IN THE SUPREME COURT OF FLORIDA

CASE NO.
LT No. 16-1991-CF-1505

STEVEN EDWARD STEIN

Appellant

v.

STATE OF FLORIDA,

Appellee

ON APPEAL FROM THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

THE LOWER COURT'S RULING FOLLOWING THE POST CONVICTION EVIDENTIARY HEARING WAS ERRONEOUS

ARGUMENT I

The lower court erred in denying Appellant's motion to disqualify the judge on the ground that the judge was a material witness in the hearing.

Appellee draws a distinction without a difference by contending that there were two separate evidentiary hearings. However, Appellee fails to note that the so-called bifurcation theory which Appellee proposes for this Court to adopt is unsupported by either statute or case law and does not address the prejudice to Appellant resulting from Appellant's claim against the judge, the judge's testimony, during which he was examined by Appellant's counsel, and the Appellant's reasonable concern that the judge would not thereafter be neutral and unbiased.

Appellee concedes that "a judge may not be a witness in a case where he presides." However, the remedy which Appellee invents out of whole cloth fails to effect this fundamental principal. The distinction is entirely artificial. Florida law explicitly requires that a judge who is a "material witness" disqualifies himself once a party has properly identified the judge as such a witness. §38.02, Florida Statutes. Further, a

presiding judge is not competent to be a witness. §90.607 (1) (b), Florida Statutes. Similarly, as Appellee notes, the Rules of Judicial Administration note that a judge who is a material witness can be disqualified, and the Canon of the Code of Judicial Conduct, Canon 3(E) requires the Judge to disqualify himself, if he has been a material witness in the "controversy." Canon 3(E), Code of Judicial Conduct. Clearly, the statutory law of Florida requires that Judge Wiggins disqualify himself after he provided material testimony on the claim for which he granted Appellant the hearing.

Appellee fails to state how the hearing was granted on the Patterson v. State, 513 So. 2d 1257 (Fla. 1987) claim. Appellant made the claim upon discovering a draft of the Sentencing Order in the State Attorney's files. He did not find such a draft in the trial attorney's files. Subsequently, the state conceded that an evidentiary hearing was necessary on the claim, and the Court ordered such a hearing on this claim as well as on the other claims of ineffective assistance of counsel and newly discovered evidence. Thereafter, Appellant moved to disqualify the judge on the ground that he would be a material witness in the evidentiary hearing. Thus, Appellant was not trying to disqualify the judge until he determined that the judge was going to be a witness in the case. Of course, as a witness the judge would have to testify and, perhaps, the

Appellant would have to challenge or question his credibility. The statutory framework discussed above makes clear that Appellant's concerns regarding the potential bias of the judge who was a material witness are firmly grounded in the law and are manifestly reasonable.

The Appellee's statement that "Judge Wiggins was not a witness at the second evidentiary hearing" employs a fiction that does nothing to address Appellant's reasonable fears of bias. Otherwise, bifurcation would be the suggested remedy in the statutory framework. The "rule of necessity" which the Appellee cites but which it does not identify also appears to be made up by Appellee in order to reach the desired result. Fortunately, the rationale for the statutory framework does not similarly work backwards toward such a result, but addresses the important Constitutional right to trial before an unbiased judge. The judge who originally tried the case has been designated as the post-conviction judge, but it is not unusual for another judge to rule for a variety of reasons. Appellee cites no authority for the proposition that this preference should override Appellant's Constitutional rights.

Despite Appellee's dismissal of Lewis v. State, 565 SE 2d 437(GA. 2002), that case is precisely on point and the Georgia Supreme Court held that the original trial judge was disqualified from further involvement in the case because she

was a witness. That court's concern with the appearance of impropriety, the obvious concern for bias, is identical to Appellant's concern with the same issue. Appellee distinguishes Georgia capital sentencing scheme but does not address the pertinent issue, which is whether a judge is a material witness in a case can continue to be a trier of fact in the same case. Appellee cites no authority to support the bifurcation proposal set forth in the answer. Further, Appellee fails to address the concern for bias, or the perception of bias, which is the underlying issue in the case. Nothing in Appellee's ad hoc solution addresses the issue of bias, which should be resolved by the disqualification of the judge and by another judge hearing the remainder of the claims. Similarly, Appellee offers no support for the fall-back solution of harmless error, nor do the facts require or justify such an analysis.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE DURING THE GUILT AND PENALTY PHASES OF THE TRIAL.

