IN THE SUPREME COURT OF FLORIDA

ANTHONY A. SPANN,

Appellant,

vs.

Case No. SC05-1334
LC No. 97-1672-CFB

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

On Direct Appeal From A Final Order of the Circuit Court Of The Nineteenth Judicial Circuit, in and for Martin County, Florida, In Case No. 97-1672-CFB, That Denied Spann's Florida Rule of Criminal Procedure 3.851 Motion For Post Conviction Relief.

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TABLE OF CONTENTS

Page(s)

Citation of Authorities 3

Preliminary Statement 4

The State's Statement of the Case and Of The Facts 5

The State's Summary Of The Argument 6

The State's Argument 7-14

Issue I: (As restated by Appellant in Answer Brief)

The court properly rejected Spann's claim of ineffective assistance with respect to an alibi defense, challenging co-defendant Philmore's testimony with prior confessions, and investigation of mitigation and the waiver of a mitigation case.

Issue I(c) and Issue II: (As restated by Appellant in Answer Brief)

Counsel rendered effective assistance through his investigation of mitigating factors to properly prepare the mental health expert and to advise Spann on his decision to waive mitigation.

Conclusion 15

Certificate Of Service 15-16

Certificate of Compliance 16

TABLE OF CITATIONS

Cases **Page**

Happ v. State, 922 So. 2d 182 (Fla. 2005) 8

Johnson v. State, 789 So. 2d. 262 (Fla. 2001) 7

Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988) 14

Rivera v. State, 859 So. 2d 495 (Fla. 2003) 13

Rose v. State, 675 So. 2d 567 (Fla. 1996) 7

Nixon v. State, 857 So. 2d 172 (Fla. 2003) 7

Strickland v. Washington, 466 U.S. 668 (1984) 7

Rules

Fla. R. App. P. 9.210(a)(2) 16

PRELIMINARY STATEMENT REGARDING RECORD REFERENCES

Anthony A. Spann, the defendant in the trial court, is the appellant here. He uses the same party and record references as employed in the amended initial brief of appellant filed in this cause. He will be referred to as "the defendant" or "Spann." The State of Florida was the plaintiff in the trial court and is the appellee here. It will be referred to as "the state."

The record on appeal regarding the post conviction proceedings is in 14 volumes. The court reporter has placed a page number at the bottom right hand corner of each page of the record. When referring to that post conviction record, the appellant will cite the letter "R" for record, followed by a volume and page number.

There are two supplemental volumes of exhibits. They will be referred to by exhibit number.

The record regarding Spann's original direct appeal of his judgments and sentences, including a death sentence, rendered in Florida Supreme Court Case No. SC 00-1498, contains 32 volumes. There is a page number provided in the upper right hand corner of each volume. When referring to this original record, Spann will cite the letters "OR" (for original record) followed by a volume and page number.

AS TO THE STATE'S STATEMENT OF THE CASE AND FACTS

The state's statement of the case and of the facts is set forth on pages 1-16 of the Answer Brief. In so doing, the state does not directly address, contest or take issue with the statement of the case and of the facts as set forth in Spann's Amended Initial Brief of Appellant. By the same token, Spann does not take issue with the state's rendition of same. Both parties realize the importance of a complete and accurate rendition of the facts in the case, and have complied with their responsibilities in this regard.

AS TO THE STATE'S SUMMARY OF THE ARGUMENT

The state's summary of the argument is set forth on page 17 of the Answer Brief. Spann disputes it.

The trial court's factual findings are not supported by the record; on the contrary, they are refuted by it. Trial counsel did not conduct an adequate factual investigation of the facts and witness accounts with regard to the presentation of an alibi defense. He was ineffective in deciding not to highlight the co-defendant's (Lennard Philmore's) multiple confessions.

Trial counsel was also ineffective for not properly advising Spann regarding waiver of the right to present mitigation. Spann suffered prejudice as a result since there was competent evidence that Spann was suffering from a serious mental condition that, had it presented would have caused the jury to recommend life, not death, and placed the trial court in the position of not having a legal basis for overriding that life recommendation.

In this regard, Spann relies upon his summary of the argument as set forth in his Amended Initial Brief of Appellant.

AS TO THE STATE'S ARGUMENT

Standard of Appellate Review

The state does not take issue with Spann's statement as to the standard of appellate review as set forth on pages 43-4 of the Amended Initial Brief of Appellant. By the same token, Spann does not take issue with the state's version of that standard as set forth on pages 19-22 of the Answer Brief.[1] This is a post conviction capital case involving mixed questions of fact and law. As such, the final order of the circuit court denying Spann's Florida Rule of Criminal Procedure 3.851 motion for post conviction relief is entitled to plenary, *de novo* review, except that findings of fact by the trial court are entitled to deference so long as there is competent and substantial evidence in the record to support them. *Nixon v. State*, 857 So. 2d 172, 175, f. 7 (Fla. 2003); *Johnson v. State*, 789 So. 2d. 262 (Fla. 2001); *Rose v. State*, 675 So. 2d 567 (Fla. 1996).

