IN THE SUPREME COURT OF FLORIDA

MICHAEL A. TANZI,

Petitioner,

v.

WALTER A. McNEIL, ETC.,

Respondents.
_____/

CASE NO. SC11-81
L.T. No. 2000-CF-573-K
DEATH PENALTY CASE

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS
AND
MEMORANDUM OF LAW

COMES NOW, Respondent, Walter A. McNeil, Secretary, Florida Department of Corrections, by and through the undersigned counsel, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefore:

FACTS AND PROCEDURAL HISTORY

The facts of this case are recited in this Court's opinion on direct appeal of Petitioner's conviction and sentence. In affirming Tanzi's conviction and sentence on direct appeal, this Court recited the following facts:

During her lunch hour on April 25, 2000, Janet Acosta was reading a book while seated inside her maroon van parked at the Japanese Gardens in Miami. At that time, Tanzi was stranded in Miami without a means of returning to Key West, where he had been residing for the previous months. Tanzi saw Acosta sitting in her vehicle with her window rolled down and approached her, asking for a cigarette and the time. When Acosta was distracted, Tanzi punched her in the face until he gained entry to the van. He then threatened her with a razor blade and drove away with Acosta in the van. Tanzi held Acosta by the wrist until he reached Homestead.

Upon reaching Homestead, Tanzi stopped at a gas station, where he bound Acosta with rope that was in her van and gagged her with a towel. Tanzi further threatened Acosta, telling her that if she kicked or made noise he would cut her from ear to ear. Tanzi took Acosta's fifty-three dollars in cash. He then bought some cigarettes and a soda and attempted to use Acosta's bank card, which he had obtained after rifling through her belongings. While still in Homestead, Tanzi also forced Acosta to perform oral sex, threatening to kill her with his razor if she injured him. However, he stopped her from continuing because Acosta's teeth were loose as a result of the earlier beating.

Tanzi then continued to drive with Acosta bound and gagged in the rear of the van until he reached Tavernier in the Florida Keys, where he stopped at approximately 5:15 p.m. to withdraw money from Acosta's bank account. He again threatened Acosta with the razor in order to obtain Acosta's personal identification number. Tanzi thereafter stopped at a hardware store to purchase duct tape and razor blades.

Tanzi continued his journey until approximately 6:30 p.m. when he reached Sugarloaf Key. He decided that he needed to get rid of Acosta as she was getting in the way. He also knew he would get caught quickly if he released her alive. Tanzi proceeded to Blimp Road, an isolated area in Cudjoe Key. Tanzi told Acosta that he was going to kill her and then crosslaced a piece of rope and began to strangle her.

He temporarily stopped to place duct tape over her mouth, nose, and eyes in an attempt to stifle the noise. Tanzi then continued to strangle Acosta until she died. Tanzi disposed of Acosta's body in a wooded, secluded area where he thought she would go unnoticed.

After the murder, Tanzi drove to Key West, where he shopped, ate, smoked marijuana, visited with friends, and used Acosta's ATM card. Tanzi had planned to access more of Acosta's money, sleep in a hotel, purchase drugs, and alter the van's appearance. However, on April 27, 2000, Tanzi's activities were interrupted when the police observed him returning to Acosta's van, which the police had located and placed under surveillance after Acosta's friends and coworkers reported her missing. When the police approached Tanzi, he had receipts in his pocket showing his ATM withdrawals and purchases. Tanzi stated that he "knew what this was about." He also spontaneously stated he wanted to talk about some bad things he had done.

After waiving his rights and while in a police car en route to the Key West Police Department, Tanzi confessed that he had assaulted, abducted, robbed, sexually battered, and killed Janet Acosta. Tanzi repeated his confession with greater detail several times on audio and video tape. Tanzi also showed the police where he had disposed of Janet Acosta's body and where he had discarded the duct tape and rope.

Tanzi was indicted for the first-degree murder of Janet Acosta. He was also charged by amended information with carjacking with a weapon, kidnapping to facilitate a felony with a weapon, armed robbery with a deadly weapon, and two counts of sexual battery with a deadly weapon. Initially, Tanzi pled not guilty; however, shortly before trial, Tanzi entered a guilty plea to the first-degree murder, carjacking, kidnapping, and armed robbery counts. The two remaining sexual battery counts were severed.

