IN THE SUPREME COURT OF FLORIDA

JOSHUA NELSON,

Appellant,

vs.

Case No. SC10-540
L. C. Case No. 95-911-CFA

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

On Direct Appeal from a Final Order of the Circuit Court of the Twentieth Judicial Circuit, in and for Lee County, Florida, Denying the Appellant's Second Amended Initial Motion for Post Conviction Relief.

Baya Harrison III
310 North Jefferson St.
Monticello, FL 32344
Tel: 850.997.8469
Fx: 850.997.5852
bayalaw@aol.com
Court Appointed Registry
Counsel for Appellant
Fla. Bar No. 099568

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

PRELIMIARY STATEMENT

As described in the Initial Brief of Appellant, this is a direct appeal from a final order (R11/1111-31) with attachments rendered on March 5, 2010, by the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida, denying Nelson's collateral motion to vacate his judgments of conviction and sentences, including a death sentence (R9/820-826). Appellant Joshua Nelson was the defendant in the trial court and will be referred to as such or as "Nelson." Appellee, the 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 12 volumes. References to specific page(s) of the record will be by the letter "R" followed by a volume and page number(s).

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

Nature Of The Case:

The attorney general does not take issue with Nelson's statement of the nature of the case in the Initial Brief of Appellant or specifically describe it. This is a direct appeal of a final order (R11/1111-31) with attachments rendered on March 5, 2010, by the Circuit Court of the Twentieth Judicial Circuit of Florida, that denied Nelson's June 15, 2009, Sworn Complete Second Amended Initial Motion for Post Conviction Relief (R9/777-837) filed per the provisions of Florida Rules of Criminal Procedure 3.850 and 3.851(e)(1).

Jurisdiction:

The attorney general does not address jurisdiction in the Answer Brief. The Supreme Court of Florida has jurisdiction over the parties and subject matter of this cause because this is a direct appeal of a final order that denied Nelson post conviction relief in a capital case. Art. V, Sec. 3(b)(1), Fla. Const. "We have jurisdiction over all death penalty appeals." *Parker v. State*, 873 So. 2d 270, 275, f. 1 (Fla. 2004). This includes jurisdiction of appeals from final orders denying post conviction relief in capital cases. *Parker v. State*, 542 So. 2d 356-57 (Fla. 1989).

Course Of The Proceedings:

The attorney general correctly describes the course of the proceedings on pages 1-8 of the Answer Brief. Those proceedings are detailed in the Initial Brief as well.

Disposition In Lower Tribunal:

On March 5, 2010, Judge Gerald rendered his final order denying post conviction relief. (R11/1100-31)

The Basic Facts Of The Case As Determined by This Court On Direct Appeal

Both parties describe the basic facts of the case as found by this court in *Nelson v. State*, 748 So. 2d 237, 239-40 (Fla. 1999).

Collateral Claims Presented In Post Conviction Proceeding

Nelson presented three post conviction claims; all involving alleged constitutional ineffective assistance of trial counsel. Those claims were:

1. Claim I: Trial counsel was ineffective for failing to assure that Nelson was tried by a fair and impartial jury during the guilt/innocence and penalty phases of the trial. This included not objecting to the inclusion of certain jurors who felt that death should be automatic if Nelson was convicted of first-degree murder. It also included not objecting to the state's challenges to persons who opposed the death penalty in general but could otherwise follow the law and otherwise serve as fair jurors. (R9/790-97)

2. Claim II: Nelson asserted in a second claim that a substantial amount of non statutory mitigating information regarding (a) Nelson's history of substance and drug abuse, (b) his subjection to sexual abuse by a step-father in a dysfunctional family situation, and (c) his bi-polar and ADHD conditions were not presented to the jury by his trial counsel during the penalty phase of the trial. (R9/805-08) In addition, Nelson claimed (d) that his attorney failed to object to improper, prejudicial statements made by the prosecution during closing arguments in the penalty phase of the trial. (R9/808-09) Furthermore, he contended that (e) his trial counsel failed to preserve his right to a fair trial regarding the issue of a tattoo that came up between the end of the guilt/innocence phase and the penalty phase of the trial that was very prejudicial to the defendant. (R9/810-12) Finally, Nelson asserted that (f) the jury that tried him was never duly sworn as required by law. (R9/812)