[1] The state argues that it is not ineffective for trial counsel to decline to investigate a line of defense so long as that decision is a reasonable one, citing *Strickland v. Washington*, 466 U.S. at 690-91. The key here is the question of reasonableness. The corollary to that assertion, of course, is that where defense counsel unreasonably fails to investigate a pertinent matter, ineffectiveness and prejudice may be established.

The Merits

Set out below is Spann's reply to the merits of the state's argument regarding the various claims rejected by the trial court in the course of the post conviction proceedings.

As to the state's response to Spann's Claim VIII of his post conviction motion -- trial counsel's failure to present the alibi testimony of Leo Spann.

In Spann's Amended Initial Brief, he noted that his brother, Leo Spann, saw Anthony Spann go into the back house owned by Mrs. Brown on November 14, 1997, at 1102 Adams Street, West Palm Beach, Florida, between the hours of 1:00 and 2:00 p.m. (R. Vol. III. pp. 281-82, 287). The state admits in its Answer Brief (pages 27-8) that this was the gist of Leo's testimony at the evidentiary hearing based upon the trial court's findings in that regard. It is just about the same time that Anthony was supposed to have been with Lennard Philmore on New Calkins Grove Road west of Indiantown directing him to shoot Mrs. Perron, according to the prosecutor. (OR. Vol. XXIX, pp. 3038-41) Thus, Spann claims he had a valid alibi that his lawyer failed to present at trial. Under appropriate circumstances, this can constitute ineffective assistance of counsel in a capital case. *Happ v. State*, 922 So. 2d 182 (Fla. 2005).

However, the state argues, based upon the trial court's findings, that defense counsel was not ineffective for not presenting Leo's testimony since Leo's post

conviction testimony was contradicted by his deposition testimony and by the defendant's post arrest statement to law enforcement. (The Answer Brief, pp. 24-32.)

While Leo's May 23, 2000 deposition testimony was not precisely consistent with his later post conviction testimony, it was close to it. For example, while it is true that Leo said in that deposition that Anthony came to Mrs. Brown's house at between 2:00 and 3: 00 p.m. on November 14, 1997, the day of Mrs. Perron's murder, he added that it could have actually been an hour earlier or later than that time frame. (See the state's Answer Brief at p. 28, quoting the trial court's findings in this regard.) In addition, while Leo did not specifically mention a Gold Lexus parked at the Brown residence at this time, he certainly inferred that he (the defendant) arrived by car and noted that no one asked him (Leo) about a vehicle other than Anthony's Subaru. (The state's Answer Brief, p. 28.)

Thus, the state's claim that trial counsel was not ineffective for failing to call Leo as a witness because there were some inconsistency in his testimony misses the point. Whether the jury would believe Leo was a question for the jury to decide. Trial counsel took that opportunity away from the defendant. The state had the burden of proof and, even had there been some doubt about Leo's ability to remember the exact time Anthony was at Mrs. Brown's on the 14th, the state did not otherwise attack his truthfulness.

Furthermore, the defendant's post arrest statement was consistent with Leo's testimony as to the time that Spann was in the back house owned by his aunt, Mrs. Brown, on November 14, 1997. In the statement, Spann said that Philmore came to his aunt's house between noon and 1:00 p.m on the 14th and picked him up in a gold Lexus. (R. Vol. II, p. 154) The trial court found in this regard that "Spann contended that about an hour later, around 12:00 or 1:00 p.m. Philmore picked Spann up at his aunt's house," citing to the original record on appeal at ROA, Vol. XXVII, p. 2830. (See the Answer Brief, p. 26.)

As to Spann's Claim IV, the improper bolstering of Ms. Brown's Testimony

The state argues that the trial court did not err in rejecting Spann's post conviction claim that defense counsel was ineffective for not objecting to the prosecutor's bolstering of Mrs. Brown's testimony. (The Answer Brief, pp. 41-48.) The trial court found that the prosecutor's argument did not constitute the improper bolstering of Mrs. Brown's testimony (*see* the trial court's order denying Spann post conviction relief, R. Vol. XIV, pp. 1993-95). It most certainly did. The prosecutor was using his own grandmother, who (he insisted) had a very sharp mind and memory, as a person much like Mrs. Brown. The prosecutor was able to get away with this even though all agreed that Mrs. Brown had serious problems with recall and reasoning skills as of the date of the homicide.

