2d 161 (Fla. 1988). In other words, "Petitioner must show 1) specific errors or

omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985). This Court recently summarized these principles:

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion. In evaluating an ineffectiveness claim, the court must determine
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> > whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
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> Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986). See also Haliburton [v. Singletary], 691 So.2d 470 [(Fla. 1997)]; Hardwick v. Dugger, 648 So.2d 100 (Fla. 1994). The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. See Knight v. State, 394 So.2d 997 (Fla. 1981). "In the case of appellate counsel, this means the deficiency must

> concern an issue which is error affecting the outcome, not simply harmless error." Id. at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. See Medina v. Dugger, 586 So.2d 317 (Fla. 1991); 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.").

Freeman v. State, 761 So.2d 1055, 1069-70 (Fla. 2000).

Generally, appellate counsel cannot be considered ineffective for failing to raise issues that were not preserved by trial counsel, unless "trial counsel was so obviously inadequate that appellate counsel had to present that question to render adequate assistance." Page v. U.S., 884 F.2d 300, 302 (7th Cir. 1989). See e.g., Provenzano v. Dugger, 561 So.2d 541, 548 (Fla. 1990) ("Trial counsel did not object . . ., thereby precluding an effective argument on appeal"); Atkins v. Dugger, 541 So.2d 1165, 1166 (Fla. 1989) (appellate counsel not ineffective for failing to raise claims as "not properly preserved for appeal by trial counsel, thus precluding appellate review"); Downs v. Wainwright, 476 So.2d 654, 657 (Fla. 1985)("appellate counsel cannot be considered ineffective for failing to raise issues which he was procedurally

barred from raising because they were not properly raised at trial").

In addition, "appellate counsel is not ineffective for failing to raise a claim that would have been rejected on appeal." Downs v. State, 740 So.2d 506, 517 n. 18. Accord, Freeman (appellate counsel not ineffective for failing to raise non-meritorious issues); Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000) (same); Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir. 1984) (appellate counsel "need not brief issues reasonably considered to be without merit"). In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable non-frivolous issue. Jones v. Barnes, 463 U.S. 745 (1983) (appellate counsel not required to argue all non-frivolous issues, even at request of client). Accord, Provenzano, 561 So.2d at 548-49 ("it is well established that counsel need not raise every nonfrivolous issue revealed by the record"); Atkins v. Dugger, 541 So.2d at 1167 ("the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points").

Nor can appellate counsel be deemed ineffective if the habeas claim, or a variant thereof, was, in fact, "raised

on direct appeal," Atkins v. Dugger, supra, 541 So.2d at 1166-67. Accord, Provenzano, supra, 561 So.2d at 548 (no ineffective assistance where appellate counsel raised the claim on appeal, but it was rejected); Jones v. Moore, supra ("habeas is not proper to argue a variant of an already decided issue"). So long as appellate counsel raised the issue on appeal, mere quibbling with or criticism of the manner in which appellate counsel raised such issue on appeal is insufficient to state a habeas-cognizable issue. Jones; Thompson v. State, 759 So.2d 650, 657 n. 6 (Fla. 2000).

SPECIFIC RESPONSE TO CLAIMS

CLAIM I

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE ADMISSIBILITY OF CERTAIN TESTIMONY BY BONIFAY ELICITED BY THE STATE ON RE-DIRECT EXAMINATION IN RESPONSE TO DEFENSE CROSS-EXAMINATION

On cross-examination, Archer's trial counsel challenged Bonifay's testimony that Archer had showed him a briefcase full of money to induce him to commit the robbery/murder at Trout Auto Parts, and that Archer had threatened him to induce him to try again Saturday night after Bonifay failed to complete the task on Friday night. Inter alia, counsel elicited testimony from Bonifay that Archer had been unemployed for an extended period of time,

had no home of his own, and was supported by his girlfriend (1AT 137-40); during the cross-examination, Bonifay testified that he had killed because he was afraid of Archer (1AT 148), but he also denied being afraid of "that man over there with the white tie on" (1AT 149).