3. Claim III: The cumulative effects of various ineffective acts and omissions of his trial counsel resulted in a death sentence. (R9/813)

As To The Attorney General's Version Of The Evidence Presented During Post Conviction Evidentiary Hearing

The attorney general did not take issue with Nelson's version of the evidence presented during the post conviction hearing as set forth in the Initial Brief of Appellant. By the same token, the Attorney General's

version of that evidence is accurately reported at pages 3-8 of the Answer Brief.

AS TO THE STATE'S SUMMARY OF THE ARGUMENT

The state argues that " . . . Nelson has failed to demonstrate any error in the lower court's denial of his motion for post conviction relief." (Answer Brief, p. 9) The state is incorrect. Nelson argues that the trial court erred in denying his post conviction claim that he was denied effective assistance of trial counsel when three individuals who held very strong views to the effect that the only appropriate punishment upon a conviction for first-degree murder was the death penalty were allowed to serve on the jury. These persons should have been successfully challenged for cause. Defense counsel had decisional law on his side but failed to present the trial court with that legal authority so that a challenge for cause would have to be sustained. Furthermore, trial counsel failed to act so that persons who held general views against capital punishment but could put aside those views and follow the law could serve on the jury. The result was a jury heavily skewed in favor of capital punishment and against the imposition of a natural life sentence.

The trial court also erred in rejecting Nelson's claim that trial counsel failed to protect him from adverse publicity generated after the guilt/innocence phase of the trial concluded and before the penalty phase began. The media discovered that Nelson had applied a tattoo to his arm

that read “natural born killer.” Stories about the matter appeared in the local newspaper and on television. Defense counsel had not asked the trial court to instruct the jurors not to read or watch media accounts of the case during this interim period. As a result, some six of the jurors were advised of the tattoo matter before the penalty phase began. The tattoo answered the question the jurors must have been pondering -- what was the reason why Nelson participated in such a horrific crime? The situation was complicated by the fact that Nelson wanted to testify during the penalty phase and express remorse. However, had he done so, the state would have introduced evidence of the tattoo. Thus, Nelson was put in a no win situation by his attorney where he had to forfeit his right to testify during the penalty phase lest evidence about the tattoo come in. This was very prejudicial to Nelson because the jury never knew that he was remorseful.

Third, defense counsel failed to subpoena Nelson’s mother and stepfather who came to the trial expecting to be called as witnesses. Both could have given very helpful mitigating evidence during the penalty phase. However, defense counsel did not subpoena them and, when some information damaging to the step-father came out during the guilt/innocence phase, both potential witnesses left and failed to attend the penalty phase.

This constituted more ineffectiveness by counsel and prejudice suffered by Nelson.

Finally, the state is wrong to assert that the trial court did not err in rejecting Nelson's claim that he is entitled to relief because the prosecution took diametrically opposite positions in his trial and in the trial of his co-defendant, Brennan. In Brennan's case, the state asserted that Nelson was emotionally younger and less mature than Nelson, therefore Brennan deserved the death penalty. In Nelson's trial, the state asserted the exact opposite.

AS TO THE STATE'S ARGUMENT

The state quotes selectively from *Strickland v. Washington*, 466 U.S. 668, 687 (1984) for the overused contention that it is virtually impossible to prove ineffective assistance of trial counsel since counsel's errors must be so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment." (AB, p. 13.) However, *Strickland* also requires " . . . vigorous advocacy of the defendant's cause. *Strickland*, supra, 466 U.S. at 689. "Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, supra, 466 at 688. "The proper measure of attorney performance remains, simply reasonableness under prevailing professional norms." *Ibid*.

Issue I: Whether the trial court erred in denying Nelson's claim of ineffective assistance of counsel for failing to secure an impartial jury (as restated by the State).

