IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-122

NORMAN GRIM,

Appellant,

v.

STATE OF FLORIDA,

Appellee

**ON APPEAL FROM THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, STATE OF FLORIDA**

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

A. Statement of the Case and Facts

In its answer brief, Appellee states, at page 8, that Dr. Larson testified at the post-conviction evidentiary hearing that Appellant "was cognizant of the wrongfulness of his conduct." However, a reading of Dr. Larson's testimony reveals that he never said that about Appellant, Mr. Grim. Dr. Larson testified that Intermittent Explosive Disorder (IED), which he diagnosed Appellant as suffering from, does not, by itself usually cause an unawareness of wrongful conduct. (EHT. 32-33) Further, he stated that this was not an opinion held by everyone. (EHT. 33) Finally, it appears from the testimony, this general statement by Dr. Larson did not consider how concomitant poly-substance abuse interaction would effect an IED sufferer's awareness of wrongful conduct. (Id.)

Again in its treatment of Dr. Larson's testimony, Appellee's answer brief states that Dr. Larson testified IED does not implicate psychosis. (Answer Brief at pages 8-9) However, Dr. Larson, disagreeing with the Assistant State Attorney, testified that IED does implicate mental illness and abnormal behavior that are "worthy of treatment", in Appellant's case "with two different types of psychotropic medication." (EHT. 38-39)

Finally as to Dr. Larson's testimony, Appellee fails to acknowledge that Dr. Larson stated that based on his evaluation, including interview and testing, he believed Appellant suffered from brain damage. As stated in Appellant's initial brief, Dr. Larson testified that Appellant's testing indicated "a red flag that there may be organicity or brain damage of some type and that the saw tooth pattern also is a red flag that there may be organicity or brain damage involved." (EHT. 26)

At page 12 of Appellee's brief, it states that John Molchan testified that Appellant's defense team was aware of Dr. Berkland's license problems in Missouri. This statement by Appellee is not accurate. As the actual testimony indicates, Berkland's deposition disclosed the license problems, *generally*. (EHT. 120) Further, the deposition was taken by Antoinette Stitt, the assistant public defender that represented Appellant prior to Richard Hill. It must be remembered that Richard Hill testified on direct examination that he was not aware of Berkland's problems and that he absolutely would have used the information to impeach Berkland. (EHT. 186-87) Molchan did not testify that Hill knew of the information, as Appellee suggests, and Hill's testimony belies such a contention. Hill's clear testimony on direct was that he was unaware of the information and "certainly" would have used it. His later testimony on cross-examination, after being confronted with the deposition is

frankly, unbelievable. Also important in this regard is that the information in Berkland's deposition is general, a scant reference to the fact that he had some difficulties which resulted in his leaving his employment. As Appellant's initial brief makes clear, the documents not turned over by the state were much stronger impeachment evidence.

Appellee states that Richard Hill testified, at pages 187 and 193 of the evidentiary hearing transcript, that he "was somewhat aware of the fact that Dr. Berkland had professional issues in Missouri. . ." This is not correct. Nowhere in thses two pages, or any other page of Hill's testimony, at least prior to being confronted with the deposition, did Hill make such a statement. To the contrary, he testified that he was completely unaware of it.

Appellee's brief asserts, correctly, that Richard Hill testified that there was, in the form of the nature of the victim's wounds, evidence of premeditation. (Answer Brief at page 18) However, Appellee fails to acknowledge that Hill testified on direct that his impression was that it was a felony-murder case with no evidence of premeditation. (EHT. 187)

In Appellee's brief at page 24, it states that Michael Rollo, penalty-phase counsel, testified that he did not waive a jury recommendation because the trial judge still made an

independent assessment of mitigation. If Appellee is asserting that this was Rollo's strategy, Appellant suggests that this is a mis-reading of the testimony. Rollo did not testify that he waived the recommendation because of the independent review; he only stated, as a matter of fact, that that is what Judge Bell ultimately did. Further, waiving the recommendation as a matter of strategy would be clearly refuted by the trial record. The trial record, as asserted in Appellant's initial brief, and supported by the evidentiary hearing testimony, reveals that Rollo did not waive the recommendation because he believed, incorrectly, that Florida law did not allow for such a waiver.

