IN THE SUPREME COURT OF FLORIDA

CROSLEY A. GREEN,

Case No. SC05-2265

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.
_____/

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, STATE OF FLORIDA

REPLY BRIEF OF CROSS-APPELLANT

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POINT I ON CROSS-APPEAL

THE TRIAL COURT ERRED IN ORDERING A NEW PENALTY PHASE; COUNSEL WAS NOT INEFFECTIVE IN INVESTIGATING THE NEW YORK CONVICTION.

Green first argues that "false evidence" was presented to the jury. There was no false evidence presented to the jury, and this was not the basis of the trial court granting a new penalty phase. The basis for granting a new penalty phase was that defense counsel was ineffective for failing to rebut evidence of Green's prior violent felony. The trial court findings were:

> (1) Green was convicted of robbery in New York (V24, R4067, 4073), and under New York law, third-degree robbery is a prior violent felony (V24, R4075);
>
> (2) Defense counsel was aware Green was adjudicated a youthful offender in New York and argued it should not be considered a juvenile conviction (V24, R4069);
>
> (3) Defense counsel did not attempt to obtain the file of the New York conviction because Defendant admitted to committing the crime (V24, R4068).

Notwithstanding, the trial judge found that counsel was ineffective for failing to obtain the file because his "only reason for not obtaining the file was because he remembered the Defendant informing him that he committed the offense." (V24, R4071). Citing *Rompilla v. Beard*, 545 U.S.374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), the trial judge concluded that even if a defendant suggests there is no mitigation, defense counsel is bound to make reasonable efforts to review materials the

prosecution will rely on. First, the prosecution did not have the documents from the New York conviction, and the trial court acknowledged this fact. (V24, R4068, 4071)("the State could not obtain the file, only defense counsel could").

Second, there is a difference between investigating a defendant's background (*Rompilla),* and misleading a court into thinking there is some doubt about whether the defendant committed a prior crime after the defendant tells you he did, in fact, commit that crime. A defendant has no due process right to require his counsel to aid in the commission of a fraud on the court. *Dehaven v. State*, 618 So.2d 337 (Fla. 2d DCA 1993).

Third, the validity of the New York conviction was never challenged in New York, the only jurisdiction which would have the capability of invalidating the conviction. Therefore, the report of a parole officer speculating about why a defendant pled guilty to an offense is not relevant to any issue in mitigation of the Florida murder. The trial judge, however, found that the parole officer's report "**could have mitigated the New York conviction."** (V24, R4078). Although relevant evidence in mitigation of the **Florida** conviction is admissible in a capital sentencing hearing, mitigation as to the New York conviction, which has never been challenged and which is based solely on a speculative statement in a report which is contrary to what Green told counsel, would not be relevant.

Green did not testify at the evidentiary hearing, and defense counsel's testimony that Green told him he committed the New York robbery is unrebutted.

The only mitigation that can be gleaned from the New York parole report which would be relevant mitigation is that he was a migrant in the area and had no one to testify in his behalf. The latter statement regarding testimony in the New York case is relevant only insofar as Green was an 18-year old migrant and had no family members in New York. Every other statement quoted by the trial judge from the parole report has to do with the validity of the New York conviction. So the alleged ineffectiveness of counsel is based on the minor bit of information that Green was an 18-year-old migrant in New York with no family. Green was 17 or 18 when their parents died (TT2221)[1]. Shirley Green (Allen) testified at the penalty phase of Green:s trial and told about his father killing his mother then shooting himself (TT2221). Their sister, Dee Dee, found the parents. There were 11 children in the family. They could not talk about the deaths because it hurt too much (TT2222). This bit of hearsay evidence was contradicted by sworn testimony at the penalty phase. At the time of the deaths, Green was living in New York with his grandfather, but all the brothers

[1] Cites are to the penalty phase transcripts of the original trial.

and sisters were in Florida (TT2225). The statement of the New York parole officer that Green was a "migrant" in New York and there was no one to testify for him seems to be contradicted by Shirley's testimony that Green was living with the grandparents. In fact, Shirley was asked whether Green was living on his own in New York, and reiterated "he was with my grandfather." (TT2225). Therefore, not only was the alleged mitigation in the parole report marginally mitigating, it would have contradicted another defense witness, Green's sister.

