IN THE SUPREME COURT OF FLORIDA

JEFFREY GLENN HUTCHINSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_________________________________/

Capital Post Conviction Case

Case No. SC08-99

L. C. Case No. 98-1382-CF

REPLY BRIEF OF APPELLANT

On Direct Appeal from a Final Order of the Circuit Court for the First Judicial Circuit, in and for Okaloosa County, Florida, that denied Hutchinson's Sworn Amended Motion for Post Conviction Relief filed pursuant to Florida Rule of Criminal Procedure 3.851.

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PRELIMINARY STATEMENT

This is a direct appeal of a final Order Denying Defendant's Sworn Amended Motion for Post Conviction Relief and Sworn Supplemental Insert rendered by the Hon. G. Robert Barron, Circuit Judge, on January 3, 2008 (R. Vol. VI, pp. 1077-1200; Vol. VII, pp. 1201-1320). The final order effectively rejected Hutchinson's sworn amended Florida Rule of Criminal Procedure 3.851 motion for post conviction relief in a capital case.

The appellant, Jeffrey Glenn Hutchinson, was the defendant in the lower tribunal, the Circuit Court of the First Judicial Circuit, in and for Okaloosa County, Florida. He will be referred to as "Hutchinson" or as "the defendant." The appellee, State of Florida, was the plaintiff in the trial court, and will be referred to here as "the state."

The record on appeal is in nine volumes.

Volumes I-VII contain post conviction pleadings, orders and related documents. The Clerk of the Circuit Court has placed a page number in the lower right hand corner of each page of these volumes. Thus, this part of the record will be referred to by the letter "R" (to designate the record on appeal), followed by an appropriate volume and page number.

Volumes VIII and IX contain the transcripts of the October 22, 2007, evidentiary hearing in the lower tribunal regarding Mr. Hutchinson's sworn

amended motion for post conviction relief. The court reporter has provided a page number in the upper right hand corner of each page of these transcripts. This part of the record will be referenced by the letter “R,” followed by a volume number (either Volume VIII or IX), the letters “EH” (for evidentiary hearing) and an appropriate page number.

References to the record on appeal regarding Mr. Hutchinson’s original direct appeal of his judgments and sentences in SC04-500 will be by the designation “OR” (or original record) followed by an appropriate volume and page number.

Any emphasis or additions to quotes or text will be acknowledged.

AS TO THE STATE'S STATEMENT OF THE CASE AND OF THE FACTS

The state does not challenge Hutchinson's rendition of the statement of the case and of the facts as set forth on pages 10-39 the defendant's Initial Brief of Appellant. Likewise, Hutchinson does not take issue with the state's rendition of the statement of the case and of the facts as set forth on pages 2-21 of the Answer Brief.

AS TO THE STATE'S SUMMARY OF THE ARGUMENT

Issue I:

The state asserts in essence on page 22 of the Answer Brief that defense counsel were not ineffective at trial for failing to contest the issue of whether it was Hutchinson's voice on the 911 tape because to do so would have cost them "credibility" with the jury. This is so, according to the state, because there was evidence (Hutchinson's nexus to the telephone when law enforcement arrived at the crime scene) that Hutchinson had made that call. (The Answer Brief, p. 22.) The state is incorrect. Not contesting this point was tantamount to conceding Hutchinson's guilt because of the substance of the call to the effect that the caller had just shot his family. Hutchinson suffered prejudice because of the number of witnesses who could have challenged the assertion that he made the call including the absolute certainty of some of those witnesses to that effect. Thus, a key piece of evidence against the Defendant would have been completely destroyed by the defense witnesses.

Issue II:

The state claims (the Answer Brief, p. 23) that it was not deficient performance for defense counsel to ignore and not introduce in evidence the nylon stocking found in the back yard because it was tan in color and

Hutchinson described his assailants as wearing black ski masks. Again, the state is mistaken. The differences in the disguises were minor compared to the fact that they were consistent with Hutchinson's claim that he was not the killer and that he too was a victim of a home invasion that took the lives of the other victims in the case.

Issue III:

The trial court should not have summarily denied Hutchinson's actual innocence claim under the circumstances notwithstanding the state's argument to that effect on page 23 of the Answer Brief. It was offered to shore up Claims I and II above and should not have been summarily denied.

