

IN THE SUPREME COURT OF FLORIDA

No. SC07-1246

RICHARD LYNCH,
Petitioner

versus,

JAMES V. MCDONOUGH,
Secretary, Florida Department of Corrections,
Respondent.

REPLY PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Any claims not addressed in this Reply are not waived. Petitioner stands on the merits as raised in his Habeas Petition.

CLAIM I

**APPELLATE COUNSEL FAILED TO RAISE ON APPEAL
NUMEROUS MERITORIOUS ISSUES WHICH WARRANT
REVERSAL OF MR. LYNCH-S CONVICTIONS AND SENTENCES.**

A. Appellate counsel was ineffective for not challenging the lack of factual basis presented to the court at Mr. Lynch-s change of plea hearing.

The state argues in its Response that this claim should be denied because it is a substitute for, or an additional appeal of, his postconviction motion. (State-s Response p. 8).

However, the State misconstrues Mr. Lynch-s arguments. In Claim One of his Initial Brief, Mr. Lynch alleges ineffective assistance of counsel for failure to advise him of the defenses that were or would have been available to him at trial. While some of the underlying facts are similar, the legal arguments and standards for each claim are different. In the Habeas Petition, Mr. Lynch argues his plea cannot stand because there was not a proper factual basis for it. AThe purpose of the writ of habeas corpus is to provide a means of judicial evaluation of the legality of a prisoner-s detention.@ Kennedy v. Wainwright, 483 So.2d 424,425-26 (Fla.

1986)(citing McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983)).

Mr. Lynch is in fact challenging the legality of his detention by arguing that the factual basis was insufficient to support his guilty pleas for all charges. As argued below and in the initial petition, Mr. Lynch's actions do not constitute burglary as a matter of law. Therefore, his detention and sentence for the burglary is illegal. Because the burglary conviction was used as an aggravator in support of his death sentence, his death sentence and subsequent detention is constitutionally suspect.

In addition, Mr. Lynch makes a separate argument under Claim I, Part C of his Habeas Petition that his convictions for kidnapping and burglary are erroneous as a matter of law.

This is unrelated to counsel's ineffectiveness for failing to adequately explain these factual deficiencies to Mr. Lynch, which is the basis for Claim One of the Initial Brief. It is entirely proper for Mr. Lynch to raise factually similar claims as two separate legal issues. In its Response, the State cites no case law to support the position that the issue of lack of factual basis is not proper under habeas review.

Additionally, the State argues that this Court has already addressed this issue on direct appeal. That is an incorrect assessment of the issue on direct appeal. This

Court, as is its duty in all capital cases, made a determination of the sufficiency of the evidence. In Mr. Lynch's case, the evidence underlying the conviction was his guilty plea. This Court noted, "When a defendant has pled guilty to the charges resulting in a penalty of death, this Court's review shifts to the knowing, intelligent, and voluntary nature of the plea. State v. Lynch, 841 So.2d 362, 375 (Fla. 2003)(citing Ocha v. State, 826 So.2d 956 (Fla. 2002)). Therefore, this Court has never before examined the issue of whether there was a sufficient factual basis for the plea itself, but instead only reviewed the knowing, intelligent, and voluntary nature of the plea.

In its Response, the State argues that Lynch attempts to challenge the facts underlying the plea but ignores the fact findings from this Court on direct appeal.® (State's Response, p. 11). The State then cites nearly four pages of block quotes from this Court's opinion on direct appeal. However, this Court's factual findings in support of the aggravators is irrelevant to whether the trial court *at the time of the plea* received an adequate factual basis.

The issue is not whether the State can now, eight years after the plea, point to facts in the record that may support

a factual basis for the charges. Rather, the issue is whether, at the time of the plea, the trial court received an adequate factual basis for the crimes to which Mr. Lynch had entered a plea of guilty. Franklin v. State, 645 So.2d 166 (Fla. 4th DCA 1994)(citing Williams v. State, 316 So.2d 267 (Fla. 1975). Mr. Lynch has demonstrated in his original Habeas Petition that the factual basis was not sufficient. Even if the trial judge relied on the facts described in the State's Response, that reliance was not placed on the record during the plea colloquy. While it is proper for a judge to look to any source in the record to support a factual basis, the judge must note the source on the record of the plea proceedings. Franklin v. State, 645 So.2d 166 (Fla. 4th DCA 1994)(citing Williams v. State, 316 So.2d 267 (Fla. 1975). As such, the factual basis was insufficient.

