IN THE SUPREME COURT OF FLORIDA

DUANE OWEN

Appellant,

v.

Case No. SC07-650
Lower Tribunal No.84-4014 CF

STATE OF FLORIDA,

Appellee.
_____/

RESPONSE TO HABEAS PETITION

BILL McCOLLUM
ATTORNEY GENERAL

CELIA TERENZIO
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0656879
1515 N. Flagler Dr. Suite 900
West Palm Beach Fl. 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5099

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PROCEDURAL HISTORY

Petitioner filed this habeas petition in conjunction with his appeal form the denial of his motion for postconviction relief. Petitioner was retired for the murder of Karen Slattery in 1999. This Court upheld that conviction and sentence on appeal. The issues therein were as follows:

> Now before this Court on a direct challenge of his conviction and sentence of death for the murder of Karen Slattery, Owen raises seven claims on appeal: (1) the trial court erred in failing to suppress Owen's confession on the basis of voluntariness; (2) the trial court erred in failing to suppress Owen's confession because Owen made an unequivocal invocation of his right to remain silent which was ignored by the law enforcement officers questioning him; (3) the trial court improperly applied the aggravating factor of heinous, atrocious, or cruel (HAC); (4) the trial court improperly applied the aggravating factor of cold, calculated, and premeditated (CCP); (5) the conviction and sentence of death is disproportionate; (6) Florida's death penalty statute is unconstitutional; and (7) the aggravating factor of murder in the course of a specified felony is unconstitutional.

Owen v. State, 862 So. 2d 687 (Fla. 2003).

ARGUMENT

ISSUE I

PETITIONER'S CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE STATES' IMPEACHMENT OF A DEFENSE EXPERT IS WITHOUT MERIT

Petitioner claims that appellate counsel was ineffective for failing to challenge on appeal the state's alleged impermissible impeachment of guilt phase defense witness Dr. Berlin. Specifically, the state over objection,[1] was permitted to inquire of Dr. Berlin's his views on the death penalty during his guilt phase testimony. (ROA 5229-5245, 5254-5262).

In order to be entitled to relief on a claim of ineffective assistance of appellate counsel, the following legal principles are germane to resolution of this claim:

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion. In evaluating an ineffectiveness claim, the court must determine whether the alleged omissions are of such magnitude as

[1] Owen presents the complete opposite argument in the postconviction appeal. Therein he claims that trial counsel, failed to properly object to the state's impermissible impeachment of Dr. Berlin.

> to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Pope v. Wainwright, 496 So.2d 798, 800 (Fla.1986). See also Haliburton, 691 So.2d at 470; Hardwick, 648 So.2d at 104. The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. See Knight v. State, 394 So.2d 997 (Fla.1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." Id. at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. See Medina v. Dugger, 586 So.2d 317 (Fla.1991); Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla.1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

Freeman v. State, 761 So. 2d 1055, 1070 (Fla. 2000); See also Rutherford v. Moore 774 So.2d 637, 643 (Fla. 2000). Additionally appellate counsel is not required to raise every preserved or nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 751-753 (1983); see also Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990). When applying these relevant legal principles

to this case, it will become clear that Petitioner has not met his burden.

Initially, it should be noted that Petitioner does not cite to any case in support of his position, therefore his claim is insufficient as a matter of law. Cf. Dailey v. State, 32 Fla. L. Weekly S293 (Fla. May 18, 2007(rejecting claim of ineffective assistance of appellate counsel for failing to anticipate changes in the law); Nelms v. State, 596 So. 2d 441, 442 (Fla. 1992)(trial counsel not responsible to anticipate changes in the law); Stevens v. State, 552 So. 2d 1082, 1084-85 (Fla. 1989); Knight v. State, 394 So. 2d 997, 1003 (Fla. 1981).

Second, Respondent asserts that had this issue been raised on appeal, it would have been rejected as Dr. Berlin's bias against the death penalty was a proper focus for impeachment. The entire exchange on cross-examination was as follows. Dr. Berlin was asked his view on the death penalty, and he responded that he was personally opposed to it but that it would not alter his objectivity in this case. (ROA 5412). That was the extent of the inquiry. Petitioner would not have been granted relief had he presented this issue on appeal. Cf. Campbell v. State, 679 So 2d 720 (Fla. 1996)(recognizing that it is proper impeachment to inquire how frequently defense expert testifies

on behalf of "capital defendants"); Henry v. State, 574 So. 2d 66, 71 (Fla. 1991)(same).

