

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-555

**DOLAN DARLING A/K/A
SEAN SMITH**

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The relevant facts were summarized by the Supreme Court of Florida in *Darling*

v. *State*, 808 So. 2d 145 (Fla. 2003):

The victim in this case, Grazyna Mlynarczyk ("Grace"), was a thirty-three-year-old Polish female living illegally in the United States. The State's first witness, Zdzislaw Raminski (known as "Jesse"), had met the victim in Poland in 1990 or 1991. Grace and Jesse developed a personal relationship, which continued when Grace moved to Orlando on September 28, 1992.

Jesse owned and operated Able Transportation, which provided shuttle service to and from the airport, and Grace was employed part-time with this enterprise. The last time Jesse saw Grace alive was on the morning of October 29, 1996, at around 9:30. At that time she was wearing shorts and a small shirt, as she was doing laundry in a facility at her apartment complex. Jesse did not exit his vehicle when talking with Grace only briefly that morning. She told Jesse that she had an appointment with a gynecologist later that day. Jesse gave Grace an AmSouth Bank envelope containing three hundred dollars cash in payment for work she had performed for the company during the prior week. Jesse drove away from the apartment complex and proceeded to work. Jesse again spoke with Grace around 10:15 a.m. by phone, and she indicated that she was still doing laundry, and would call him after she returned from her doctor's appointment. Although Jesse continued to telephone Grace throughout the day, he was unable to reach her again. Around 4:10 p.m., Jesse called again and was still unable to reach Grace. He became concerned that she had not telephoned him after her doctor's appointment, so he returned to her apartment complex.

Upon arriving there, he was surprised to find that the blinds

to Grace's apartment--which she never closed during the daytime--were closed. He used his key to enter the apartment, where he found a basket with laundry in the living room, and the door to the bedroom closed. He recalled seeing no disturbed objects in the apartment. Upon entering the bedroom, however, he found Grace. She was on her back on the floor, naked from the waist down, with her face near the bed and her legs inside the closet. When she did not respond to him, Jesse moved Grace to the bed, and discovered that she was cold, and had blood on her. He proceeded to call 911 for assistance and members of the fire department arrived shortly thereafter. They soon determined that Grace was dead.

Officers from the Orange County Sheriff's Office responded to the scene and secured items of evidence found in the bathroom, which included a lotion bottle, a pair of panties, and a pink throw pillow. The pillow had a blackened area and a gunshot hole through the sides. There was blood spatter on the door of the closet, and blood present in the closet area. Two AmSouth Bank envelopes were found which contained cash totaling approximately twelve hundred dollars and a shoe box was discovered which contained one thousand dollars. There was also a wallet which held fifty-eight dollars. Jewelry located in boxes appeared to be undisturbed.

An officer who had canvassed Grace's neighborhood to determine whether there were witnesses with information regarding the murder testified that he had contacted Darling on October 30, the day after the murder. Darling's apartment was located just north of Grace's apartment. In response to the investigating officer's inquiry, Darling had said that "he was working and didn't know anything of the incident."

Dr. William Robert Anderson of the Orlando Medical Examiner's Office testified at trial. His testimony included a discussion concerning the "defect" in the pillow, particularly

the "cloud of soot" from the "burning gun powder" left on the pillow as the "bullet comes out." The gun was fired at close range because he observed "in the victim only a small amount of soot material. But ... on the pillow there is a significant amount of that soot material." Dr. Anderson indicated that "the end of the weapon was up against that pillow ... fairly tightly." He also testified that the "defect in the middle is consistent with a bullet passing through ..., creating a tear." When the doctor first saw Grace, "[r]igor mortis was complete," and he estimated that she "was probably dead at least six hours from the time we saw her, which was about seven."

Dr. Anderson testified that the bullet entered "the right back of the head." Grace had an abrasion there "consistent with something having been up against the cloth transferring energy across to the skin and creating that." "That pillow" was consistent with the abrasion. The doctor found that Grace had "some vaginal injuries, but nothing that would make her bleed significantly." There was "[a] lot of bleeding ... inside the brain," but "she's gonna die pretty quick." He stated that "[c]onsciousness would probably not be more than a few seconds," and that "[s]he would have no motor activity" or any "ability to move anything at that point." The doctor stated that "the rapidity [with] which she dies" is "one of the reasons she probably didn't bleed."