After the plea colloquy and following a lunch recess, defense counsel moved to waive the penalty phase jury; however, the trial judge denied the motion. Hours later and arguing pro se, Tanzi stated

that he had problems with one of his attorneys and vaguely mentioned that he should have a jury determine his guilt if he was forced to have a penalty phase jury. While the trial judge inquired into Tanzi's dissatisfaction with his attorneys, the judge did not rule on Tanzi's oral motion to withdraw his plea. The case proceeded to the penalty phase before a jury.

On February 19, 2003, the jury returned a unanimous recommendation of a death sentence. The court followed the jury's recommendation and sentenced Tanzi to death, finding that the aggravators greatly outweighed the mitigators. [FN1] The court also sentenced Tanzi to consecutive life sentences for carjacking with a deadly weapon, kidnapping to facilitate a felony with a deadly weapon, and armed robbery with a deadly weapon.

> FN1. Specifically, the trial court found the following aggravators: (1) that the murder was committed by a person previously convicted of a felony and under sentence of imprisonment or on felony probation; (2) that the murder was committed during the commission of a kidnapping; (3) that the murder was committed during the commission of two sexual batteries; (4) that the crime was committed for the purpose of avoiding arrest; (5) that the murder was committed for pecuniary gain; (6) that the murder was especially heinous, atrocious, or cruel (HAC); and (7) that the murder was committed in a cold, calculated, and premeditated (CCP) manner. The court gave each aggravator "great weight" except the HAC aggravator, which the court gave "utmost weight." The court found the following mitigators: (1) that Tanzi suffered from "axis two" personality disorders; (2) that he was institutionalized as a youth; (3) that his behavior benefited from psychotropic drugs; (4) that he lost his father at an early age; (5) that he was sexually abused as a child; (6) that he twice attempted to join the military; (7) that he cooperated with law enforcement; (8) that he assisted inmates by

> writing letters and that he enjoys reading; (9) that that his family has a loving relationship for him; and (10) that he had a history of substance abuse.
>
> On May 9, 2003, Tanzi filed a written motion to withdraw his plea, and an evidentiary hearing on the motion was held on November 15, 2004. The court entered a written order denying Tanzi's motion to withdraw his plea on January 6, 2005.

Tanzi v. State, 964 So. 2d 106, 110-12 (Fla. 2007). Tanzi filed a petition for writ of certiorari in the United States Supreme Court on November 26, 2007, which was denied February 19, 2008. Tanzi v. Florida, 552 U.S. 1195 (2008).

On direct appeal to this Court, Petitioner raised the following nine issues:

> I. THE TRIAL COURT ERRED IN DENYING MICHAEL TANZI'S PRESENTENCING MOTION TO WITHDRAW HIS GUILTY PLEA.
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> II. THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO MAKE LACK OF REMORSE A FEATURE OF ITS PENALTY-PHASE PRESENTATION AND ARGUMENT.
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> III. THE TRIAL COURT ERRED IN RULING THAT DR. WILLIAM VICARY COULD BE IMPEACHED WITH A SPECIFIC ACT OF MISCONDUCT IN AN UNRELATED MATTER.
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> IV. THE TRIAL COURT ERRED IN ADMITTING THE CONFESSION TO SEXUAL BATTERY PURSUANT TO SECTION 92.565 WITHOUT COMPLYING WITH THE REQUIREMENTS OF THAT SECTION.
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> V. THE TRIAL COURT ERRED IN IMPROPERLY ASSESSING THE FELONY MURDER AGGRAVATOR TWICE.
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> VI. THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND FIND AND WEIGH VALID MITIGATING EVIDENCE, AND ABUSED ITS DISCRETION IN ITS BOILERPLATE TREATMENT OF WEIGHTY MITIGATING CIRCUMSTANCES.

VII. SECTION 921.141 IS UNCONSTITUTIONAL UNDER RING BECAUSE IT REQUIRES THE TRIAL JUDGE TO MAKE THE FINDINGS NECESSARY TO IMPOSE A DEATH SENTENCE.

