In the Supreme Court of Florida

CASE NO. SC11-2053

JOHN CALVIN TAYLOR, II *Petitioner*

v.

KENNETH S. TUCKER, *Respondent*.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Taylor, through registry counsel, filed a petition for writ of habeas corpus in this Court raising one claim of ineffective assistance of appellate counsel. For the reasons discussed below, the petition should be denied.

FACTS AND PROCEDURAL HISTORY

The facts of the case and its procedural history are recited in the accompanying answer brief. Taylor was represented in the direct appeal by Assistant Public Defender Nada Carey.*Taylor v. State*, 855 So.2d 1 (Fla. 2003). Assistant Public Defender Carey was admitted to the Florida Bar in 1987.[1] According to this Court's docketing, she is counsel of record in twenty-two (22) capital cases. Her representation of capital defendants in this Court started in 1995. And she had represented twelve other capital defendants previously at the time of the direct appeal in this case in 1999.

In the direct appeal, Assistant Public Defender Carey raised nine issues in her initial brief including six guilt phase issues and three penalty phase issues. *Taylor*, 855 So.2d 1, 14, n.11 (listing issues in footnote). Assistant Public Defender Carey originally filed a 129 page initial brief which included 62 pages of facts which was stricken by this Court as too long. She then filed a 96 page amended initial brief with 35 pages of facts. She filed a 21 page reply brief addressing four of the original nine issues raised (issues I, II, IV and VI). She also filed a supplemental brief raising an *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) claim.

After this Court affirmed, APD Carey filed a motion for rehearing

[1] This information is available on the Florida Bar's website which this Court can take judicial notice of because the Florida Bar is supervised by this Court.

regarding the suppression issue arguing that Taylor's consent to the search of the cushion; the search of his car; and going down to the station was involuntary because his detention was illegal. She cited the United States Supreme Court's then recently released opinion in *Kaupp v. Texas*, 538 U.S. 626, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003), as support. The State responded to the motion for rehearing. She also filed a petition for writ of certiorari in the United States Supreme Court raising the Fourth Amendment search issue based on *Kaupp*.

Standard of review

The standard of review of an ineffectiveness claim is *de novo. Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999); *Holladay v. Haley*, 209 F.3d 1243, 1247 (11th Cir. 2000). This standard of review applies to claims of ineffective assistance of appellate counsel as well as claims of ineffective assistance of trial counsel.

ISSUE I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A VIOLATION OF *CAMPBELL V. STATE*, 571 So.2d 415, 419 (Fla. 1990)?

Taylor asserts that his appellate counsel, Assistant Public Defender Nada Carey, was ineffective for not raising a claim that the trial court's written sentencing order in this case does not contain a detailed, exhaustive discussion of the weighing process.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

This Court has explained that a habeas petition is the proper vehicle to assert ineffective assistance of appellate counsel. Claims of ineffective assistance of appellate counsel are appropriately presented in a petition for writ of habeas corpus. *Chavez v. State*, 12 So.3d 199, 213 (Fla. 2009); *Davis v. State*, 928 So.2d 1089, 1126 (Fla. 2005)(citing *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000) and *Thompson v. State*, 759 So.2d 650, 660 (Fla. 2000)). "Claims of ineffective assistance of appellate counsel are properly raised in a petition for writ of habeas corpus addressed to the appellate court that heard the direct appeal." *Connor v. State*, 979 So.2d 852, 868-869 (Fla. 2007).

In *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000), this Court explained that the standard for proving ineffective assistance of appellate counsel mirrors the standard for proving ineffective assistance of trial counsel established in *Strickland v. Washington*,

466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To grant habeas relief on the basis of ineffectiveness of appellate counsel, this Court must resolve the two issues: 1) whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance, and 2) whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Douglas v. State*, - So.3d -, -, 2012 WL 16745, 15 (Fla. 2012)(quoting *Bradley v. State*, 33 So.3d 664, 684 (Fla. 2010)).

In the appellate context, the prejudice prong of *Strickland* requires a showing that the appellate court would have afforded relief on appeal. Petitioner must show that he would have won a reversal from this Court had the issue been raised. This Court has explained that to show prejudice petitioner must show that the appellate process was compromised to such a degree as to undermine confidence in the correctness of the result. *Rutherford*, 774 So.2d at 643.

