IN THE SUPREME COURT OF FLORIDA
SC05-632

WYDELL EVANS

Appellant
v.
STATE OF FLORIDA

Appellee

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

REPLY BRIEF

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PRELIMINARY STATEMENT

This reply brief addresses arguments I, II, and III of Mr. Evans. Initial brief. As to all other issues, Mr. Evans stands on the previously filed initial brief and Habeas Corpus Petition.

ISSUE I

THE LOWER COURT ERRED IN HOLDING THAT MR. EVANS WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE TO HIS CAPITAL TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE PREPARE AND PRESENT THE DEFENSE OF DIMINISHED CAPACITY, AND AS A RESULT, MR. EVANS' CONVICTIONS AND DEATH SENTENCE ARE UNRELIABLE.

Appellee's contention on page 50 of the Answer brief that "Counsel made a strategic decision to focus on the inconsistencies in eye-witness testimony." Flies in the face of established case law.

No tactical motive can be ascribed to an attorney whose omissions are based on ignorance. Brewer v. Aiken, 935 (7th Cir. 1991), or on the failure to properly investigate or prepare.

An effective attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970); see also Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990) (en banc) (ineffective assistance in failure to present theory of self-defense); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978). This error also violates defendant's right to present a meaningful defense. See Crane v. Kentucky, 476 U.S. 683 (1986). Failure to present a defense that could result in a conviction of a lesser charge can be ineffective and prejudicial. Chambers v. Armontrout 907 F.2d 825 (8th Cir. 1990).

While Appellee is quick to quote Evans' statements at trial, Appellee overlooks the significant and important testimony of the evidentiary hearing. Studstill's "devil may care" attitude is demonstrated by the fact that he did not have his client evaluated by a mental health professional either for guilt or penalty phase. (PCR Vol. VII p.1088-9). Studstill did not explore any other possible defenses, nor did he research the law. (PCR Vol. VII p. 1094-5).

Regarding the impact a closed head injury would have on his client's behavior, Studstill testified:

Q. Do you know what effect a closed-head injury could have on someone's reasonable process and his ability to control his impulses?

A. I know a closed-head injury sometimes can leave a person with a permanent brain damage that can affect their personalities and a whole lot of other things. (PCR Vol. VII p. 1105)

Perhaps the most significant evidence which proves that Studstill did not make any kind of "strategic decision is where Studstill opined that if he had known about Mr. Evans' closed head injury he would not have ignored it. (PCR Vol. VII p. 1108).

Appellee skirts around the issue of preparation when she states on page 31, "Evans had indicated he knew what he was doing at the time and he was under control. However, Dr. Carpenter did a full evaluation of Mr. Evans and used records (which Studstill could have obtained) and interviews of witnesses who were present at the crime. Regarding Evans' "indications" Carpenter testified:

Q. Why is it a good idea to go with corroborating reports or documentation, if you will, rather than just go by the self-history of the defendant?
A. Well, because there is always the chance of selective recall. There is the problems with memory. There is the tendency sometimes to put oneself in a favorable light.

So human beings being what they are often times have difficulty with accurate recall.

Additionally. Their own descriptions of themselves may not be entirely in keeping with the consensual reality or the group perception of what others see the defendant does. And so all of these things need to be taken into account because, really what you're trying to do is to get the most accurate picture that you can of who this person really is that you're dealing with.(PCR Vol. II p.243).

When Carpenter was asked by the State in the evidentiary hearing as to Evans' contention that he was not impaired by alcohol the following testimony took place:

Later on in his testimony they asked him, and you were perfectly aware of everything, and you were functioning fine? And he said, oh, yes.

Were you aware that that testimony existed?

A. No. Ma'am.

Q. Would that affect your opinion on his degree of intoxication?

A. Not really, because this is, I think, consistent with his narcissistic personality style. We've already heard testimony – and I think it's replete in the tape that Dr. McClaren provided of his interview – where he doesn't want to admit anything that puts him in a bad light. And I think, quite frankly, from my impressions, my interviews of Wydell, and based on everything I heard, he would see that as a sign of weakness. In other words, a real man holds his liquor; and for anybody to impugn his ability to drink heavily would be something he would challenge.

I don't think he was very accurate. And we also know in the self-report literature on alcohol ingestion, it's very unreliable. So I would really tend to put very little weight on that. (PCR Vol. II p.307-08)

Studstill knew nothing about his client's state of mind. He did no research into the defenses available to him in the guilt phase, he relied solely upon self-reporting. Thus his decision to go with the defense of accident was based on ignorance.