On redirect, the State, after reminding Bonifay that he had told police he was afraid of Archer, but had just testified that he was not afraid of Archer, asked him, if he was not afraid of Archer, what he was afraid of? Bonifay responded that he was afraid of Archer's gun and his associates (1AT 163). Archer's trial counsel did not object to this testimony. In addition, the prosecutor elicited testimony from Bonifay that, despite being unemployed, Archer had a significant income from a source other than work (1AT 166). The defense objection to this testimony was overruled on the ground that the cross-examination had opened the door to an exploration of Archer's ability to pay Bonifay.

Archer contends that his appellate counsel on direct appeal should have challenged this redirect testimony on direct appeal.

With respect to Bonifay's testimony about his fear of Archer's gun and his associates, Archer's claim of appellate ineffectiveness founders on the lack of objection

by trial counsel.[1] Because trial counsel did not preserve this issue for appeal, appellate counsel cannot be deemed ineffective for failing to raise the issue on appeal, absent fundamental error. If there was any error at all, it was not fundamental. First of all, the jury already knew that Archer had a gun: Archer admitted he had one; his girlfriend testified that he had bought one with a credit card (despite not having a job); and Wells testified that he had seen it, too. Secondly, whether Bonifay had any reason to fear Archer, who was smaller than Bonifay, was a legitimate inquiry in response to a defense cross-examination whose purpose was to suggest that he did not.

As for the testimony about Archer's outside income, this too was legitimate response to the defense counsel's attempt to discredit Bonifay's testimony by demonstrating that, due to his lack of a job, Archer could not have had funds to pay Bonifay.

Because Archer's trial counsel opened the door to the State's redirect examination, and because the testimony was relevant to the issues in this case, appellate counsel was not ineffective for failing to challenge the testimony on

[1] The State would note that, in his circuit court postconviction proceedings, Archer had the opportunity to raise a claim of ineffectiveness of trial counsel for failing to make such an objection but failed to do so.

direct appeal, especially when only a portion of it was even preserved for appeal.

CLAIM II

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE AS FUNDAMENTAL ERROR TESTIMONY REGARDING ARCHER'S DELIVERY OF THE MURDER WEAPON

Archer contends here that his appellate counsel should have challenged the admissibility of testimony about Archer's delivery of the murder weapon to Bonifay. Again, because there was no objection to this testimony at trial, Archer argues fundamental error.[2]

There was no error at all, much less fundamental error. Bonifay testified that he got the murder weapon from Archer, who had obtained it from Kelly Bland (AT 128-29). Barth testified that Bonifay told him he needed to get a gun from Archer (2AT 204). According to Barth, he and Bonifay went to where Archer was staying; Bonifay and Archer walked to Archer's truck and Archer leaned inside; when Bonifay returned, he had a .32 caliber revolver (2AT 204-05, 235). After the murder, Bonifay returned the gun, ammunition and a backpack to Kelly Bland 1AT 136). The murder weapon was a .32 caliber revolver (2AT 224), which

[2] Again, the State would note that, in his circuit court postconviction proceedings, Archer could have claimed that trial counsel was ineffective for failing to object to this testimony, but did not.

police retrieved from Kelly Bland, along with a backpack and ammunition (2AT 219-20).

In short, until he visited Archer, Bonifay did not have a gun; after he visited Archer for the stated purpose of obtaining a gun to commit robbery and murder, he did. Bonifay testified that Archer had obtained the gun from Kelly Bland and that, after the robbery/murder, he returned the gun to Bland. A gun positively identified as the murder weapon was retrieved by police from Kelly Bland, along with other items used in the robbery/murder.

All this was legitimate evidence tying Archer to the murder. It did not call for an impermissible "stacking" of inferences. It merely invoked straightforward, common-sense inferences from the evidence. Any contrary inferences could and should have been (and were) argued to the jury. This Court determined on direct appeal that the evidence was sufficient to support the conviction; Archer may not relitigate that determination in this habeas proceeding.

CONCLUSION

For the foregoing reasons, Archer's petition for writ of habeas corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Sara K. Dyehouse, Esquire, 3011 Richview Park Circle, Tallahassee, Florida 32301, this 21st day of July, 2005.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief was produced in Microsoft Word, using Courier New 12 point, a font which is not proportionately spaced.

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CURTIS M. FRENCH
Senior Assistant Attorney General