Review is de novo as to conclusions with deference to the trial court's factual findings. The state is correct (AB, p. 10) that Nelson did not seek an evidentiary hearing as to Claim I. This is because there was no reason for one. The facts necessary to resolve the issue were already a part of the record on appeal. It is not helpful to a defendant in a capital post conviction proceeding to demand an evidentiary hearing when it is not required to resolve the issues raised for obvious reasons. *Walton v. State*, 3 So. 3d 1000,

1005 (Fla. 2009). That being said, the state is incorrect when it argues that a " . . . review of the record fully supports the lower court's ruling to deny this claim . . ." (AB, p. 11.)

The jury was not " . . . carefully selected." (AB, p. 11.) Prospective jurors Dolan, Carlsen and Wotitzky indicated that, as far as they were concerned, if Nelson were convicted of first-degree murder, then death was the appropriate sentence. (OR Vol. XIV, pp. 163, 164.) The state asserts that "significantly, these responses were all offered before the jury had been instructed on the legal principles to be applied . . ." (AB, p. 12, referencing OR Vol. XIV, pp. 162-63, 174-77.) This is not a distinction with a difference. A juror's candid answer to such an important question should be afforded great weight by a reviewing court. It is simply too easy and convenient to brush aside a candid response like this in favor of one where almost by rote a potential juror answers a soft ball, loaded question ("whether the potential juror can follow the law and the court's instruction" AB, p. 12).

The state next (AB, pp. 12-15) references the standard to be used when evaluating a claim of ineffective assistance of counsel in general and as it applies to the matter of jury selection in a capital case in particular, in the context of *Strickland v. Washington,* 466 U.S. 668 (1984). The state

claims that Nelson has not shown that "all reasonable attorneys would have excused these prospective jurors, and he cannot show that any biased jurors sat on his case." (AB, pp. 14, 15.) Perhaps Nelson cannot prove that every reasonable attorney in Florida would have exercised a peremptory or cause challenge for these three individuals. But the fact remains that it would be very difficult if not impossible to find any lawyer, reasonable or otherwise, who would be willing to effectively concede that, as far as the these particular jurors are concerned, if Nelson was convicted as charged, the proceedings were effectively over and the death penalty was a foregone conclusion.

The state's reliance on *Evans v. State*, 995 So. 2d 933 (Fla. 2008) is misplaced. That case involved a potential juror who felt that self-defense was the only argument against imposition of the death penalty in a first-degree murder case. She backed off that position when questioned further by counsel and instructed by the judge. *Evans*, supra, 995 So. 2d at 942-43.)

Nor is the case of *Carratelli v. State*, 961 So. 2d 312 (Fla. 2007) supportive of the state's argument as to Claim I. In that case, this Court simply clarified the standard that is applied when determining prejudice based upon a claim of juror bias. This Court determined that prejudice was only established when actual prejudice was shown.

Issue Two: Whether the trial court erred in denying Nelson's claim of ineffective assistance of counsel for failing to protect Nelson from adverse publicity (restated by the state).

The state does not contest the fact that there was a long, three-week break between the return of the guilty verdicts in the guilt/innocence phase of the trial and the beginning of the penalty phase of that trial. (AB, p. 18, 19.) Nor does the state take issue with the fact that defense counsel made no effort whatsoever to sequester the jury during this time, to have the trial court admonish the jurors not to expose themselves to any media coverage of the trial during this interim period or to caution the defendant in terms of doing anything prejudicial that the jurors could learn about in the media or otherwise. (AB, pp. 18, 19.) It was during this time that Nelson applied a tattoo that read "Natural Born Killer" to himself -- and that fact made its way into the newspapers and the television media. The trial court rejected Nelson's post conviction claim that defense counsel should have anticipated that something like that could happen and done something effective to prevent it. Deference is afforded the trial court's factual findings but its conclusions are reviewed de novo.