Appellant would also note that Appellee's recitation of Rollo's testimony ignores several crucial points. Rollo testifed that he recalled Dr. Larson recommending he consult a pharmacologist, that he did not follow up on the recommendation, that the suggested consult could have been fruitful, and that Rollo never had a conversation with Appellant about the suggested consult. (EHT. 14, 19)

B. Argument

Brady claim

Appellee's answer, at pages 32-35, regarding Dr. Berkland's de-licensure in Missouri, is worthy of several points in reply. Appellee asserts that Appellant "overstates the impact of Berkland's testimony." This ignores the clear,

crucial importance of Berkland's opinion regarding sexual battery and the key nature of sexual battery to the first-degree murder conviction. Again, Richard Hill, Appellant's trial counsel, testified that this was a felony-murder case with sexual battery being the underlying felony and that there was no evidence of premeditation. Although on cross-examination, after being confronted with a deposition of Dr. Berkland that he allegedly knew about, Hill stated that there was evidence of premeditation, even then it was premeditation in the form of the type of weapon used. Clearly, premeditation based on the type of weapon used pales in comparison to more traditional evidence of premeditation, such as statements of intent or actions of planning. Appellant would argue that, by itself, the type of weapon used is often not evidence of premeditation at all, as is the case here.

Also regarding Dr. Berkland, Appellee states, perhaps inadvertently, that Appellant has argued that the lack of a sexual battery *aggravator* would result in a likelihood that Appellant would not have been convicted of first-degree murder. (Answer at page 33) However, this is not Appellant's argument as the sexual battery aggravator is a penalty phase matter. Rather, what Appellant argues is that the underlying allegation of sexual battery was the lynchpin to felony-murder, that there was no evidence of premeditation, that Dr. Berkland provided the

sole evidence of sexual battery, and, thus, impeaching Berkland's credibility would make the ultimate difference in the verdict.

Appellee argues that, in his deposition, Dr. Berkland "fully explained" his "problems" in Missouri. (Answer at page 33) This, Appellant would respectfully suggest, is incorrect. The transcript of the Berkland deposition quoted by Appellee pales in comparison to the exhibits admitted by Appellant at the hearing and laid out in detail in Appellant's initial brief. Berkland's conduct in Missouri, viewed by both his superiors and the judge who heard the case, was much more nefarious than he suggested in his deposition. This point is simply not open to debate.

Appellee makes two other factual arguments regarding Berkland that are not supported by the record. First, Appellee argues, at page 34 of its answer, that trial counsel for Appellant were "unmistakably" aware of Berkland's problems. This alleged fact is far from unmistakable. In fact, Richard Hill's testimony on direct examination was more firm, more sincere, and more credible when he testified, unequivocally, that he was unaware of the Berkland issue and that he certainly would have used it to impeach. His testimony on cross, after stating on direct that he had read the public defender files and

then being confronted with the deposition, seems to be an after-action attempt to cover for his deficient performance.

When Appellee states, at page 36 of its answer, that Hill was cognizant of the Berkland issue, because he stated that he had read the depositions, this is not entirely accurate. On direct examination, while stating that he saw all the depositions, Hill also stated, in absolute terms, that he was not aware of the Berkland issue. Appellant would respectfully suggest the Berkland issue is not something that Hill would have forgotten about and then miraculously recalled upon being made aware of the deposition. Further, Hill never specifically recalled being aware of the Berkland issue or offered any strategic explanation for not impeaching Berkland with the evidence.

In addressing the prejudice prong of Brady v. Maryland, 373 U.S. 83 (1963), Appellee notes that there was overwhelming evidence of Appellant's guilt in the "murder" of the victim. (Answer at page 37) However, as Appellee apparently is aware, there was not overwhelming evidence of *first-degree* murder, a charge for which Berkland's testimony was crucial. The nexus between Berkland's testimony on sexual battery and the conviction for first-degree murder is plainly cogent and the result of a discovery violation in this regard is prejudice.

Guilt Phase IAC

Regarding Appellant's guilt-phase ineffectiveness assistance claim, Appellee seems to mischaracterize the claim as one of failure to present "mental mitigation." (Answer at page 40) This is an inaccurate statement of Appellant's claim. Appellant's claim was that counsel was ineffective at the *guilt* phase by failing to investigate persuasive evidence, that they were clearly aware of, regarding the effect on Appellant's mental state by the use of various drugs, both prescribed and illicit.

