IN THE SUPREME COURT OF FLORIDA

GARY RICHARD WHITTON

Petitioner,

v. CASE NO. SC12-2522

MICHAEL D. CREWS
Secretary, Fla. Dept of Corrections

Respondent.

RESPONSE TO PETITION FOR HABEAS CORPUS AND MEMORANDUM OF LAW

COMES NOW, Respondent, MICHAEL D. CREWS, by and through the undersigned Assistant Attorney General, and hereby responds to Whitton's Petition for Writ of Habeas Corpus. The State of Florida respectfully submits the petition should be denied.

PRELIMINARY STATEMENT

Petitioner, Gary Richard Whitton, raises two claims in this petition for writ of habeas corpus. References to petitioner will be to "Whitton" or "Petitioner," and references to respondent will be to "the State" or "Respondent." The record from Whitton's direct appeal will be referenced as "TR" followed by the appropriate volume and page number. Citations to Whitton's pending post-conviction appeal will be referred to as "PCR" followed by the appropriate case number.

References to the Initial Brief in Whitton's post-conviction appeal will be referred to as "IB" followed by the appropriate page number. References to Whitton's instant habeas petition will be referred to as "Pet." followed by the appropriate page number.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

The statement of the facts and procedural history of this case will be set forth in the State's answer brief on appeal from the denial of Whitton's motion for post-conviction relief. Whitton filed the instant petition on December 5, 2012, contemporaneously with his initial brief on appeal from the denial of his motion for post-conviction relief. This is the State's response to Whitton's state habeas petition.

PRELIMINARY DISCUSSION OF APPLICABLE LAW

Claims of ineffective assistance of appellate counsel are appropriately raised in a petition for writ of habeas corpus. *See* Freeman v. State, 761 So.2d 1055, 1069 (Fla.2000). Like claims of ineffective assistance of trial counsel, the standard of review for claims of ineffective assistance of appellate counsel is *de novo*. Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (standard of review applicable to claims of ineffective assistance of counsel raised in a habeas petition mirrors the

Strickland v. Washington, 466 U.S. 668 (1984), standard for trial counsel ineffectiveness).

When evaluating an ineffective assistance of appellate counsel claim raised in a petition for writ of habeas corpus, this Court must determine: (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 performance deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Johnson v. Moore, 837 So.2d 343 (Fla. 2002). The petitioner bears the burden of alleging a specific and serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). It is not enough to show an omission or act by counsel constituted error. Rather, the "deficiency must concern an issue which is error affecting the outcome, not simply harmless error." Knight v. State, 394 So.2d 997, 1001 (Fla. 1981).

Absent fundamental error, a petitioner cannot prevail on a claim of ineffective assistance of appellate counsel when the issue was not preserved for appeal. *See* Medina v. Dugger, 586 So.2d 317 (Fla. 1991). Fundamental error is supposed to be

rare. Fundamental error is error that reaches 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. Brooks v. State, 762 So.2d 879, 899 (Fla. 2000).

Appellate counsel is not constitutionally required to raise a meritless claim. This Court has held that an appellate counsel is not ineffective for failing to raise a claim that would have been rejected on appeal. Downs v. State, 740 So.2d 506, 517 n. 18. *Accord,* Freeman v. State, 761 So.2d 1055, 1069-1070 (Fla. 2000) (appellate counsel not ineffective for failing to raise non-meritorious issues); Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000)(same).

This Court has also ruled that appellate counsel cannot be deemed ineffective if the habeas claim, or a variant thereof, was, in fact, "raised on direct appeal." Atkins v. Dugger, supra, 541 So.2d at 1166-67. So long as appellate counsel raised the issue on appeal, mere quibbling with, or criticism of, the manner in which appellate counsel raised such issue on appeal is insufficient to state a habeas-cognizable issue. Thompson v. State, 759 So.2d 650, 657, n. 6 (Fla. 2000).

RESPONSE TO WHITTON'S CLAIMS

CLAIM I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO FOLLOW UP ON AN ALLEGATION THAT A STATE WITNESS HAD RECANTED

In this claim, Whitton alleges that appellate counsel was ineffective for not doing enough when she learned, by way of two letters from Billy Key, that a State witness, Kenneth Ray McCollough, wanted to recant his trial testimony. At trial, McCollough testified that Whitton confessed he killed Mr. Mauldin. Key claimed in his first letter that McCollough admitted perjuring himself at the behest of Assistant State Attorney Clayton Adkinson. According to Key, McCollough wanted to sign a sworn statement admitting to these facts.

Whitton concedes that appellate counsel advised trial counsel of this "development." (Pet. at page 3). Whittton avers that, after appellate counsel notified trial counsel of Key's letter, Key wrote appellate counsel another letter saying that trial counsel had been by the jail trying to talk to McCollough. According to Key, McCollough refused to talk to trial counsel and would only talk to appellate counsel and an investigator. (Pet. at page 4).

Whitton claims that appellate counsel was ineffective for failing to go to interview McCollough and to get an affidavit attesting to his perjury at trial. Whitton alleges the prejudice stems from the fact that McCollough died without executing an affidavit. (Pet at page 3-6).

This claim should be denied for one reason. This is not a claim of ineffective assistance of appellate counsel. Unsurprisingly, Whitton cites not to a single case in support of the proposition that it is.