Appellant contends that counsel improperly employed a "jury pardon strategy." Appellee states that a jury pardon is a rather common trial strategy, but the citation for this unsupported statement are inapposite. Walls v. State, 926 So 2d 1156 (Fla. 2006) does not support the proposition that a jury pardon is a common trial strategy. In that case counsel

testified that he was arguing from the evidence that the killings were committed as part of a burglary gone bad. This is not a "jury pardon" as Attorney Morrow employed that strategy. Attorney Morrow had no facts to support his argument. He just proposed to argue the jury that they should find second degree murder without providing an evidentiary basis for that. Appellee seems to argue that anytime counsel urges the jury to accept a different theory that there is a jury pardon argument. That is not what happened in this case.

Mr. Morrow testified that he planned to concede that Mr. Stein was guilty of robbery despite the fact that the concession would mean that Mr. Stein was also guilty of felony murder. (PC-R3. 38) Mr. Morrow maintained that he talked to Mr. Stein about the fact that a concession of guilt of robbery would make Mr. Stein liable for felony murder and eligible for the death penalty. Id. Thus, Mr. Morrow's strategy was to concede in said manner but to argue for a lesser included like second-degree murder or manslaughter. Id. In fact, Mr. Morrow belatedly admitted that his strategy was to "look for a jury pardon." (PC-R3. 39) Mr. Morrow maintained that the jury could find Mr. Stein guilty of robbery but not guilty of felony murder. Id. He does not, however, indicate how this could happen, although this is what he asked the jury to do in his closing argument.

Id. Further, Mr. Morrow maintained that Mr. Stein agreed that Morrow could plead him guilty to robbery. Id.

Mr. Morrow initially indicated that he had many jail conferences with Mr. Stein. Id. However, the statement for services rendered doesn't corroborate "many" such conferences. (PC-R. 39-40) Each time he went to court, Morrow testified, he saw Mr. Stein, although he simply couldn't testify to every single time. (PC-R3. 41) Close to trial there would be a lot of times where they discussed the particular strategy of calling the sister and girlfriend. Id. Mr. Morrow also discussed the guilt-phase strategy of conceding guilt and pleading him guilty to armed robbery felony murder. Id. Such discussion, Mr. Morrow asserted, was "very, very complex," Id.

Mr. Morrow's only guilt-phase strategy was to argue for a jury pardon. (PC-R3. 45). He disputed that the felony murder determination would be "automatic" upon conviction for armed robbery, which he was conceding, but admitted that a verdict of guilt on an armed robbery count and guilt on a count of second-degree murder would be inconsistent. (PC-R3. 46) Mr. Morrow does not explain what sort of jury form or instruction could permit the outcome he was arguing for.

Mr. Morrow did not advise Mr. Stein regarding the law on jury pardons, but told Mr. Stein that the jury pardon is a mechanism for society to express mercy and for the jury to try

to find the good in people. (PC-R3. 46) Thus, "sometimes a jury pardon exists and, when it does, if there's a finding of second degree murder then the state will not be able to appeal and get a first-degree murder." Id. After such discussion, Mr. Morrow recommended this strategy and, he testified, Mr. Stein agreed that the defense "May have to take the argument of felony murder and try to get a jury pardon." (PC-R3.17) Further, such a strategy was not only a guilt-phase strategy, but was, according to Mr. Morrow, Mr. Stein's "best chance of not getting the death penalty." Id. Apparently, then, Mr. Morrow is propounding the jury pardon strategy as obviating the need for mitigation as well as the only practicable guilt-phase defense, although Mr. Morrow did not think there was any realistic chance that Mr. Stein would not be convinced of armed robbery. (PC-R3. 47-48) In fact, he agreed that he asked the jury to convict Mr. Stein of the armed robbery count. (PC-R3. 48) The only alternative, Mr. Morrow testified, would be to "stonewall the state and make them prove every single element of the crime." Id. However, Mr. Morrow though then, and still believes, that the best strategy was to go for a jury pardon. (PC-R3. 49)