VIII. THE ADVISORY SENTENCING RECOMMENDATION OF A FLORIDA CAPITAL JURY DOES NOT SATISFY THE SIXTH AND FOURTEENTH AMENDMENTS.

IX. BECAUSE AGGRAVATING CIRCUMSTANCES ARE ELEMENTS OF THE OFFENSE OF CAPITAL MURDER UNDER RING, FLORIDA LAW ALSO REQUIRES THAT THEY BE CHARGED IN THE INDICTMENT AND FOUND UNANIMOUSLY BY THE JURY BEYOND A REASONABLE DOUBT.

The appeal from the denial of postconviction relief is currently pending before this Court. Tanzi v. State, SC10-807.

ARGUMENT

I.

WHETHER APPELLATE COUNSEL RENDERED DEFICIENT PERFORMANCE ON DIRECT APPEAL FOR FAILING TO RAISE AN ERROR BASED UPON THE PROSECUTOR'S AND COURT'S STATEMENTS TO THE JURY DURING VOIR DIRE?

Petitioner alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. The State disagrees. Neither issue asserted by Tanzi in the instant petition was any stronger than the errors raised by appellate counsel on direct appeal. To the contrary, the claims were not meritorious and therefore do not establish either deficient performance or resulting prejudice.

A. Preliminary Statement On Applicable Legal Standards

The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the Strickland v. Washington, 466 U.S. 668 (1984), standard for claims of trial counsel ineffectiveness. Valle v. Moore, 837 So. 2d 905 (Fla. 2002). The two prong test for ineffective assistance established in Strickland requires a defendant to show deficient performance by counsel and that the deficient performance prejudiced the defense. If a claim of ineffectiveness can be disposed of on the prejudice prong, there is no need to consider the deficiency prong. Strickland, 466 U.S. at 697; Provenzano

v. State, 616 So. 2d 428, 432 (Fla. 1993). Prejudice is only established with a showing that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364 (1993).

The Supreme Court recognized that "since time beyond memory" experienced advocates "have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). The failure of appellate counsel to brief an issue which is without merit is not a deficient performance which falls measurably outside the range of professionally acceptable performance. See Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986), cert. denied, 481 U.S. 1059 (1987). Moreover, an appellate attorney will not be considered ineffective for failing to raise issues that have little or no chance of success. Engle v. Dugger, 576 So. 2d 696 (Fla. 1991). Finally, appellate counsel is "not ineffective for failing to raise issues not preserved for appeal." Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991).

B. Analysis Of Petitioner's Claim

At the outset, the State notes that appellate counsel filed a ninety-eight page brief raising nine separate allegations of error. Tanzi has not shown that any of the additional claimed

errors are stronger or more viable than the claims raised by appellate counsel on direct appeal. Nor can he show that the result of his direct appeal is unreliable or unfair based upon appellate counsel's alleged deficiencies. Consequently, he has failed to establish his appellate counsel provided ineffective assistance.

As an initial matter, collateral counsel has failed to point to a single instruction to a single juror, that under certain circumstances, the law "required" or "mandated" a death sentence. See Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise meritless issues is not ineffective assistance of appellate counsel). Collateral counsel cites to the court's instructing juror Covino (Habeas Petition at 8), that under certain circumstances, the law "states that the jury should recommend the death penalty." (SuppV-15, 110). While the court did make that statement to **prospective** juror Covino, that juror did not serve on the jury. (T. 1822-24) [Volume 27]. Consequently, the individual voir dire of prospective juror Covino cannot have had any impact upon the jury deliberations in this case.

Similarly, the only other prospective juror mentioned in Tanzi's habeas petition, prospective juror Plowden, did not serve on his jury. (T. 1822-24). Consequently, the

prosecutor's statement that "[i]f the aggravating factors outweigh the mitigating factors, the judge is going to tell you the law says you should recommend the death penalty" to juror Plowden cannot have any impact upon the jury's verdict in this case. Indeed, any such claim would be frivolous if raised on direct appeal.

Since collateral counsel has failed to show a single inappropriately instructed prospective juror actually sat on his jury, Tanzi's claim is frivolous.[1] See Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991) (appellate counsel is "not ineffective for failing to raise issues not preserved for appeal.").