AS TO THE STATE'S ARGUMENT

Issue I: Whether trial court properly determined that trial counsel was not ineffective for failing to present testimony regarding whose voice was on the 911 tape (as restated by the state)?

Standard of Appellate Review

Hutchinson agrees with the state as to the standard of appellate review regarding Issue I as set forth on page 26 of the Answer Brief. This is a post conviction capital case involving mixed questions of fact and law. The legal issues resolved by the trial court are entitled to plenary, *de novo* review except that findings of fact made by the trial court are entitled to deference

so long as there is competent and substantial evidence in the record to support them. *Johnson v. State*, 789 So. 2d 262 (Fla. 2001); *Rose v. State*, 675 So. 2d 567 (Fla. 1996); *State v. Duncan*, 894 So. 2d 182, 192-93 (Fla. 2005). Such factual findings will not be disturbed absent the showing of an abuse of discretion. *Schwab v. State*, 814 So. 402, 408 (Fla. 2002).

Merits

The state quotes the findings of the trial in their entirety on pages 26-32 of the Answer Brief court regarding the 911 tape issue for the proposition that there was neither deficient performance by trial counsel nor prejudice suffered by Hutchinson. The defendant addressed both of these issues in great detail in his Initial Brief of Appellant and relies upon same here, adding only the following:

The trial court's main reason for rejecting the potency of the post conviction testimony of Hutchinson's friends and relatives to the effect that it was not his voice on the 911 tape was that the witnesses could not in many instances recall with certainty when the tape was played for them, what lawyers were present at the time, the exact words they heard on the tape and the degree to which they were confident that it was not Hutchinson's voice they heard. *See* the trial court's order in this regard with citations to the record as set forth on pages 26-31 of the Answer Brief. The trial court's

findings in this regard overlook the fact that almost six years had passed between the time of the trial and the time of the post conviction proceedings. Certainly, these individuals should not have been expected to remember all of the facts surrounding their review of the 911 tape under these circumstances. Furthermore several of the family members had a keen and detailed recollection of the facts of the case including what was on the tape. For example, Kurt Hutchinson testified that he spent a lot of time on the telephone with the defendant over the years. He listened carefully to the September 11, 1998, 911 audio tape. He heard a copy provided him by the Cobbs. He was asked, "(w)as that Jeffrey Hutchinson's voice on the tape saying I just killed my family or words to that effect plus other things?" He answered, "(a)bsolutely, unequivocally not." (R. Vol. VIII, EH, p. 156). Daniel Hutchinson's confidence that it was not the defendant's voice on the tape was just as strong. The other witnesses' recollection may not have been as detailed or complete, but there was one thing they (Dana Nelson, Kay Masters and Kelly Hutchinson) were sure of: It was not Hutchinson's voice on the tape.

The jury needed to hear this testimony if Hutchinson was to have any chance of avoiding a conviction, a death penalty, or if convicted, of avoiding jury recommendation, based on the heinousness of the crimes committed.

Not to present the testimony was to in effect concede the client's guilt. This is so because virtually no other defense as to innocence was offered at trial.

Trial counsel's inaction cannot be attributed to strategy, notwithstanding the state's argument to that effect on pages 33-35 of the Answer Brief. The state claims (Answer Brief, p. 33) specifically that lead trial counsel wanted to retain his credibility with the jurors, and did not believe that disputing his client's voice on the tape was a "viable route" for the defense to take. The problem with this "strategy" was that the 911 tape was the key to the question of the defendant's guilt or innocence and there was no other route available to avoiding a conviction for multiple counts of first-degree murder. In addition, the state claims that trial counsel wanted to keep this information (the testimony from witnesses who would say that it was not Hutchinson's voice on the 911 call) to use during the penalty phase of the trial, and this was a tactical decision entitled to deference from the courts. (The Answer Brief, p. 34.) This is incorrect. It is hard to imagine any scenario where the jury would not recommend death given the number of victims (including three children) and the viciousness of the murders.

The Court is asked to reject the state's argument in this regard and find that Hutchinson was in fact denied effective assistance of counsel for

failing to present the host of credible witnesses who would have created reasonable doubt as to Hutchinson's guilt.

Issue II: Whether the trial court properly concluded that defense counsel was not ineffective for not investigating the nylon stocking (restated by the state)?