Moreover, even if it were error, Petitioner would not have been granted relief on appeal. Berlin's guilt phase testimony regarding insanity was severely challenged by two mental health experts called in rebuttal at both the guilt and penalty phases. Dr. Waddell, a board certified psychologist in Florida was first to testify. (ROA 5678, 5683-5685). He reviewed family history, VFW orphanage files, police reports, confession, autopsy report, interviewed appellant for five hours in the presence of his attorney. Waddell spent an additional ten hours reviewing all the materials. (ROA 5697-5700). Owen does not have a delusional disorder, he is not schizophrenic. Schizophrenia is so devastating and serious appellant should be exhibiting additional symptoms other than bizarre delusions. (RA 5710). Appellant is a paraphilliac, voyeur, transvestite, peeping tom, uncomfortable as a male, depressed and also suffers from gender identity disorder. He has an anti-social personality disorder, and he is a sociopath. (ROA 5711-5716). Waddell said that his diagnosis is not even a close call. (ROA 5725).

The second rebuttal witness was Dr. McKinnely Cheshire. Dr. Cheshire, a psychiatrist and fellow of the American Psychiatric Association, interviewed appellant, reviewed

depositions of the defendant's doctors, reviewed police reports, video-tapped confession, medical examiners report, family history of appellant. He spent twenty-four hours reviewing all the material in addition to the clinical interview. (ROA 5831-5832). Appellant has an average IQ, he is clever, and functions at a level above his IQ. (ROA 5833). He is calculating, fairly bright, has ability to study psychiatric materials. He is sane, and not psychotic. (ROA 5833-5834). He opined that appellant has a sexual disorder, an anti-social personality disorder, and he is a sociopath. (ROA 5834-5839, 5888). Appellant's delusion is manufactured. It does not fit the picture of appellant since he needs to dominant, control, demean, and have power over women. (ROA 5839-5841). In the confession, Owen should no compassion, he is callous, and has no empathy. (ROA 5842). Owen does not have schizophrenia. (ROA 5849). He was not psychotic during confession. The only symptom of schizophrenia is the delusion. (ROA 5849-5852). Appellant was clear, oriented to time and place. His crime was motivated by anger towards women. (ROA 5853-5854). There was no evidence of delusion, psychosis, or schizophrenia. (ROA 5854). He knew rape was wrong, he knew stabbing was wrong, he knew it would kill her. (ROA 5856). The attack was well planned. (ROA 5856-5858). Even if he believed that he needed hormones to survive, he knew

rape was killing was wrong. His disorders would not prevent him from knowing what he did was wrong. (ROA 5839-5840).

Rejection of Berlin's diagnosis that Petitioner was insane at the time of the killing was based on the evidence presented by the state's experts and not because of Berlin's anti-death penalty views. Petitioner cannot establish prejudice. Cf. Powers v State, 605 So. 2d. 856 (Fla. 8654, 863 (Fla. 1992)(finding harmless, trial court's refusal to allow defense to rehabilitate witness regarding views on death penalty because impeachment would had very little effect on credibility of testimony); Gore v. State, 2007 WL1932061 (Fla. July 5, 2007)(finding no prejudice in trial counsel's failure to impeach state expert due to fact that there was other evidence presented that was cumulative tot that of expert). Relief is not warranted. See Gordon v. State, 863 SO. 2d 1215, 1219 (Fla. 2003(finding counsel can't be ineffective for failing to pursue motions that were futile).

ISSUE II

PETITIONER'S CLIAM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE ADMISSIBILITY OF HEARSAY AT THE PENALTY PHASE IS WITHOUT MERIT

Petitioner alleges that appellant counsel was ineffective for failing to challenge on appeal, the admissibility of the

details of the three prior violent felonies that were introduced at the penalty phase. Petitioner contends that it was error to do so because the prior felonies became a feature of the case and the evidence submitted to establish their existence amounted to inadmissible hearsay. Petitioner further alleges that because he attempted to stipulate to the priors, the state was required to accept same. Respondent asserts that this issue if presented on appeal would not have entitled Petitioner to relief.