The trial court also erred in its finding that the jury was under the mistaken belief that Green was convicted of armed robbery rather than simple robbery. The testimony and argument from both parties was consistent with the fact that Green was only convicted of robbery. There was only one mention of armed robbery, and that was that Green was *charged* with armed robbery but pled to robbery. Whether the judge made an error in his sentencing order is an issue for the judge to resolve; however, that does not involve the jury or a complete new penalty phase. Furthermore, it is not clear that Judge Antoon was mistaken about the status of the robbery. In one place in his order, he refers to the prior conviction as "armed robbery." (TT2840). Shortly thereafter, he refers to the prior conviction as "robbery." (TT2845). Considering every reference at the trial was to "robbery," it should not be assumed the reference to

armed robbery was anything more than a scrivener's error and Judge Antoon was not perfectly aware the conviction was for robbery.

The relevant facts from trial are: Bob Rubin, Probation and Parole in Florida, supervised Green beginning January 31, 1978. (TT2192). Rubin testified that Green had transferred from New York and was on parole for "armed robbery" (TT2194); however, it was later clarified Green was **charged** with armed robbery, but he **pled** to simple robbery and was sentenced as a Youthful Offender (TT2216-17). State's Exhibit 1 at the penalty phase states that Green's New York conviction was for "robbery." (TT2204, 3059). During closing argument, the prosecutor talked to the jury about "the robbery in New York" for which Green was "sentenced to prison as a youthful offender." (TT2284). Mr. Parker told the jury that the prior "robbery" conviction should not be given weight because Green received "youthful offender treatment, a 15-16-year old boy." (TT2314).

The issue was also addressed at the "*Spencer*"[2] hearing (TT2407). The prosecutor referred to the New York offense as a "robbery" (TT2378), stated that Green was arrested for "robbery"

[2] *Spencer v. State*, 615 So.2d 688 (Fla. 1993), had not been decided at the time of Green's sentencing procedure; however, the trial judge used a comparable procedure by having oral arguments on the aggravating/mitigation circumstances on November 7, 1990. (TT2339-2420). Sentencing was February 8, 1991. (TT2442-2459).

in New York, and was convicted of "robbery" in New York, and that they are "talking about robbery." (TT2379). The prosecutor also stated that he believed Green was 17 or 18 at the time of the New York offense. (TT2380). Mr. Parker argued that the State did not file any judgment and sentence of the New York offense, and there was insufficient proof. (TT2405). He also argued that Green was very young at the time of the New York offense and received Youthful Offender treatment, the offense was remote and should be given little weight. (TT2407). And a Youthful Offender conviction should not be considered a prior violent felony. (TT2252).

The record shows that after the clarification that Green may have been arrested for armed robbery, but pled to robbery, all parties were crystal clear that the offense was a robbery. There was no subsequent reference to the jury of anything except "robbery." The only exhibit which was introduced regarding the New York conviction, State's Exhibit 1, listed the offense as "robbery."

Trial counsel was not deficient for failing to pull the New York conviction file because his client admitted the prior violent felony. Trial counsel was not deficient in his treatment of the robbery at the penalty phase. Even though the offense charged was armed robbery, it was clear that Green only pled to robbery. Green was not prejudiced by the omission of

alleged mitigation that Green was a migrant in New York with no one to testify for him because this information was contradicted by Shirley Green's testimony. Green was not prejudiced by the absence of the speculative information of the parole officer that he may not have committed the New York robbery because this information is inadmissible. As the trial judge held, Green *was* convicted of robbery in New York and there is no question it is a prior violent felony. The trial judge's findings on ineffective assistance of counsel are not supported by competent, substantial evidence and are a misapplication of *Strickland v. Washington*, 466 U.S. 668 (1984). As to deficient performance, the Court stated:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland v. Washington, 466 U.S. 668, 691 (U.S. 1984). Although the trial judge cites to *Rompilla* as authority that counsel must make reasonable efforts to investigate even if a

defendant's statements suggest none exists(V24, R4071), *Rompilla* also clearly states that:

> the duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. *See Wiggins v. Smith*, 539 U.S., at 525, 156 L. Ed2d 471, 123 S. Ct. 2527 (further investigation excusable where counsel has evidence suggesting it would be fruitless); *Strickland v. Washington,* supra, at 699, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (counsel could "reasonably surmise . . . that character and psychological evidence would be of little help").

Rompilla v. Beard, 545 U.S. 374, 383 (2005).

The trial judge also misapplied the prejudice component of *Strickland.* The prejudice component at the sentencing stage requires:

> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Strickland v. Washington, 466 U.S. 668, 695 (U.S. 1984).

CONCLUSION

Based on the arguments and authorities herein, the Cross-Appellant respectfully requests this Honorable Court reverse the trial court finding which grants Appellant a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to Mark Gruber, CCRC-Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, this 22nd day of January, 2007.

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