Appellee's analysis of Bunney v.State, 603 So.2d 1270 (Fla. 1992) on page 52 is taken out of context. Although she concedes that the Court specifically delineated several exceptions to the *Chestnut* rule, such as voluntary intoxication, epilepsy, infancy, or senility, the complete quote from the case follows:

In Bunney v. State, 603 So.2d 1270 (Fla. 1992) the Florida Supreme Court held:

> Although this Court did not expressly rule in *Chestnut* that evidence of any particular condition is admissible, it is beyond dispute that evidence of voluntary intoxication or use of medication is admissible to show lack of specific intent. *See Gurganus v. State*, 451 So2d 817 (Fla. 1984). If evidence of these self-induced conditions is admissible, it stands to reason that evidence of certain commonly understood conditions that are beyond one's control, such as those noted in *Chestnut* (epilepsy, infancy, or senility), should also be admissible. In the present case, Bunney simply sought to show that he committed the crime during the course of a minor epileptic seizure. A jury is eminently qualified to consider this. Id. at 1273.

At the evidentiary hearing, Wydell Evans testified that he did not remember punching the windshield. (PCR Vol.IX-1451). He further testified that the laughter of the women probably angered him further because "I get hot quick.

I snap" and had been getting upset quickly "Since I was a child." Dr. Henry Dee was a qualified neuropsychologist and had evaluated Mr. Evans for brain damage. Records of Mr. Evans' head injury and school records were reviewed by Dr. Dee and tests were given. (PCR Vol. IX-1471-1480). The ultimate conclusion after reviewing the relevant records and the testing was that "Putting all the evidence together, the most part of the explanation certainly is that he had a brain injury with probably some specific areas of damage and some diffuse damage that left him with speech and language problems and also problems with impulse control." (PCR Vol. IX-1466). Furthermore, Wydell's alcohol consumption would exacerbate his already existing medical condition. (PCR Vol. IX-1470). Dr. Dee characterized Mr. Evans' brain damage as a condition commonly understood within the mental health field, not esoteric, but concrete, accepted and obvious. (PCR Vol. IX-1481-82). This condition was beyond Mr. Evans' control. Mr. Evans' condition is not self induced, rather it was brought about as a result of a head injury when he was three years old. Because of this injury, Mr. Evans suffered from an inability to control his impulses. He simply sought to show, pursuant to *Bunney,* that he committed this crime during the course of a "clicking" episode which was brought about by his brain injury, exacerbated by alcohol consumption. The anticipated State argument that frontal lobe damage is not

specifically noted in Chestnut (epilepsy, infancy, or senility)fails when the Bunney court held on page 1273 "If evidence of these self-induced conditions is admissible, it stands to reason that evidence of certain commonly understood conditions that are beyond one's control, such as those noted in *Chestnut* (epilepsy, infancy, or senility), should also be admissible." Clearly, Evans' brain injury as a result of his accident was beyond his control. His frontal lobe damage was a condition commonly understood within the mental health field, not esoteric, but concrete, accepted and obvious. A jury was eminently qualified to consider this. Effective counsel would have investigated his client's past and would have retained a mental health professional to fully communicate the defense to the jury. Had he done so, Mr. Evans would have been convicted of a lesser included offense or would have been found not guilty of first degree murder. The verdict of guilt is the prejudice. A new trial is the remedy pursuant to Bunney.

The issue of Mr. Evans' head injury and subsequent "clicking" episodes merited presentation to the jury. In Wise v.State, 580 So.2d 329 (Fla. 1st DCA 1991), the court held:

> Wise sought to present the expert testimony of Dr. Walker, a forensic psychiatrist, that a blow to the head can cause a seizure, including the type known as "the running fit," which "is the psychomotor, partial complex epilepsy in which people will continue to engage in what appears to be purposeful behavior but they don't know what it is that they are doing." Wise would have amnesia

> concerning his behavior during the seizure, although he may have had a subconscious awareness of his surroundings, and would vomit once the seizure was over. Dr. Walker opined that within a reasonable degree of medical certainty, Wise experienced this type of seizure when he was struck in the head during the brawl. Dr. Walker based this opinion on Wise's history of seizures and stated he was "confident" that Wise suffered this type of injury. The court ruled that unless Wise was planning an insanity defense, this testimony was inadmissable under *Chestnut v. State*, 538 So.2d 820 (Fla. 1989). In doing so the court erred. Id. at 329.