Aside from issues of preservation, as to the matter of the prosecutor's comments during voir dire, the prosecutor's comments were not designed to instruct the jury on the state of the law but to initiate a discussion and responses from the prospective jurors on whether or not the jurors would be able to recommend death when the aggravating circumstances outweigh the mitigating circumstances. The prosecutor did not indicate the

[1] There was some question below during the charge conference about whether or not any of the initial group of jurors who were allegedly improperly instructed, actually sat on the jury. Defense counsel admitted he did not object to the court's instructions until the 21st juror. (T. 1663). The Respondent did find one, juror Sanchez, who was in the initial group, but the trial court's instruction to him, [without objection] was unquestionably proper. It was a "weighing process" and only if the State proves sufficient aggravating circumstances "could a recommendation be for the death penalty." (T. 45-46).

jurors "must" recommend death, but, that if the aggravating circumstances outweigh the mitigating circumstances, the jury should or would be "supposed" to recommend death.[2] The prosecutor did not state as Tanzi implies, that the law "requires" or absolutely mandated a death recommendation in those circumstances. Consequently, this case is distinguishable from Henyard v. State, 689 So. 2d 239, 249 (Fla. 1996) where the prosecutor instructed several prospective jurors during voir dire that "[i]f the evidence of the aggravators outweighs the mitigators by law your recommendation must be for death."[3] (emphasis added)

In any case, this Court has found similar allegations of error harmless where a prosecutor's or court's instructions to the jury in voir dire are inappropriate, but, not repeated and the jury is later properly instructed. See Franqui v. State, 804 So. 2d 1185, 1193 (Fla. 2001) (while the trial court's comment during voir dire that the law required jurors to

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[2] As the prosecutor explained to one juror:

> That's sort of how it goes. Then what our responsibility is going to be is to decide whether or not the aggravating circumstances, or reasons to give the death penalty, are greater, weigh more, greater weight, than the mitigating circumstances. (SuppV-16, 131).

[3] This Court nonetheless found the prosecutor's comments harmless in Henyard because they were made in voir dire and the trial court provided proper jury instructions prior to jury deliberations.

recommend a death sentence if the aggravating circumstances outweighed the mitigating circumstances misstated the law, the defendant suffered no prejudice because the trial court did not repeat the misstatement of law when providing the penalty phase instructions); accord Darling v. State, 966 So. 2d 366, 385-386 (Fla. 2007); Henyard, 689 So. 2d at 250.

As for appellate counsel's failure to raise a special instruction claim, this issue is likewise without merit. As an initial matter, it is unclear whether or not Tanzi is asserting a separate allegation of deficient performance for failing to raise an error based upon a specially requested instruction, or simply mentions it in support of his assertion that some jurors were improperly advised on whether or not the law required a death recommendation. Collateral counsel briefly mentions a special instruction in his petition, but provides no supporting argument. See Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."). Regardless of the cryptic nature of his claim, Tanzi has not established any abuse of the trial court's discretion in this case.

When trial defense counsel expressed concern that two of the jurors were present when the allegedly improper comments were made, the court stated that defense counsel would be free to make the argument presented in the special instruction to the jury, "and if anybody objects I will overrule it." (T. 1664).

Tanzi cites no authority for the proposition that a trial court abuses its discretion in failing to provide a specific mercy instruction. And, since the trial court provided the standard penalty phase instructions (T. 1802, 1805, 1813), he has provided no basis for finding the trial court abused its broad discretion in this case.[4] See Stephens v. State, 975 So. 2d 405, 421 (Fla. 2007) ("A trial court does not err in failing to provide such a special mercy instruction.") (citing Mendyk v. State, 545 So. 2d 846, 850 (Fla. 1989)); Correll v. Dugger, 558 So. 2d 422, 425 (Fla. 1990) (appellate counsel not ineffective for failing to raise mercy instruction issue where "the court gave the standard jury instructions with respect to sentencing, including the advice that the jury could consider any other aspect of the defendant's character or record and any other circumstances of the offense."). The trial court agreed to provide the standard instruction to the jury on weighing

[4] The trial court has wide discretion in determining whether or not to provide a special instruction. Absent "prejudicial error" such decisions "should not be disturbed on appeal." Card v. State, 803 So. 2d 613, 624 (Fla. 2001).

aggravating and mitigating circumstances, the instruction approved by the Florida Supreme Court. (T. 1664) [Volume 26]. See Freeman v. State, 761 So. 2d 1055 (Fla. 2000) (The standard jury instructions are presumed to be correct.)

