IN THE SUPREME COURT OF FLORIDA

KENNETH LOUIS DESSAURE,

Petitioner,

v.

WALTER A. McNEIL
Secretary, Florida
Department of Corrections

Respondent
_____/

Case No. SC09-1551
L.T. No. CRC99-15522 CFANO
DEATH PENALTY CASE

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

ERIC C. PINKARD, ESQ.
Florida Bar No. 651443
Robbins Equitas
2639 Dr. MLK Jr. Street N.
St. Petersburg, Florida 33704
(727) 822-8696
Attorney for Petitioner

TABLE OF CONTENTS

PRELIMINARY STATEMENT

The record on direct appeal will be cited throughout this document as “DAR” with the appropriate volume and page number (DAR v#:page#); the postconviction record will be cited as “PCR” with the appropriate volume and page number (PCR V#:page#).

THE RESPONDENT IS INCORRECT IN ASSERTING THAT THE JURY INSTRUCTION FOR SEXUAL BATTERY WAS CORRECTLY GIVEN IN THIS CASE, AS THERE WAS NO EVIDENCE TO SUPPORT THE INSTRUCTION

The respondent incorrectly states that the trial court properly instructed the jury on the uncharged crime of sexual battery because semen was found near the body on the bedroom comforter and on the towel in the bathroom. However, The Medical Examiner testified that there was no evidence that Mr. Dessaure had had sexual contact with the victim. (ROA VOL XI at 1540) A rape kit had been submitted which came back negative. (ROA VOL XI at 1540). Furthermore, oral, vaginal and anal swabs were taken which all came back negative for sperm or any other indication of sexual activity. (ROA VOL XI at 1540).

Inexplicably, the Respondent also relies upon the testimony of a "State witness" that Petitioner told him he had sexual intercourse with the victim after punching her and knocking her unconscious. However, the Respondent fails to mention the "State witness" is jail house snitch Shavar Sampson. In fact, Mr. Sampson testified that Mr. Dessaure told him he had had sex with the victim and came inside her. (ROA VOl 35 at 1449). As stated above this directly refutes the testimony of the Medical Examiner that there was no evidence of sexual activity. Mr. Sampson was shown to be a liar about what Mr. Dessaure told him, as demonstrated by the Medical Examiner, who was another "State witness". The State cannot rely upon the testimony of a confession by Mr. Dessaure to a sexual battery where the scientific evidence conclusively establishes that the testimony was false. There was simply no evidence of any sexual battery having occurred in this case. Contrary to the assertions of the Respondent, the Lower Court in this case

instructed the jury on the uncharged crime of sexual battery without sufficient and credible evidence, which constitutes fundamental error and should have been raised by appellate counsel on Direct Appeal.

THE RESPONDENT IS INCORRECT IN ASSERTING THAT APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE INSTANCES OF PROSECUTORIAL MISCONDUCT AND FUNDAMENTAL ERROR

Respondent also erroneously argues that the comments by the prosecutor in closing that Mr. Dessaure was no longer entitled to the "presumption of innocence" did not amount to fundamental error. Improper comments on longstanding constitutional rights are fundamental to the trial process. It is hard to imagine a more fundamental right in the area of criminal law than the right to a presumption of innocence all the way through to jury deliberations. It is repugnant to the American legal system for a prosecuting attorney to inform a jury that this fundamental right had evaporated.

Respondent is also incorrect in asserting that the Petitioner had not proven that the testimony of the jail house snitches in this case was false. The Respondent did not even try to refute the evidence of the perjured testimony of the snitches. Specifically, Valdez Hardy stated that Mr. Dessaure had blood on his underwear. (ROA VOl 28 at 634). No blood was found on Mr. Dessaure's underwear. He also stated that Mr. Dessaure told him he went "upstairs", when in fact there was no upstairs to the apartment. (ROA VOL 28 at 634).

Snitch Shavar Sampson testified that Mr. Dessaure told him he had sex with the victim and came inside her. (ROA VOl 35 at 1449). This directly contradicts the Medical Examiner who stated no sperm or body fluids were found

after vaginal, anal, and oral swabs taken from the victim. (ROA VOl XI at 1540). Mr. Sampson also stated that Mr. Dessaure told him that the victim was having her period when the sex took place. (ROA VOl 35 at 1449) This testimony is directly refuted by the Medical Examiner, who stated the victim was not having her period. (ROA VOL XI at 1540).

Clearly, the prosecuting attorney had to know that the testimony of the Medical Examiner was that there was no sexual battery committed in this case. In the face of that evidence of an expert witness called by the State, the State called "snitches" to falsely testify about a sexual battery. Just because those witnesses were impeached does not mean that there testimony was not false, and knowingly presented by the prosecuting attorney. It is scientifically impossible for Mr. Dessaure to have ejaculated inside the victim, and nothing be found in the vaginal swabs. It is impossible for her to have been having her period when the Medical Examiner said she was not. Yet the State produced a witness to testify that the impossible did take place. The State's motive in presenting this testimony is obvious, it was the only way they could obtain a Felony Murder instruction and a conviction based on the charge of sexual battery. There is simply no other reason for the State to have presented the false testimony concerning the sexual battery. The State is not permitted to "Cherry Pick" reality. They cannot present irrefutably false testimony and then throw up their hands and say "well they were impeached". There is a substantial likelihood that Mr. Dessaure's conviction and sentence was based upon this false testimony. Thus, the State cannot prove beyond a reasonable doubt that the testimony was harmless. Contrary to the

assertions of Respondent, Appellate Counsel was ineffective for failing to raise this meritorious issue on Direct Appeal, and Mr. Dessaure is entitled to a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail this 25th day of January, 2010, to:

Stephen D. Ake, Assistant Attorney General
Office of the Attorney General
Conourse Center 4
3507 E. Frontage road, Suite 200
Tampa, Florida 33607
Fax: 813-287-7910
Email: Stephen.ake@myfloridalegal.com

_____
ERIC PINKARD, ESQ.
Florida Bar No.: 651443