In the Answer Brief, the state asserts that, once the guilty verdicts were returned, defense counsel asked for extra time to prepare a penalty phase defense for Mr. Nelson (by hiring a mental health expert), therefore

there was no ineffectiveness. (AB, p. 19.) This ignores the fact that the evidence against Nelson was overwhelming in that, among other things, Nelson provided law enforcement well before trial with a full confession ultimately presented to the jury on videotape. That tape makes it clear that the homicide was cold blooded to put it mildly. Under these circumstances, defense counsel should have completed the preparation of a strong penalty phase case before the guilt/innocence phase began. Had defense counsel done that, the very damaging "Natural Born Killer" incident would not have occurred and the jurors would never have become aware of it. Clearly ineffectiveness and prejudice were shown, at the trial court erred in not granting Nelson a new penalty phase trial on this claim.

Issue III: Whether the trial court erred in denying Nelson's claim of ineffective assistance of counsel for failing to present Nelson's mother and stepfather as penalty phase witnesses (restated by the state).

This claim is reviewed de novo except for the trial court's factual findings which are afforded deference. The state's response to Nelson's initial brief on this point is to change the subject by noting that defense counsel called seven witnesses during the penalty phase including the findings of "a well respected mental health expert" who alluded to Nelson's dysfunctional upbringing and drug and alcohol abuse. (AB, p. 26, 27.) In so doing the state skips over the fact that Nelson's mother and stepfather

attended a part of the trial but left once the guilt/innocence phase was over in part because they had not been subpoenaed. This meant that eye-witness testimony regarding the sexual abuse inflicted upon Nelson by the stepfather, Mr. Percifield, never got before the jury. It is one thing to have such powerful testimony presented by a mental health expert third hand -- it is another to have it admitted to by the perpetrator himself -- or if he had refused to do so -- by the victim's mother and the abuser's wife. Surely this testimony would have persuaded the jury that there was an explanation for Nelson's seeming total lack of feeling when he killed the victim in this case.

Issue IV: Whether the trial court erred in denying Nelson's claim of newly discovered evidence regarding culpability of Nelson's codefendant (as restated by the state).

The standard of review of this claim is *de novo*. *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009).

The state argues that the trial court did not err in denying this claim even though in Brennan's direct appeal to this Court, it argued that Brennan, although slightly younger than Nelson, was actually more mature emotionally than was Nelson at the time of the homicide. (AB, p. 33, 34.) In other words, it is of no consequence to the state that it took utterly inconsistent positions in the two trials in order to try to obtain a death sentence against both defendants. The state adds that the state's position

was merely a part of a legitimate proportionality analysis. (AB, p. 34.) The trial court should have realized that this argument is not valid.

Section 921.141(6)(g), Florida Statutes, makes the age of the defendant, including his or her emotional age, a key part of the jury's consideration as to whether the death penalty is appropriate. The state was wrong to manipulate this critical issue in the course of seeking death for both Brennan and Nelson. Reversal is required.

CONCLUSION

For the reasons set forth above, the Court is requested to

1. Reverse the final order (R11/1111-31) of the trial court rendered on March 5, 2010 that denied Nelson post conviction relief.

2. Remand the cause to the trial court.

3. Order that the motion be granted and that Nelson be afforded a new trial.

4. Grant him such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

Baya Harrison
310 North Jefferson St.
Monticello, FL 32344
Tel: 850.997.8469
Fx: 850.997.5852
bayalaw@aol.com
Court Appointed Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Appellant has been furnished by electronic mail delivery and U.S. Mail Delivery, this 14th day of February, 2011, to counsel for the appellee, State of Florida:

Hon. Steven B. Russell, State Attorney, and

Assistant State Attorney Dean Plattner
c/o Office of the State Attorney
Twentieth Judicial Circuit of Florida
The Lee County Courthouse
1700 Monroe Street.
Ft. Myers, Florida 33901

Carol Dittmar, Esq.
Assistant Attorney General
Office of the Attorney General of Florida
Florida Department of Legal Affairs
Concourse Center 4
3507 Frontage Road
Suite 200
Tampa, Florida 33607

CERTIFICATE OF COMPLIANCE

I certify that this initial brief of appellant was prepared using a Times New Roman font, 14 point, in compliance with the Florida Rules of Appellate Procedure.

_____
Baya Harrison