Tanzi has demonstrated neither deficient performance nor prejudice based upon appellate counsel's failure to raise this claim on direct appeal.

II.

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AN UNPRESERVED HEARSAY CLAIM ON DIRECT APPEAL?

Petitioner next asserts that appellate counsel failed to challenge hearsay admitted during the penalty phase below. Tanzi reluctantly recognizes that such a claim was not preserved for review (Habeas Petition at 19), but, nonetheless, asserts the claim should have been raised on direct appeal. The Respondent disagrees.

Appellate counsel cannot be considered ineffective for failing to raise unpreserved issues on direct appeal. See Peede v. State, 955 So. 2d 480, 499 (Fla. 2007). As this Court stated in Rodriguez v. State, 919 So. 2d 1252, 1282 (Fla. 2005): "[A]n exception is made where appellate counsel fails to raise a claim which, although not preserved at trial, represents fundamental

error. See Kilgore v. State, 688 So.2d 895, 898 (Fla.1997). A fundamental error is error that 'reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.' State v. Delva, 575 So.2d 643, 644-45 (Fla.1991)(quoting Brown v. State, 124 So.2d 481 (Fla.1960))." Under the circumstances of this case, the hearsay claim cannot amount to fundamental error.

First, on the matter of hearsay, without an objection at trial, the State or trial court had no opportunity to consider the matter.[5] See Schoenwetter v. State, 931 So. 2d 857, 871 (Fla.), cert. denied, 549 U.S. 1035 (2006); Williams v. State, 967 So. 2d 735, 748 (Fla. 2007) (a specific objection is necessary to preserve a Crawford challenge). [Crawford v. Washington, 541 U.S. 36 (2004)] On a bare record, fundamental error cannot be found in this case. This is a heavily aggravated case, with six aggravators, including HAC and CCP. Moreover, the only challenge to the aggravation made by Tanzi below, and, in any potential hearsay issue, was the evidence supporting a second sexual battery, which supported a single aggravator [during the course of a felony]. But, since this

[5] Obviously, trial defense counsel may not want to lodge such an objection and have to possibly confront yet another state forensic witness.

aggravator was supported by an unchallenged kidnapping and an unchallenged oral sexual battery based upon Tanzi's confession, the hearsay issue cannot cast doubt upon Tanzi's death sentence. In the sentencing order, the court stated: "The Defendant committed two sexual batteries on the victim during the course of her four-hour ordeal which the court is counting as one aggravator even though the two sexual batteries could have been separated in time and place." (R. 1809). Consequently, it cannot be said Tanzi suffered any prejudice as the result of the complained of testimony which tended to establish the second sexual battery. The same aggravators are balanced against the same mitigation in a case where the aggravators greatly outweigh the mitigation presented. The fact the trial court also credited evidence showing a second sexual battery, even if in error, [which the State does not admit here], could not possibly alter the outcome of this heavily aggravated case. See Brown v. State, 473 So. 2d 1260 (Fla. 1985) (where multiple felonies are stated as supporting the "during the course" aggravator, and one felony is invalidated, the validity of the aggravator is not undermined where there are other felonies to support it).

Tanzi in this case cannot show any prejudicial error in admission of the challenged testimony below, much less an error so prejudicial that it served to vitiate the entire penalty

phase. Consequently, Tanzi's claim must be denied. Appellate counsel was clearly not deficient in failing to raise this unpreserved issue.

CONCLUSION

In conclusion, Respondent respectfully requests that this Honorable Court DENY the instant petition for writ of habeas corpus.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF LAW has been furnished by U.S. mail to Paul Kalil, Assistant CCRC-South, Office of the Capital Collateral Regional Counsel, 101 N.E. 3rd Ave., Suite 400, Ft. Lauderdale, Florida 33301-1162, on this 18th day of April, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(*l*).

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COUNSEL FOR RESPONDENT