The doctor stated that there was "seminal purulent" in Grace's vaginal area and bruising on the "back of the elbows ... consistent with some moving around." There was "a hemorrhage," which "means that took place when circulation was alive." The vaginal area abrasions were "consistent with vaginal trauma from penetration of some object, penial, digital, some other object." The doctor pointed out that the "tear of the labia majora, which is a very sensitive area" was "quite painful," adding: "This would not be consistent with consensual sex, in that the pain would interrupt the activity. It would be painful enough that

consensual sex would not apply after that point." The doctor observed that "there wasn't anything in the labia that would explain those abrasions other than trauma." [FN1] The victim's "rectal area" had "some tears," which were caused by "[d]igital penetration, penial penetration, some trauma." The doctor opined that this, too, was painful. He further indicated that the "gunshot wound to the head with the injuries ... described" was the cause of Grace's death.

FN1. Dr. Anderson stated that he had "seen many, many sexual assault victims that don't have ... defense wounds...." He observed, further, that in "[t]he majority of the cases of sexual battery ... they don't put up a struggle."

Photographs and records of fingerprints found in Grace's apartment were developed and submitted to a comparison expert. A photograph of fingerprints from the lotion bottle was developed, and admitted into evidence as Exhibit 14. At trial, the State's expert in the detection, enhancement, and recording of fingerprints opined that the fingerprint on the lotion bottle had been there for less than one year. The State's expert in the area of fingerprint comparison compared the fingerprints on Exhibit 14 with fingerprints obtained from Darling. He testified at trial that he found a print on the lotion bottle which matched that of Darling's right thumb.

Additionally, David Baer, a Senior Crime Laboratory Analyst with FDLE, testified that the DNA in the semen sample from the victim matched the DNA from Darling's blood sample.

The jury found Darling guilty of capital murder and armed sexual battery.

Darling raised eleven points on direct appeal. He claimed that the trial court

reversibly erred in:

- (1) denying Darling's motion for judgment of acquittal;
- (2) admitting DNA evidence;
- (3) not allowing defense counsel to comment on the State's failure to exclude other suspects;
- (4) limiting Darling's *voir dire* examination during jury selection;
- (5) denying Darling's requested instruction regarding circumstantial evidence;
- (6) precluding defense counsel's rebuttal closing argument where the State had waived its closing argument;
- (7) refusing to allow Darling to argue residual doubt as a mitigator; and
- (8) denying Darling's requested special penalty phase jury instructions.

Additionally, Darling asserted that:

- (9) the absence of a complete record on appeal deprived him of adequate appellate review;
- (10) his death sentence is disproportionate; and
- (11) his death sentence violates the Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (Dec. 24, 1969) (the "Vienna Convention").

Darling v. State, 808 So. 2d 145 (Fla. 2003).

This Court affirmed the convictions and sentences. Darling filed a petition for

writ of certiorari in the United States Supreme Court which was denied October 7, 2002. *Darling v. Florida*, 537 U.S. 848 (2002). Darling filed a Motion for PostConviction Relief on September 22, 2003, raising thirty-eight (38) claims:

- (1) State agencies withheld public records;
- (2) Counsel was ineffective for allowing Juror Wilson to serve on the jury;
- (3) Counsel was ineffective for failing to object to a fingerprint on a lotion bottle;
- (4) Counsel was ineffective in the penalty phase for failing to ensure adequate mental health exam and present mental health mitigation;
- (5) The jury was misled by comments and instructions which diluted their sense of responsibility;
- (6) Jury instructions limited mitigation; counsel was ineffective;
- (7) The prosecutor made improper closing remarks; counsel was ineffective;
- (8) The jury was told a death recommendation was required; counsel was ineffective;
- (9) Counsel failed to obtain an adequate mental health evaluation in violation of *Ake v. Oklahoma*;
- (10) Cumulative effects of ineffective assistance of counsel and erroneous trial court rulings;
- (11) Newly discovered evidence;
- (12) The State withheld material evidence;

- (13) Counsel was ineffective in *voir dire*;
- (14) Improper prosecutor arguments; counsel was ineffective;
- (15) Counsel was ineffective for failing to investigate and present mitigating evidence;
- (16) Darling is innocent of the death penalty;
- (17) Darling was absent during critical stages of the trial;
- (18) Penalty phase instructions shifted the burden; counsel was ineffective;
- (19) Jury instruction on expert testimony was erroneous; counsel was ineffective;
- (20) Jury instructions on aggravating circumstances erroneous; counsel was ineffective;
- (21) The State introduced nonstatutory aggravating factors; counsel was ineffective;
- (22) Jury was misled by comments and instructions that diluted its sense of responsibility; counsel was ineffective;
- (23) Darling could not interview jurors; counsel was ineffective;
- (24) The prosecutor overbroadly and vaguely argued aggravating circumstances; counsel was ineffective;
- (25) Electrocution is cruel and unusual;
- (26) Florida's death penalty is arbitrary and capricious;
- (27) Darling was prejudiced by pre-trial publicity; counsel was ineffective;