The state in its Answer Brief claims that no prejudice resulted from the bolstering of Mrs. Brown's testimony since Udell successively established the fact that Mrs. Brown did not know for sure whether Anthony was staying in the back house. (R. Vol. XIV, pp.) This belies Mrs. Brown's recorded trial testimony where she stated rather emphatically:

> Q. That's (referring to whether Anthony was living in the back house) what I wanted to ask you about. Tony was living there, wasn't he?
>
> A. No, no, no. He never lived – he never lived in my place.
>
> Q. Well, I know. How about in the room in the back of your house. He wasn't living in that other house?
>
> A. No, he sure wasn't. If he was back there, I did not know it.

(OR., Vol. XXVIII, p. 2894, emphasis added.)

As To The State's Response To Spann's Claim VI Regarding the Failure To Cross-examine Philmore On His Prior Inconsistent Statements

Udell's purported reason for not impeaching Philmore based upon a multitude of inconsistent pretrial statements was because they became increasingly self-incriminating the more he was interviewed and interrogated. (R. Vol. II. pp. 106-07). The state, in its Answer Brief, a pages 48-59, argues that this was a reasonable, legitimate strategy entitled to deference. However, as Spann noted in his Amended Initial Brief, Philmore was already implicated in the murder with the

blood that was found on his clothing. It was therefore unreasonable to conclude that he was further implicating himself with his statements. (R. Vol. II, p. 153) Most importantly, the failure to impeach Philmore with his series of obvious falsehoods permitted the prosecutor to argue to the jury that Udell had not impeached Philmore with any prior inconsistent statements during on cross-examination, and therefore he should be believed. Spann suffered the consequences.

As To The State's Response to Spann's Claims I(c) and Issue II

The state, in its Answer Brief, pp. 60-99, attempts to refute Spann's claim that his counsel failed to adequately investigate the possible mitigation available, fully prepare the defense mental health expert, and properly advise Spann about the waiver of mitigation case. Spann relies on the argument contained in his Amended Initial Brief of Appellant in this regard. He adds here that the fact remains that trial counsel made precious little effort to collect the available mitigating evidence for a life recommendation from the jury in the first place. This inaction was apparently based upon counsel's (mis)undertanding that if Spann was going to deny that he committed the crimes charged in the indictment, preparing a case for mitigation, for all practical purposes, became moot. This was dangerous given the fact that the state had already developed a circumstantial case of guilt again Spann as of the time of his arrest. Then, once Spann indicated that he did not want

to present a case for mitigation, they compounded their mistake by essentially giving up on the idea of presenting mitigation at all. They also made little effort to talk Spann out of his wishes in this regard. The results were predictable and disastrous for the client and could have been avoided.

Dr. Mosman testified that neither Udell nor Little provided Dr. Petrilla with any significant record information with which to conduct a thorough mental health evaluation of the defendant. As of March 2000, when Dr. Petrilla ceased his contact with Spann, no jail records which would have included Mr. Spann's medical records had been obtained by counsel and forwarded to the doctor. This is evident because Little did not know that Spann was HIV positive. (R. Vol. III, p. 187) Furthermore, Dr. Petrilla was unaware that Spann had been on anti-depressants one year prior to being admitted to Florida State Prison on July 17, 2000. (R. Vol. III, pp. 275-89, 414-18) In addition, Little indicated at the post conviction evidentiary hearing that he was not sure that he ever even spoke to Dr. Petrilla. (EH. 185-186)

The Prejudice

In *Rivera v. State*, 859 So. 2d 495 (Fla. 2003) this Court explained the test that it uses in evaluating prejudice as it relates to a claim of ineffective assistance of counsel regarding the obligation to investigate and present all available

mitigating circumstances in a capital case, citing language from, *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988) as follows:

> First, it must be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If, however, the failure to present the mitigating evidence was an oversight, and not a tactical decision, then a harmlessness review must be made to determine if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Then, it must be determined that defendant suffered actual prejudice due to the ineffectiveness of his trial counsel before relief will be granted.

Spann suffered prejudice as a result of his counsels' ineffectiveness in not finding and presenting all the available mitigation. Dr. Mosman's testimony revealed a plethora of mental health mitigation that would have supported a life recommendation.

In summary, Spann suffered prejudice because he was denied a full and fair penalty phase trial (or *Spencer* hearing, for that matter) during which relevant evidence as to whether he should be sentenced to death or life in prison could have been presented.

CONCLUSION

For the reasons set forth above, the court is requested to reverse the July 1, 2005 final order that denied Spann post conviction relief per the provisions of Florida Rule of Criminal Procedure 3.851, remand the cause to the trial court, require the trial court to grant Spann post conviction relief including setting aside his judgments of conviction and sentences, including the death sentence, order that he receive a new guilt/innocence and penalty phase trial and grant him such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the amended initial brief of appellant has been furnished to opposing counsel listed below this 2d day of October, 2007, by United States mail and/or electronic mail delivery, to:

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CERTIFICATE OF COMPLIANCE

I certify that this Reply Brief was prepared using a 14 point Times New Roman font, not proportionally spaced, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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Baya Harrison, III