Appellee cites to Brown v. State, 894 So.2d 137 (Fla. 2004). The instant case is distinguishable from Brown as to the point it is cited for. In Brown, and the cases cited within Brown, the voluntary intoxication claims that were rejected at trial by the defendant appear to be claims that were fully investigated and presented to the defendant as a viable option. In the instant matter, that is not the case. As the evidence and testimony demonstrated, Appellant's attorneys did not follow-up or investigative the avenue of defense suggested by Dr. Larson and, further, provided no reasonable explanation for not doing so.

Appellee states that Appellant "takes issue" with Hill's and Rollo's testimony that they did not present evidence of Appellant's poly-drug use and its affect because they were

acting in accordance with Appellant's wishes. More accurately, what Appellant takes issue with is the fact that Appellant's trial attorneys never acted upon or investigated the avenue of defense Dr. Larson suggested and about which Dr. Lipman testified extensively at the hearing. Appellee assumes, incorrectly, that Appellant had an opportunity to reject the presentation of Dr. Lipman's evidence and testimony.

Appellee refers to the Koon[1] hearing in the instant case to refute Appellant's claim. However, what Appellee fails to acknowledge is that neither the transcript of the Koon hearing, Judge Bell's findings, or the testimony of Appellant's trial attorneys demonstrate that the pharmalogical defense suggested by Dr. Larson was ever followed up on. Simply because a Koon hearing occurred does not mean that it was adequate. As the evidence from the evidentiary hearing shows, the Koon hearing was inadequate. Further, in terms of the guilt-phase effectiveness of Appellant's counsel, the Koon hearing, as a sentencing-focused procedure, was largely irrelevant. Appellee's argument that Appellant's attorneys abided by Appellant's wishes that they not present *mitigation* and that this was reasonable, ignores the basic fact that this claim is one of *guilt-phase* ineffectiveness. The basic principle of Lewis v. State, 838 So.2d 1102 (Fla. 2002) remains. That is,

[1] Koon v. Dugger, 619 So.2d 246 (Fla. 1993).

trial counsel has a responsibility to investigate avenues of defense before rejecting their implementation. Trial counsel never investigated the defense suggested by Dr. Larson and certainly never had any discussions about it with Appellant, as both counsel conceded. Appellee seems to distinguish the instant case from Lewis by pointing to the fact that Appellant's trial counsel did investigate some areas, but, not surprisingly, never mentions or accounts for the fact that they never investigated Appellant's best defense and mitigation, the pharmalogical evidence.

Appellee's citation to Henry v. State, 2006 Fla. LEXIS 943 (Fla. May 25, 2006) is similar in its flaw to the Brown citation. Again, this Court, in Henry, analyzed a situation where the evidence in question had been investigated and rejected by the defendant in favor of a different course. In the instant matter, Appellant was never informed of the pharmalogical defense and, thus, never had the opportunity to accept or reject it. The citation and analogy to Henry is inapt.

As to Appellee's anwer regarding Appellant's claim of ineffectiveness in failing to move for Judge Bell's recusal, Appellee's characterization of the Henry Homes evidence as a "convoluted theory" is absurdly inaccurate. The theory and, in fact, evidence, could not have been more straightforward.

Witnesses would have testified that the victim told them that if she was "found floating in the bay, look to Henry Homes." There was evidence that the victim had been involved in acrimonious litigation, both personal and on behalf of clients, with Henry Homes. Contrary to Appellee's characterization, the "theory" was crystal clear.

Next, Appellee states that Appellant "believes that Judge Bell's prior representation of Henry Company Homes was evidence, or at least the appearance of bias." (Answer at page 48) Not only does Appellant believe the appearance of bias existed, but Judge Bell did as well. As Appellant pointed out in his initial brief, and which the trial record shows, Judge Bell disclosed this prior relationship because ***he*** believed it created an appearance of bias.