- (28) The trial court erred in finding mitigating circumstances;
- (29) The sentencing order does not reflect an independent weighing;
- (30) The record on direct appeal was incomplete;
- (31) Excessive security measures or shackling; counsel was ineffective;
- (32) The judge and jury relied on misinformation; counsel was ineffective;
- (33) Jury instruction on majority vote of jury was erroneous; counsel was ineffective;
- (34) Darling's death sentence is predicated on an automatic aggravating circumstance; counsel was ineffective;
- (35) *Ring v. Arizona*;
- (36) Counsel was ineffective for failing to request an instruction and present evidence of parole ineligibility;
- (37) Counsel was ineffective for failing to hire experts and challenge scientific findings of FDLE regarding DNA;
- (38) Darling's trial was fraught with error.

The trial court issued an order granting the State's motion to strike and summarily denied claims 11, 12, 14-34, and 36 as shell claims. The trial court issued a separate order summarily denying certain claims and set other claims for an evidentiary hearing. The claims set for evidentiary hearing were: 1, 2, 3, 4 (merged with 15), 10

(merged with 38), and 37. The evidentiary hearing was held April 26-29, May 3 and May 7, 2004. Relief was denied on November 1, 2004. Darling appealed, raising 10 issues:

- (1) trial counsel failed to adequately investigate and present mitigating evidence;
- (2) counsel was ineffective at the penalty phase for failing to challenge a prior conviction;
- (3) the trial court erred in excluding the testimony of the attorney who represented the Defendant in the prior conviction;
- (4) the trial court erred in ruling on public records regarding DNA;
- (5) counsel was ineffective in challenging the DNA evidence;
- (6) counsel was ineffective for failing to object to a photograph of a fingerprint;
- (7) Defendant was denied his right to an individualized sentencing;
- (8) trial counsel was ineffective in failing to object when the jury was told a death recommendation was required.

Darling v. State, 966 So. 2d 366, 376 (Fla. 2007).

On November 1, 2005, Darling submitted a petition for writ of habeas corpus in this Court alleging four claims:

- (1) Darling was denied effective assistance of counsel and access to the courts in the taxi-carjacking matter;
- (2) Darling's counsel on direct appeal was ineffective for abandoning claims which had been raised and preserved during trial;

(3) execution by lethal injection constitutes cruel and unusual punishment; and

(4) Darling's execution will constitute cruel and unusual punishment because he may be incompetent at the time of execution.

This Court denied all relief on both the postconviction appeal and the petition for habeas corpus. *Darling v. State*, 966 So. 2d 366, 375-376 (Fla. 2007).

Darling filed a successive Rule 3.851 motion on November 8, 2007, which was amended on October 6, 2008. (R 1-35, 153-176). The State responded on November 21, 2007. (R 36-65). The trial judge entered an order denying relief on February 20, 2009, which was amended on March 24, 2009. (R 177-182, 189-194). This appeal follows.

SUMMARY OF ARGUMENT

This is a successive Rule 3.851 motion. Claims 2 and 3 are time-barred/procedurally barred. No issue raised herein has merit. Darling acknowledges adverse authority. (Initial Brief at 1). This Court has repeatedly denied the claims raised herein, and the lower court judge properly followed this Court's established precedent.

STANDARD OF REVIEW ON SUCCESSIVE RULE 3.851 MOTIONS

Florida Rule of Criminal Procedure 3.851 governs the timeliness of, and necessity of an evidentiary hearing on, successive postconviction motions in final capital cases. Rule 3.851(d)(1) bars a postconviction motion filed more than one year after a judgment and sentence are final. An exception to this rule permits otherwise untimely motions if the movant alleges that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2)(A). Rule 3.851(f)(5)(B) permits denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief."

This Court's precedent provides the criteria for obtaining a new capital penalty phase based on newly discovered evidence. In addition to demonstrating that the

evidence could not have been discovered previously through the exercise of due diligence, the defendant must establish that the newly discovered evidence probably would have produced a life sentence. *Ventura v. State*, 794 So. 2d 553, 571 (Fla. 2001); see also *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991) ("[T]he newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial."); *Scott v. Dugger*, 604 So. 2d 465, 468 (Fla. 1992) ("The *Jones* standard is also applicable where the issue is whether a life or death sentence should have been imposed.").