In its Response, the State does not address the cases cited by Mr. Lynch with respect to what constitutes an insufficient factual basis. Therefore, the State is conceding that these cases are on point and applicable to the facts of Mr. Lynch's case.

1. The factual basis was insufficient to support a plea of guilty for armed burglary.

In its Response, the State appears to argue that there

were two separate entries into the apartment on the day of the incident and even if the first entry was consensual, the second was not. (State's Response, p. 13). However, the State offers no support in the record for this proposition. What is evident from the record as noted by this Court on direct appeal is that Ms. Morgan's neighbor's heard Mr. Lynch tell Ms. Caday to open up the door because her mom was hurt. Lynch v. State, 841 So.2d 362, 371 (Fla. 2003). In its Response, the State cites to the following passage and makes the following assertion to support its argument that there was a second entry and that the second entry was not consensual:

Morgan's neighbor across the hall testified that she looked out of the peephole in her door after hearing the initial shots and saw Lynch dragging Morgan by the hands into the apartment. She further testified that Lynch knocked on the door to Morgan's apartment and said, "Hurry up, open the door, your mom is hurt." The neighbor testified that Morgan was screaming and was bloody from her waist down. Morgan's neighbor further observed the door being opened, Lynch entering and closing the door behind him, and approximately five minutes later hearing three more gunshots. A second neighbor in the apartment complex also testified that approximately five to seven minutes after she heard the initial shots, she heard three more gunshots.

Lynch v. State, 841 So.2d 362,371 (Fla. 2003). Thus, even if the initial entry of Lynch was consensual, the second entry was not, and burglary is established.

(State's Response, p. 13).

It appears that the State is conceding that the first entry into the home was consensual. The State points to no evidence suggesting it was not consensual, and does not challenge Mr. Lynch's characterizations of his initial entry into the apartment as described both in the factual basis before the trial court and in his Initial Brief and Habeas Petition. Because the State cannot find support for its position in the record to attack the first consensual entry, the State creates a "second entry" and appears to be arguing that Mr. Lynch was trying to trick or coerce Ms. Caday into opening the door during this "second entry." However, the State does not offer any support in the record for this position. Mr. Lynch was not making a false statement nor using fraud to get Ms. Caday to open the door. Ms. Morgan had been shot in the lower body and was in fact injured. In the line of cases describing fraud or trick as negating consent, there has to be an *actual fraud or trick*. See Johnson v. State, 921 So.2d 490, 508 (Fla. 2005)(defendant cannot claim consent as a defense to burglary when he gained entry into the locked laundromat under the false pretense of asking for change); Schrack v. State, 793 So.2d 1102 (Fla. 4th DCA 2001)(burglary conviction affirmed where defendant gained entry by concocting a story about a surprise

party); Alvarez v. State, 768 So.2d (Fla 3d DCA 2000)(defendant lacked consent to enter where he gained entry by pretending he had to use the bathroom); Gordon v. State, 745 So.2d 1016 (Fla. 4th DCA 1999)(defendant's faking a tooth ache to gain entry into the home negated consent); Howard v. State, 400 So.2d 1329 (Fla 4th DCA 1981)(consent was negated when defendant gained entry into home by telling occupant that his van had broken down and he needed to use the telephone). None of these or any similar factual scenarios are present in Mr. Lynch's case.

The State does not address this Court's opinions in Delgado v. State, 776 So.2d 233 (Fla. 2000) or Ruiz v. State, 863 So.2d 1205 (Fla. 2003), nor does the State attempt to distinguish these cases. Thus, the State is conceding that these cases are on point and applicable to the facts of Mr. Lynch's case.

2. The factual basis was insufficient to support a plea of guilty for kidnapping.

In its Response, the State does not address the factual basis as it relates to the kidnapping charge. The State merely cites this Court's explanation of why the HAC aggravator was upheld for the death of Ms. Caday. (State's Response, p. 11-12). Neither the State, nor this Court, has addressed whether there was a sufficient factual basis for Mr. Lynch's guilty

plea to the kidnapping charge. In fact, the only portion of the factual basis which mentions kidnapping states:

[h]e gained entry voluntarily into the home at that point in time. Subsequently removed from a bag that he had, one of [sic] two or three firearms. And at that point in time the **kidnapping ensues...**

(TR ROA Vol. 2, p. 378)(Emphasis added). There are no other facts outlined in the factual basis that support the elements of kidnapping and the State does not point to any other facts that the trial judge stated on the record during the plea colloquy that he considered when accepting Mr. Lynch's guilty plea to kidnapping.