Appellee next cites case law, Wiley v. Wainwright, 793 F.2d 1190 (11th Cir. 1986), for the proposition that a motion for disqualification cannot be based on a court's particular rulings. (Answer at page 49) Appellant would reply that the suggested disqualification in the instant case is not based on any of Judge Bell's particular rulings, but rather, his professional relationship with an alternative suspect in the victim's murder. Appellee also cites precedent, California v. Hall, 718 P.2d 99 (Cal. 1986), for the proposition that evidence of third party inculpation must be based on more than suggestion

of motive or opportunity. (Answer at page 49-50) Appellee ignores the fact that Appellant proposed to present evidence beyond mere motive or opportunity; rather, that the victim believed a person or persons from Henry Homes may kill her and dump her body were it was in fact found. The citation to Hall, etc. falls short of accounting for what Appellant's evidence would have shown.

On this issue, Appellant would also direct the Court to the United States Supreme Court's opinion in Holmes v. South Carolina, 126 S.Ct. 1727 (2006). In Holmes, the defendant proposed to present evidence of a third party's guilt in the crime Holmes was charged with. Id at 1730. The trial court, and the South Carolina Supreme Court, held that the evidence was inadmissible because the proposed evidence did not raise a reasonable inference of innocence. Id at 1731. The United States Supreme Court reversed, holding that the Constitution, either through the Sixth or Fourteenth Amendment, guarantees criminal defendants an opportunity to present a complete defense, regardless of the strength of the prosecutions case. Id at 1734-35.

Appellee's characterization of Appellant's argument regarding trial counsel's unsolicited statement to the court as to lesser included offenses as "specious" is somewhat ironic given Appellee's apparent misunderstanding of the claim.

Appellant never argued, as Appellee suggests, that a defendant does not have the right of self-determination in his own defense. Appellant's argument goes to the necessity, or lack thereof, for trial counsel to disclose Appellant's request to the court. Appellee has cited no legitimate reason[2], and Richard Hill offered none, in his testimony, for Hill to disclose to the court that Appellant did not want lesser included offenses argued. To the extent that Appellee characterizes this argument as one alleging a concession of guilt (Answer at pages 53-54), the argument never makes such an assertion. There is no Nixon[3] claim or any variation of it.

Penalty Phase IAC

As to Appellant's arguments regarding ineffectiveness at the penalty phase, Appellee argues that penalty-phase counsel Michael Rollo, unlike counsel in Lewis, did not abdicate his responsibility to investigate. (Answer at page 57) This conclusion is not supported by the record concerning, especially, mitigation related to the effect on Appellant's

[2] Richard Hill alluded to protection against future claims of ineffectiveness as the reason for doing this. (EHT. 198) Appellant would respectfully suggest that trial is not the venue for litigating post-conviction claims against the client. Mr. Hill was representing Appellant, not opposing him. 3.851 proceedings like those conducted in this case are the proper mechanism for the litigation of post-conviction claims.

[3] Nixon v. Singletary, 758 So.2d 618 (Fla. 2000).

state of mind by the use of several drugs and alcohol. Rollo, as stated more thoroughly in Appellant's initial brief, testified that he was aware of Dr. Larson's suggestion, that he never followed up on it, and that he never discussed it with Appellant. Further, he stated that the evidence could have been fruitful at the trial. Thus, Rollo's performance is certainly not as distinct from counsel's in Lewis as Appellee suggests. Also at page 57 of its answer, again citing to Brown, Appellee appears to argue for a per se rule that counsel cannot be deemed ineffective when the defendant waives mitigation. If that is Appellee's argument, it is contrary to this Court's holdings in Koon, Lewis, and other similar cases. There is no such rule.

Remaining Claims

As to claims and arguments not addressed in this Reply, Appellant will rely on the arguments made in the initial brief.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, and the arguments made in the initial brief, Appellant prays that this Court reverse the lower court and remand this case for a new trial.

Respectfully submitted,

_____

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CERTIFICATE OF FONT SIZE AND SERVICE

Below signed counsel certifies that this reply brief was generated in Courier New 12 point font pursuant to Fla. R. App. P. 9.210 and served by U.S. mail on Assistant Attorney General Ronald Lathan, Capital Appeals, PL-01, The Capitol, Tallahassee, FL 32399 by first-class U.S. mail on this _____ day of January, 2007.

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