Standard of Appellate Review

The standard of appellate review is the same as to Issue II as it is for Issue I. The legal issues resolved by the trial court are entitled to plenary, *de novo* review except that findings of fact made by the trial court are entitled to deference so long as there is competent and substantial evidence in the record to support them. *Johnson v. State*, 789 So. 2d 262 (Fla. 2001); *Rose v. State*, 675 So. 2d 567 (Fla. 1996); *State v. Duncan*, 894 So. 2d 182, 192-93 (Fla. 2005). Such factual findings will not be disturbed absent the showing of an abuse of discretion. *See* also, *Sochor v. State* 883 So. 2d 766, 771-72 (Fla. 2004).

Merits

The trial court dismissed the importance of the nylon stocking found in the back yard of the house where the homicides occurred (to support Hutchinson's claim that the real killers were masked men who attacked him and the victims) because it did not have eye holes cut in it, it did not match the description of the masks that Hutchinson said the intruders were wearing

and it had been used as a pool filter device. (The Answer Brief, p. 37.) Therefore, according to the trial court and the state, defense counsel was not ineffective for failing to introduce the stocking during trial. (The Answer Brief, pp. 37-8.) The state even went so far as to describe the mask as something the jury would have seen as a "red herring." (The Answer Brief, p. 37.)

This was error because, once again, Hutchinson was deprived of the use of exculpatory evidence just because counsel felt that it did not fit seamlessly into the defendant's version of events. That is, the masks that Hutchinson saw may not have matched the stocking found in the back yard in all respects, but that could be expected given the defendant's claim that he was surprised by the assailants and assaulted by them. Also, the fact that the stocking did not have eye holes cut into it does not mean that it could not have been used by one of the intruders as a mask since it is transparent. Finally, not to use this key piece of evidence left Hutchinson virtually defenseless in terms of trying to show who the real killers were. There is nothing strategic about failing to use evidence that might result in the client's acquittal, and there was no definitive evidence that stocking had been actually used or a pool filter.

Issue III: Whether the trial court properly summarily denied the actual innocence claim and the conflict of interest claim (restated)?

Standard of Appellate Review

As the Court said in *McLin v. State*, 827 So. 2d 948, 954 (Fla. 2002), "on appeal from the denial of relief, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief."

Merits

Defendant alleged in the amended motion that he is actually innocent of the crimes for which he was convicted and that the findings of the Supreme Court of Florida, as far as they incriminate Hutchinson, were mistaken and in error.' Defendant also alleged that he was not represented by conflict-free counsel based on his trial attorney's personal dislike of him. (R. Vol. IV, p. 787). The trial court held that the defendant's claim of actual innocence was not cognizable in a 3.850/3.851 motion absent a showing of newly discovered evidence. (R. Vol. IV, p. 788). This was error because Hutchinson brought these issues to the attention of the trial court in the context of his effort to explain why his trial counsel failed to aggressively defend him during the trial. For that reason, Hutchinson should have been able to present and argue this evidence during the post conviction proceedings.

CONCLUSION

For the reasons set out above, the Supreme Court is requested to:

1. Reverse the October 11, 2007, order (R. Vol. IV, pp. 787-89) of the trial court that summarily denied the defendant's reassertion of his innocence and that Hutchinson was not represented by conflict-free counsel, as alleged in the August 15, 2007, sworn amended motion for post conviction relief, and grant the defendant an evidentiary hearing on these claims.

2. Reverse the January 3, 2008, final Order Denying Defendant's Sworn Amended Motion for Post Conviction Relief and Sworn Supplemental Insert to Motion for Post Conviction Relief. (R. Vol. VI, pp. 1077-1200; Vol. VII, pp. 1201-1320.)

3. Reverse and set aside the defendant's judgments of conviction and sentences, including the death sentences, because he was not afforded constitutionally effective assistance of counsel at trial. Remand the cause to the trial court, requiring that court to grant the relief sought in the sworn amended motion for post conviction relief.

4. Order that Mr. Hutchinson be granted a new trial, and appoint retrial counsel for him.

5. Grant Mr. Hutchinson such other relief as is deemed

appropriate in the premises.

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

I hereby certify that I have furnished accurate copies of this initial brief of appellant by postage prepaid first class U.S. mail delivery to the persons identified below this 17th day of November, 2008.

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief of appellant has been prepared using a 14 point Times New Roman font not proportionally spaced in conformity with Rule 9.210(d), Florida Rules of Appellate Procedure.

____
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