The similarities between Wise and the circumstances surrounding the death of Angel Johnson are noteworthy. In the case at bar, Mr. Evans had a documented history of a serious head injury. There is documented evidence that this head injury had affected Mr. Evans at times during his school years and adult life. Dr. Richard Carpenter testified at the 3.851 hearing that Wydell had been drinking all day. (PCR Vol. VIII-1280). Dr. Carpenter also testified that due to Wydell's history of impulse control problems and history of a head injury, Wydell was already suffering from an irrepressible rage reaction. (PCR Vol. VIII-1284-85).Dr. Carpenter also stated that the women laughing at Wydell acted as a partial trigger of his rage. (PCR Vol. VIII-1286-1289). Regarding the actual shooting and the apparent lack of premeditation, Carpenter stated: "It's an example of a loss of control, because, obviously, if it was premeditated, you wouldn't do it in front of three people. The only way I can imagine someone doing it in front of

three people in a car such as this is if the person had lost control of themselves. (PCR Vol. VIII-1290-1291) Dr. Carpenter further opined that Wydell's impulse disorder and rage reaction was brought about by his closed head injury. (PCR Vol. VIII-1294-1295). Furthermore, Dr. Carpenter testified that Mr. Evans' condition is further exacerbated by the ingestion of alcohol. (PCR Vol. VIII-1297). In light of the facts of the case, the history of a head injury and the ingestion of alcohol, Dr. Carpenter could not say that Mr. Evans was able to form the requisite intent to premeditatively shoot Angel Johnson (PCR Vol. VIII-1298).

The instant case presents a question of Evans' consciousness of his acts themselves. Regarding his "clicking" and loss of memory the following testimony was elicited:

> Q. And he denies punching the windshield. Were you aware of that?
> A.. No, I don't recall that.
> Q. Would you like to see that?
> A. Sure.
> Q. I'm on page 1837, line 17 of Mr. Evans' testimony. The question was there ever a time when you hit the windshield for anything?
> A. Correct, I see that.
> Q. I never hit a windshield.
> A. Correct.
> Q. Would that affect your assessment of the situation that was going on at that time, that he simply – the facts that you had were that he simply exploded, he hit a windshield, and then he reacted? The fact that he did not hit a windshield and that he was handing the gun to her and it just went off?

A. I don't find his statement at the trial that he never hit a windshield to be in any way credible versus the dispassionate testimony of the people in the car. (PCR Vol. II p.311-12).

There can be no doubt that the windshield was smashed by Wydell as evidenced by the further testimony:

Q. Now, counsel for the sovereign alluded to the fact that Mr. Evans appeared to have a vivid – a vivid recollection of the events surrounding the incident that night; did she not say that?
A. Yes, I do recall her stating something like that.
Q. And then in the next statement she stated that – do you remember testifying that you were unaware that Wydell even denied hitting the windshield?
A. I was not aware of that; correct.
Q. Okay. So if you knew that during the trial several witnesses testified that Wydell punched the windshield – in fact, pictures of the damaged windshield were introduced into evidence – and then you have Mr. Evans denying the windshield was punched, is that an accurate recall of the events or not?
A. Well, no, I don't think he has a good recall based on that. (PCR Vol. II p.314-315).

Effective trial counsel would have begun an investigation upon the initial appointment of representation. Hospital records and expert testimony revealed a head injury which caused his frontal lobe damage, a well understood condition not esoteric and exacerbated by alcohol. All of the civilian witnesses and the educators who testified at the evidentiary hearing and were available to testify at trial, portrayed a man who had never planned anything in his life. Studstill did no research into the law and knew nothing about his client. His preparation and presentation resembled a third degree felony rather than the representation of a client facing first degree murder charges. Clearly Studstill's decisions were based on ignorance of the facts and the law and therefore were not "strategic" at all. Relief is proper and a new guilt phase is the remedy.

ISSUE II

THE LOWER COURT ERRED IN HOLDING THAT MR. EVANS WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. TRIAL COUNSEL FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

The State and the trial court in the Order denying Mr. Evans relief erroneously suggests that Attorney Studstill's presentation that Mr. Evans was a good person worth saving was a tactical or strategic decision. There was nothing tactical or strategic about the penalty phase presentation because Attorney Studstill conducted no investigation in preparation for penalty phase. A tactical decision can only be based upon an informed choice - it cannot be based on ignorance.