First, hearsay statements presented by a police officer regarding facts of a prior violent felony at the penalty state are permissible. In fact Rodriguez v. State, 753 So. 2d 29 (Fla. 2000) a case relied upon Petitioner in support of his position, actually reaffirms Respondent's position. In distinguishing the facts of Rodriguez this Court explained:

> We distinguish this case from those cases in which the police officer gave hearsay testimony concerning a defendant's prior violent felonies. See Hudson v. State, 708 So.2d 256, 261 (Fla.1998); Clark v. State, 613 So.2d 412, 415 (Fla.1992); Waterhouse v. State, 596 So.2d 1008, 1016 (Fla.1992). Details of prior felony convictions involving the use or threat of violence to the victim are admissible in the penalty phase of a capital trial, provided the defendant has a fair opportunity to rebut any hearsay testimony. See Rhodes v. State, 547 So.2d 1201, 1204 (Fla.1989); Tompkins v. State, 502 So.2d 415, 419 (Fla.1986).

> In the case of prior violent felony convictions, because those details are admissible, it is generally beneficial to the defendant for the jury to hear about those details from a neutral law enforcement official rather than from prior witnesses or victims. In fact, we have cautioned the State to ensure that the evidence of prior crimes does not become a feature of the penalty phase proceedings. See Finney v. State, 660 So.2d 674, 683-84 (Fla.1995); see also Duncan v. State, 619 So.2d 279, 282 (Fla.1993)(stating that details of prior felony convictions should not be made a feature of the penalty phase proceedings); Stano v. State, 473 So.2d 1282, 1289 (Fla.1985) (same). Nonetheless, in many cases, any error in admitting the hearsay testimony has been considered harmless because the certified copy of the conviction itself conclusively establishes the aggravator. See, e.g., Hudson, 708 So.2d at 261; Tompkins, 502 So.2d at 420.

Rodriguez , 753 So. 2d at 45. In the instant, Sgt. McCoy's testimony regarding the facts about the prior violent felonies was permissible. McCoy's testimony was not a feature of the case,[2] as the penalty phase hearing spanned three plus days. (ROA 6329-6929). In addition to Sgt. McCoy, the state presented the testimony of the medical examiner Dr. Hobin and mental health expert, Dr. Waddel. Appellate counsel would not have prevailed had he raised this issue. See also Moore v. State, 820

[2] In further support of his position, Petitioner cites to pages 6376, 6350, 6370 of the record on appeal. However, a review of those specific references do not support the factual assertions made by Petitioner.

So. 2d 199, 209 (Fla. 2002)(rejecting claim of ineffective assistance of appellate counsel as neutral witness may provide details of prior violent felony at penalty phase).

Nor was the state required to accept Petitioner's stipulation. See Elledge v. State, 706 So. 2d 1340, 1345 (Fla. 1997)(reaffirming that state is allowed to present details of prior violent felonies irrespective of defense's offer of stipulation). Sgt. McCoy's testimony was properly admitted. Relief must be denied as appellate counsel is not required to raise non-meritorious issues. Freeman v. State, 761 So.2d 1055, 1070-71 (Fla.2000).

ISSUE III

PETITIONER HAS FAILED TO ESTABLSIH THAT HE IS ENTITLED TO RESENTENCING FOR HIS NON-CAPITAL OFFENSES

Petitioner claims that he was not provided an opportunity to elect whether to be sentenced under the guidelines pursuant to Smith v. State, 537 So. 2d 982 (Fla. 1989). In support of that argument, Petitioner cites to page 4060 of the record. However, that portion of the record does not support his argument. Because Petitioner fails to establish record support for his argument he has not demonstrated his entitlement to relief pursuant to Fla. R. Crim. Pro. 3.800 (A). Gammon v. State, 858 So.2d 357, 358 (Fla. 1ts DCA 2003) (recognizing

proper basis for 3.800(a) relief where claim that minimum mandatory sentence of three years for firearm was illegal and claim appeared on face of record because state conceded on record that no firearm was present).

The record demonstrates that petitioner was sentenced under the guidelines. He received fifteen years for attempted sexual battery with a deadly weapon and a life sentence for burglary of a dwelling while armed. (ROA 6994, 7024). However, the record does not establish that Appellant was not provided the opportunity to elect whether to be sentenced under the guidelines. Should petitioner be able to establish otherwise, he would be entitled to relief. See Owen v. State, 864 So. 2d 557. (Fla. 4th DCA 2004); Owen v. State, Case no. 4D-06-81 (April 18, 2007).

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court DENY this petition.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

/S/ CELIA TERENZIO
Celia A. Terenzio
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 656879
1515 N. Flagler Drive

Suite 900
West Palm Beach, Fl. 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail and U.S. Regular Mail to James L. Driscoll, Jr., Esq., and David Bass Esq., Capital Collateral Regional Counsel - Middle, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33619 this 16th day of July, 2007.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

___/S/ CELIA TERENZIO_____
COUNSEL FOR RESPONDENT