Appellate counsel's performance will not be deficient if the legal issue that appellate counsel failed to raise was meritless. *Wyatt v. State*, 71 So.3d 86, 112-113 (Fla. 2011)(explaining that the failure of appellate counsel to raise a meritless issue will not render appellate counsel's performance ineffective citing *Walls v. State*, 926 So.2d 1156, 1175–76 (Fla. 2006)(quoting *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000)); *Spencer v. State*, 842 So.2d

52, 74 (Fla. 2003)(observing that appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success.) Appellate counsel has a "professional duty to winnow out weaker arguments in order to concentrate on key issues" even in capital cases. *Thompson v. State*, 759 So.2d 650, 656, n.5 (Fla. 2000)(citing *Cave v. State*, 476 So.2d 180, 183 n. 1 (Fla. 1985)). Furthermore, appellate counsel is not ineffective for failing to raise claims that were not preserved in the trial court, in the absence of fundamental error. *Lowe v. State*, 2 So.3d 21, 45 (Fla. 2008)(explaining that appellate counsel cannot be deemed ineffective for failing to present a claim that was not preserved citing *Davis v. State*, 928 So.2d 1089, 1132-1133 (Fla. 2005)); *Morton v. State*, 995 So.2d 233, 247 (Fla. 2008)(noting that appellate counsel is not ineffective for failing to raise an issue that was not preserved at trial unless the claim rises to the level of fundamental error citing *Rodriguez v. State*, 919 So.2d 1252, 1281-1282 (Fla. 2005)).

Merits

There was no deficient performance. First, it is hard to conceive of more exacting appellate advocacy than that which occurred in this case. The initial brief filed in this case was 129 pages, 62 of which were facts, that raised nine issues. Appellate counsel then filed a supplemental brief because *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), was pending in the United

States Supreme Court. Appellate counsel then filed a motion for rehearing based on a new Supreme Court case.

Moreover, appellate counsel did raise a *Campbell* error claim. Assistant Public Defender Nada Carey argued in point 8 of her initial brief that the trial court improperly rejected five non-statutory mitigating circumstances. *Taylor v. State*, 855 So.2d 1, 29-31 (Fla. 2003). APD Carey cited both *Campbell v. State*, 571 So.2d 415, 419 (Fla. 1990), and *Ferrell v. State*, 653 So.2d 367, 371 (Fla. 1995), in support of that claim. (Amend IB in DA at 89). A plurality of this Court found "that the trial court's decision rejecting these five nonstatutory mitigating factors was not an abuse of discretion." *Taylor*, 855 So.2d at 31. Appellate counsel did raise a *Campbell* error claim. There was no deficient performance.

Nor is there any prejudice. If the issue had been raised, this Court would have denied relief just as this Court rejected the *Campbell* error claim that was raised. Any attack based on *Campbell v. State*, 571 So.2d 415, 419 (Fla. 1990), *receded from on other grounds by Trease v. State,* 768 So.2d 1050, 1055 (Fla. 2000), would have been rejected. Habeas counsel basically asserts that the trial court weighing process was not detailed enough. There is no requirement, however, that a trial court's sentencing order contain detailed, exhaustive findings regarding the weighing process. The focus of this Court's *Campbell* jurisprudence is the trial court's treatment of mitigating circumstances, not weighing.

Taylor's reliance *Hudson v. State*, 708 So.2d 256, 259 (Fla. 1998), is misplaced. Pet. at 14. In *Hudson*, this Court explained that a trial court's sentencing order must truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty. This Court stated: "We do not use the word 'process' lightly. If the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence." This Court further explained that a trial court may not treat mitigating evidence "as an academic exercise." *Hudson*, 708 So.2d at 259 (quoting Walker, 707 So.2d at 319). See also *Reese v. State*, 728 So.2d 727 (Fla. 1999)(remanding for a new sentencing order based on *Campbell* error).[2] *Hudson* did not hold that a trial court must enter detailed, exhaustive findings regarding the weighing process; the focus of the *Hudson* Court was the trial court's treatment of mitigating circumstances, not weighing.

There was no ineffectiveness on the part of appellate counsel for not raising a *Campbell* violation based on the weighing process. See *Owen v. Crosby*, 854 So.2d 182, 193 (Fla. 2003)(rejecting a claim of ineffective assistance of counsel for failing to raise a *Campbell* violation, finding the argument "meritless" and finding no prejudice). This claim of ineffective assistance of appellate

[2] Assistant Public Defender Nada Carey was counsel of record in *Reese*.

counsel should be denied. Accordingly, the habeas petition should be denied.

CONCLUSION

The State respectfully requests that this Honorable Court deny the habeas petition.

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
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 has been furnished by U.S. Mail to Frank Tassone, Tassone & Dreicer, 1833 Atlantic Blvd. Jacksonville, FL 32207 this 24th day of January, 2012.

Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12 point font.

Charmaine M. Millsaps
Attorney for the State of Florida