Attorney Studstill admitted at the evidentiary hearing that he did not obtain Mr. Evans' school and medical records or have a mental health evaluation done. (PCR. Vol. I - 58 - 59). Studstill acknowledged that brain damage was something that should have been looked into. (PCR. Vol. I - 86). Studstill was not aware that Mr. Evans was placed in special learning disabled classes and was designated emotionally handicapped as a child. (PCR. Vol. I - 76).

The trial court ignored, overlooked, or disregarded that Studstill said, "[i]f I had known about his head injury I would have done something." (PCR. Vol. I - 97). Clearly, Studstill was representing Mr. Evans from a position of ignorance and had Studstill obtained the information, he would have done something with it.

The trial court, throughout the order denying relief, focuses on Attorney Studstill's presentation to the penalty phase jury that Mr. Evans is a good person. The trial court completely disregarded counsel's failure to investigate into

Mr. Evans' background. The trial court did not note or acknowledge that Mr. Studstill failed to investigate the accident and head injury which Mr. Evans suffered as a child at age three. The trial court did not address the speech impediment that Mr. Evans had as a result of the head injury. Furthermore, the trial court did not note that Attorney Studstill failed to investigate the school records which showed that Mr. Evans was a specific learning disabilities student and was placed in emotionally handicapped classes because of a long history of behavioral difficulties. Instead, the trial court simply concluded that Attorney Studstill made a tactical decision to present Mr. Evans in a good light and that any investigation would not have benefitted the otherwise favorable portrayal of him as a decent person.

Both the trial court and the State miss the point. A tactical decision can only be made after the facts are gathered. The decision must be an informed decision. It cannot be made before an adequate investigation is completed. Since Attorney Studstill did not conduct a full investigation, the decision cannot be said to be tactical.

Curiously, the trial court, in the order denying relief, when mentioning Mr. Evans' prior head injury at age three and his prior school records, refers to the evidence as "mitigation" in quotations as if the evidence is not mitigation at all.

See page 46 and 70 of Appellee's Answer brief. The are three problems with this characterization of the evidence by the trial court. First, it may show that the trial court was distracted by the State's contention that this "mitigation" was not compelling. Second, this characterization shows that the trial court was weighing the mitigation. This was not the role of the court regarding this issue. Finally, the characterization shows that the trial court missed the issue. The issue in this case is whether Studstill was ineffective in failing to investigate and present evidence of the head injury and poor school performance for presentation to a jury of Evans' peers, not whether the 3.851 court thought the evidence was mitigation. After all, ultimately, it would have been the penalty phase jury's role to determine whether the aggravating circumstances outweigh the mitigating circumstances. The jury was unable to do this not because the 3.851 court improperly weighed the mitigation but rather Mr. Evans' life was never properly investigated and presented to the people who would ultimately decide his fate. The prejudice is that the jury knew nothing about the man that they condemned to death. Mr. Evans was deprived of an individualized sentencing. The mitigation in this case was all the more crucial because the aggravation was weak.

Respondent, in their answer, states that the trial court order is supported by competent, substantial evidence. However, the trial court, in the order

denying relief, concludes that Studstill was not ineffective in failing to request appointment of penalty phase counsel without addressing the lack of investigation. The trial court did not address the failure of Attorney Studstill to investigate Mr. Evans' background and obtain medical and school records. Such an investigation would be the minimum acceptable by a penalty phase counsel in a capital case.

Respondent is incorrect in citing State v. Ricechmann, 777 So.2d 342 (Fla. 2000). In Riechmann, the Court found that trial counsel, who acted as sole counsel, was ineffective in the penalty phase of the trial. In denying the claim for failure to request appointment of second counsel, the Court stated that Riechmann did not show specifically how counsel's solo representation affected his performance at trial. Apparently, a connection was not made between counsel's failure to present available mitigation and the failure to request second counsel.

In the initial brief, Mr. Evans raised United States Supreme court cases which address the failure to investigate for penalty phase. Mr. Evans raised Rompilla v. Beard, 125 S.Ct 2456, 2466 (U.S., 2005) stating "[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." Mr. Evans also raised Williams v. Taylor, 529 U.S. 362 (U.S. Va., 2000) stating that "the graphic description of Williams'

childhood, filled with abuse and privation, or the realty that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability." Finally, regarding United States Court precedent, Mr. Evans raised Wiggins v. Smith, 123 S.Ct. 2527 (2003) where the investigation regarding mitigation was abandoned and leads were not pursued. However, the State in their answer brief do not address or even mention these cases.