Mr. Morrow testified that the main thing that he knew about Mr. Stein's life was the "evidence of him being a skinhead," his "hate crimes," and "all that." (PC-R3. 50) He testified that Mr. Stein had tattoos with racial screeds, had a "hate crime" to

his name, and a prior murder in Arizona. Id. Strangely, then, the Court records reveal that the only mitigation the Court found was "no significant criminal history." (PC-R3.51)

As the court in Harding v. State, 736 So. 2d 1230 (2nd DCA 1999) noted, the trial judge advised counsel that a jury pardon argument would ask the jury to violate the oath it took. Thus, essentially, Attorney Morrow's "strategy" was not a strategy at all but a bald plea for the jury to disregard the court's instructions and the jury's oath.

Finally, regarding the remaining aspects of the ineffective assistance of counsel claims, Appellant will rely upon the provisions of the initial brief and not reply further herein.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING APPELLANT'S CLAIM THAT NEWLY DISCOVERED EVIDENCE OF THE CO-PERPETRATOR'S LIFE SENTENCE REQUIRED THAT APPELLANT'S DEATH SENTENCE BE VACATED.

Appellee contends that the issue is procedurally barred because this court determined the relative liability of Stein and Christmas in the direct appeal. However, this completely ignores the newly discovered evidence, which was the trial court's sentencing order in Christmas' case, in which the court found that Christmas was as liable or more liable than Stein.

Further, Stein has now presented new evidence of substantial mitigation which his trial counsel failed to present at trial and which this Court has not heretofore had the opportunity to consider and anglicizing the relative culpability of Stein and Christmas.

Appellee concedes that a co-defendant's subsequent life sentence can constitute newly discovered evidence cognizable in a 3.50 proceeding. Marquard v. State, 850 So. 2d 417 (Fla. 2002); Fotopoulos v. State, 838 So. 2d 1122 (Fla. 2002); and Scott v. Dugger, 604 So. 2d 465 (Fla. 1992) Thus, the argument that the procedurally barred must fail. Appellee is actually arguing that the evidence is insufficient to justify a new trial in that the culpability is not equal. However, the sentencing order in Christmas makes a finding that regardless who the shooter might be Christmas' culpability is as great or greater than Mr. Stein's.

The further mitigation presented by Mr. Stein considered with the trial court's findings, after that court considered the facts in both cases, are irrefutable evidence that the culpability of Mr. Stein does not justify him receiving a death sentence while Mr. Christmas receives a life sentence. This court has held that the determination of the shooter is not dispositive on the question of culpability. See, e.g., Larzelere v. State, _____ So. 2d _______ (Fla. ________)

("Mastermind" more culpable than shooter; death sentence vacated on other grounds by circuit court in post-conviction) Further, there is no determinative evidence of record that Mr. Stein was the shooter. Christmas' own statements have gone back and forth on this issue although he admits that he was the planner of the crime. However, assuming *arguendo*, that Mr. Stein was the shooter, the culpability of the two is still close to equal. The newly discovered evidence shows that the trial court, which heard the facts on both cases in their entirety, thought that the culpability was essentially the same. Appellee presents no argument or evidence to persuasively alter this conclusion. Certainly, this court is not in a position to make that determination at this point. There is certainly a much stronger case of mitigation now of record than when this court reversed Mr. Christmas' death sentence and noted the dearth of mitigation presented by Mr. Stein's counsel. Appellee presents no argument or evidence that in any way demonstrates a degree of culpability by Mr. Stein, not borne by Mr. Christmas, which justifies that Mr. Stein be killed while Mr. Christmas serve life in prison.

CONCLUSION

Based upon the foregoing, Appellant respectfully prays that this Court grant him the relief requested in his initial brief, either remanding the case to the circuit court for further proceedings before an unbiased tribunal or vacating the death

sentence and imposing such a sentence as this Court determines is fit and proper, or granting such other relief as it deems appropriate.

Certificate of Font and Service

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