3. The factual basis was insufficient to support a guilty plea for premeditated first degree murder.

The State's Response alleges that under the doctrine of transferred intent, Mr. Lynch is guilty of premeditated murder of Ms. Caday because he acted with premeditation in the killing of Ms. Morgan. (State's Response, p. 15). However, the State does not refer to the factual basis presented to the trial court during the plea colloquy. The State again merely cites to this Court's findings of premeditation with respect to Ms. Morgan. (State's Response, p. 14-15). However, as noted above, this Court's factual findings are not relevant as to whether or not the trial court received an adequate factual

basis for Mr. Lynch's guilty pleas. Moreover, the factual basis before the trial court does not demonstrate that Mr. Lynch had a premeditated intent to kill either Ms. Morgan or Ms. Caday. With respect to Ms. Morgan, the factual basis states:

Ms. Morgan, the victim in Count One, arrived at her apartment, at her home. She was met at the door, we believe either by her daughter or by my client, **she had a heated discussion with my client**, and refused to come into the apartment with him there.

He shot her with more than one of the guns he brought. And during one of those times, and I'm not sure if it was two or three times, **that they were still having this heated exchange back and forth....**

(TR ROA Vol. 2, p. 378-379)(emphasis added). With respect to Ms. Caday, the factual basis states:

And during one of those times, and I'm not sure if it was two or three times, that they were still having this heated exchange back and forth, Ms. Caday either went to her mother or attempted to leave **and got in the way of the shooting and she was shot one time and she died.**

(TR ROA Vol. 2, p. 379)(emphasis added). The evidence presented to the trial court in the factual basis suggests that the death of Ms. Morgan is consistent with a killing that occurred in the heat of passion over her breaking off their

relationship. As for the death of Ms. Caday, the evidence presented to the trial court in the factual basis is equally consistent with Second Degree Murder or Aggravated Manslaughter of a Child. There were no additional facts to support the essential element of premeditation with respect to either death. Because there was an insufficient factual basis to support a plea of guilty for premeditated murder for Ms. Morgan, the doctrine of transferred intent cannot apply to the death of Ms. Caday.

Again, the State does not address the cases Mr. Lynch cites in support of a lack of premeditation in the factual basis. Therefore, the State is conceding that these cases are on point and applicable to the facts of Mr. Lynch's case.

4. Mr. Lynch suffered prejudice and manifest injustice because there was an insufficient factual basis for his pleas.

The State does not address Mr. Lynch's assertion that he was prejudiced by the lack of factual basis for his guilty pleas. The State does not address the requirements of Kendrick and Lyles that call for the trial court to conduct an extensive factual inquiry ^{where a defendant raises the possibility of a defense to his guilty plea.} State v. Kendrick, 336 So. 2d 353 (Fla. 1976). See also Lyles v. State, 316 So.2d 277 (Fla. 1975). As noted in the original Habeas Petition, Mr. Lynch,

both through counsel's factual basis at the plea colloquy and his own statements at the *Spencer* Hearing, denied certain factual elements of the crimes, specifically premeditation. The State does not address or dispute the prejudice prong, therefore, the State has conceded that Mr. Lynch has suffered prejudice and manifest injustice.

B. Mr. Lynch's conviction for burglary is erroneous as the facts alleged and proven by the State do not constitute the charged offense as a matter of law.

1. Mr. Lynch's actions on March 5, 1999 do not constitute a burglary.

As noted above, the State does not address the Delgado or Ruiz cases, nor any of the other cases cited by Mr. Lynch as they relate to the burglary conviction. The State also remains silent on the burglary statute that was in place at the time of Mr. Lynch's crime and this Court's interpretation of the Legislative Intent of that statute in the Ruiz opinion. It is undisputed then, that the facts as alleged by the State do not constitute burglary as a matter of law. At the time of his plea, Mr. Lynch could not have been found guilty of burglary based on the evidence that the State possessed. As such, his conviction for burglary must be reversed. Griffin v. State, 705 So.2d 572 (Fla. 4th DCA 1998)(AA conviction is fundamentally erroneous when the facts affirmatively proven by the State

simply do not constitute the charged offense as a matter of law.@)

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein and in his original Petition for Writ of Habeas Corpus, Mr. Lynch respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this day of December, 2007.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Petition for Writ of Habeas Corpus, was generated in a Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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