At the State level, Mr. Evans cited Orme v. State, 896 So.2d 725, 732 (Fla., 2005) where this Court held that:

The trial court concluded in its order denying postconviction relief that Orme's defense counsel acted reasonably by not presenting bipolar disorder as a defense during the guilt phase and as a mitigator during the penalty phase, stating that there was some disagreement on how to diagnose Orme at the time of trial and at the postconviction proceeding, even with the additional information presented. The court noted that because the experts agreed that Orme was addicted to cocaine, and the drug addiction was a factor in his murder trial, it was reasonable for trial counsel to present only this evidence. We disagree and find that counsel's performance was deficient in both the investigation of Orme's mental health and the presentation of evidence of Orme's mental illness to the jury.

Mr. Evans cited Ragsdale v. State, 798 So.2d 713 (Fla. 2001) where this Court found that trial counsel failed to conduct a reasonable investigation into the defendant's background for possible mitigating evidence where counsel failed to present evidence of a head injury after childhood accidents. Mr. Evans also cited Rose v. State, 675 So.2d 567 (Fla. 1996) where the defendant was denied effective assistance when counsel failed to investigate the defendant's background and to obtain school, hospital, medical and prison records which contained information as to defendant's extensive mental problems. Again, the State either failed to address these cases or chose to ignore them.

ISSUE III

THE LOWER COURT ERRED IN HOLDING THAT MR. EVANS WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE BECAUSE HIS ATTORNEY WAS INEFFECTIVE IN FAILING TO REQUEST THAT STATUTORY MITIGATION JURY INSTRUCTIONS BE GIVEN IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Appellee, in the Answer Brief, demonstrates a complete lack of understanding of the case law cited by Appellant in the Initial Brief. The lower court was not the trial court and based its finding of fact on evidence other than

live testimony. See Thompson v. State, 548 So.2d 198, 204 n.5 (Fal. 1989). On page 83 of the Answer, Appellee quotes the 3.851 court:

> "However, the Defendant himself testified that he was "focused on everything he was doing," that he was, "Not drunk but just, you know, slightly intoxicated," and that he had a clear recollection of what happened. (Exhibit E, Trial transcript, pp. 987-988.) Id. At 83.

At the evidentiary hearing, attorney Studstill admitted that he was aware that there was evidence that Wydell Evans and Lino Odendat were drinking. (PCR Vol. I p.89). The on the record evidence that would have supported the giving of the statutory mitigation instructions is found at FSC ROA Vol. XIV-1848, FSC ROA Vol. XIV-1824, FSC ROA Vol. XIV-1837 and FSC ROA Vol. XI-1220.

Studstill's shocking admission that he was unaware of the case law regarding statutory mitigation and therefore he did not think he had grounds to ask for statutory mitigation, (PCR Vol. I-(90-91), is blatant evidence of ineffectiveness. It is not unreasonable to expect an attorney representing a client in a capital case to at least *research the applicable law* concerning the issues he would be arguing. The cases cited in the Initial Brief, Bryant v. State, 601 So.2d 529 (Fla. 1992), Smith v. State, 492 So.2d 1063 (Fla. 1986), and Stewart v. State, 558 So.2d 416 (Fla. 1990) are clear and unambiguous. If there is any evidence,

however slight, the instructions should be given. Effective counsel would have researched the law. Effective counsel would have requested the instructions, and would have cited the above cases to the trial court.

Appellee's bare, unsupported statement on page 84 that "These findings are supported by competent, substantial evidence, are just that; a bare, unsupported contention devoid of legal argument. Appellee cites no cases to refute the holdings in Bryant, Smith, and Stewart. Appellee ignores the testimony of the 3.851 hearing where Studstill admits his ignorance of the law and his general lack of preparation. Appellee failed to address the on the record trial testimony which would have supported statutory mitigation instructions being given by the trial court. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Wydell Evans rule 3.851 relief. This Court should order that his convictions and sentences be vacated and remand the case for such relief as the Court deems proper.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY BRIEF OF APPELLANT which has been typed in Font Times New Roman , size 14, has been furnished by U.S. Mail to all counsel of record on this 23rd, January 2006.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing REPLY BRIEF OF APPELLANT, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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