CLAIM I

FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION IS CONSTITUTIONAL

Darling raises this issue based on the "newly discovered evidence" of the Diaz execution in December 2006.¹ Darling also argues that *Baze v. Rees*, 551 U.S. ____, 128 S.Ct. 1520, 170 L.Ed. 420 (2008), requires reconsideration of this Court's

¹ Darling's previous Rule 3.851 appeal was denied July 12, 2007; however, this Court indicated that:

This habeas claim was presented to the Court in connection with facts existing prior to the execution of Angel Diaz on December 13, 2006. No events that may have occurred in connection with the Diaz execution have been considered as part of this proceeding.

Darling v. State, 966 So.2d 366 (Fla. 2007).

precedent. The same arguments were recently addressed by this Court in *Marek v. State*, 8 So. 3d 1123 (Fla. 2009), and this Court held:

Marek's next claim challenges the constitutionality of Florida's lethal injection procedures. We have repeatedly rejected similar claims and have upheld the constitutionality of Florida's lethal injection procedures. See *Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008), cert. denied, 129 S. Ct. 1305, 173 L. Ed. 2d 482 (2009); *Power v. State*, 992 So. 2d 218, 220-21 (Fla. 2008); *Sexton v. State*, 997 So. 2d 1073, 1089 (Fla. 2008); *Schwab v. State*, 969 So. 2d 318, 321-25 (Fla. 2007), cert. denied, 128 S. Ct. 2486, 171 L. Ed. 2d 777 (2008); *Lightbourne v. McCollum*, 969 So. 2d 326, 349-53 (Fla. 2007), cert. denied, 128 S. Ct. 2485, 171 L. Ed. 2d 777 (2008). We also have held the procedures constitutional under the requirements of *Baze v. Rees*, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008). See *Ventura v. State*, 2 So. 3d 194, 200 (Fla. 2009) ("Florida's current lethal-injection protocol passes muster under any of the risk-based standards considered by the *Baze* Court (and would easily satisfy the intent-based standard advocated by Justices Thomas and Scalia)."), petition for cert. filed, No. 08-10098 (U.S. Apr. 16, 2009);² *Henyard v. State*, 992 So. 2d 120, 130 (Fla. 2008), cert. denied, 129 S. Ct. 28, 171 L. Ed. 2d 930 (2008). Marek has not presented any reason why we should not follow the same course in his case.

As in *Marek*, Darling has not presented any reason this Court should deviate from established precedent. The trial judge cited *Henyard*, *Schwab*, and *Lightbourne*, properly following this Court's precedent.

² The petition for writ of certiorari was denied June 22, 2009. *Ventura v. Florida*, ___ U.S. ___, S.Ct., 174 L.Ed.2d 562 (U.S. June 22, 2009).

CLAIMS II and III

SECTIONS 945.10 AND 27.702, FLORIDA STATUTES ARE CONSTITUTIONAL

The claim regarding Sections 945.10 and 27.702, Florida Statutes, are time barred/procedurally barred and have no merit. Darling makes no argument regarding his failure to raise these issues in his prior Rule 3.851 motion. Darling did This Court stated in *Cox v. State*, 5 So. 3d 659 (Fla. 2009):

We have consistently rejected each of these claims. *See, e.g., Ventura v. State*, 2 So. 3d 194, 34 Fla. L. Weekly S71 (Fla. Jan. 29, 2009); *Tompkins v. State*, 994 So. 2d 1072 (Fla. 2008), *cert. denied*, No. 08-8614, 129 S. Ct. 1305, 173 L. Ed. 2d 482, 2009 U.S. LEXIS 1008 (U.S. Feb. 11, 2009); *Henyard v. State*, 992 So. 2d 120 (Fla. 2008), *cert. denied*, 129 S. Ct. 28, 171 L. Ed. 2d 930 (2008); *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007), *cert. denied*, 128 S. Ct. 2485, 171 L. Ed. 2d 777 (2008); *Provenzano v. State*, 761 So. 2d 1097, 1099 (Fla. 2000); *Bryan v. State*, 753 So. 2d 1244, 1250 (Fla. 2000); *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 410 (Fla. 1998).

Darling has failed to advance any reason this Court should revisit these issues and overrule established case law. The trial court followed this Court's precedent and its order should be affirmed. (R 191-193).

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests this Honorable Court affirm the order of the trial court and deny all relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **Mark Gruber**, CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, this _____ day of July, 2009.

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CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Times New Roman 14 point font, pursuant to Fla. R. App. 9.210.

Assistant Attorney General