Whitton's claim has nothing to do with appellate counsel's review of the record, composition of the brief, argument before this Court at oral argument, duty to advise the client when a decision is issued and file a motion for rehearing, or advise the client when the mandate issues. Instead, Whitton's theory is that appellate counsel was required to act as *de facto* collateral counsel and investigate the alleged newly discovered evidence. (Pet. at page 3-4). The State disagrees. Freeman v. State, 761 So.2d 1055, 1069 (Fla.2000) (noting that in order to grant habeas relief on the basis of ineffectiveness of appellate counsel, this Court must examine, inter alia, whether counsel's performance compromised the ***appellate process*** as to undermine confidence in the correctness of the result).

The underlying basis for this claim is claim outside the record on appeal and as such outside appellate counsel's responsibility. Rather, this claim is a claim of newly discovered evidence.[1] Such a claim is properly brought in a motion for post-conviction relief where evidence may be taken and findings of credibility may be made. [2] Indeed, this Court has observed that recanted testimony is a discrete form of newly discovered evidence which a collateral court must determine first, if the recantation is true, and second, if witness' testimony will change to such an extent as to render probable a different verdict. Armstrong v. State, 642 So.2d 730, 735 (Fla.1994).

Appellate counsel did all that she was required to do with Key's letters; advise trial counsel of Key's letters and allow trial counsel to follow up or to place Key's letters in the file so that the matter may be litigated in post-conviction proceedings. This claim should be denied.

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[1] To the extent that Key's letter implies that an ASA intentionally put on false testimony, a Giglio claim was litigated in Whitton's post-conviction proceedings.

[2] Not all claims of newly discovered evidence require an evidentiary hearing but all must be brought in a motion for post-conviction relief (unless, perhaps discovered in the narrow window after trial where newly discovered evidence might form the basis for a timely motion for a new trial).

CLAIM II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM ON APPEAL AS TO ALLEGED UNAUTHORIZED COMMUNICTIONS BETWEEN THE JURORS, BAILIFF, AND THE TRIAL COURT

In this claim, Whitton avers that appellate counsel was ineffective because, after Whitton's conviction and sentence to death became final, it was discovered that the trial court had received, and responded to, several "secret" notes from the jury. Whitton notes these communications were sealed by the trial court and not made part of the appellate record. Whitton alleges appellate counsel was ineffective for failing to ensure these notes were made part of the record on appeal. Whitton avers that, if she had, the unauthorized communications would have been grounds for reversal on appeal. The State disagrees.

During post-conviction proceedings, the collateral court judge, at Whitton's request, unsealed five notes to and from the jury. These notes can be found in the post-conviction record at Volume IX, pages 1767-1770).

The first note was apparently presented in the penalty phase. The note appears to be a note from the jurors in which they expressed an objection to a "lady in the audience" who had a tape recorder recording the proceedings. The jury informed

the court it objected to the taping because it gave them an uneasy feeling. (PCR Vol. IX 1767). Contrary to Whitton's suggestion that this was a "secret note," the record reflects that Judge Melvin, in open court, with counsel and the defendant present, advised the jury she had "dealt with the situation that you brought to my attention." She also announced that she would "file this note with the clerk." (TR Vol. XI 2152). Whitton made no objection to the trial court's "dealing" with the situation. (TR Vol. XI 2152).

The second note, third and fourth note also appear to have been written during the penalty phase deliberations. However, nothing in the appellate record reflects how these notes came to the court's attention or what the court did in response to the juror's notes. Indeed, the record is completely silent on these notes. (TR Vol. XI 2253-2262).

The second note requests a list (copy) of Judge Melvin's instructions. The third note requests the court to instruct the jury as to what would be the soonest Whitton could get out of prison considering gain time, being a model prisoner, etc. The note asked specifically whether 25 years would be the soonest Whitton could get out of prison. (PCR Vol. IX 1768). The fourth note appears to be Judge Melvin's response to the third

note. In this note Judge Melvin simply instructs the jury to refer to the jury instructions. (PCR Vol. IX 1769).

This fifth note is the only note that came during the guilt phase of Whitton's capital trial. The fifth note is composed of two parts. The first part is written by Judge Melvin. The second part is written by a juror, apparently by Ms. Keyser, an alternate juror. (PCR Vol. IX 1770).

Like the first note, the last note reflects that trial counsel was present during this "secret" communication. (TR Vol. VIII 1674). Indeed, during the discussion of the juror's note, trial counsel, Mr. Bishop, noted that "we are all here in the courtroom." (TR Vol. VIII 1674).

During trial, the trial court advised the parties that she just got a note that reads, "[s]ome of the jurors want to ask a question. May they write it down?" The trial court told the parties the note was handed to her by the bailiff. (TR Vol. VIII 1674). The judge suggested that she needed to bring the jury in to tell them they need to write their questions down.

Trial counsel for Mr. Whitton suggested the trial court simply send the message through Mr. Campbell (the bailiff). The trial court agreed. (TR Vol. VIII 1674-1675).

The judge read the note, in open court, that she wrote to the jury. It read: "I understand you may have a question. If so,

please write it down and Tim (Mr. Campbell) will hand it to me." (TR Vol. VIII 1675). When the note came back, the trial judge read it into the record. It read: "Mrs. Keyser's feet cannot touch the floor in the jury box which is causing her feet to swell. Could I get a box to prop up my feet." (TR Vol. VIII 1675). The judge directed that Ms. Keyser get something to prop up her feet. (TR Vol. VIII 1675). Trial counsel made no objection to providing the juror, who was actually an alternate juror who never deliberated, a box for her feet. (TR Vol. VIII 1675).

Whitton's claim may be denied, first, because, at least as to the three notes about which there was no mention in the appellate record, and perhaps even the "lady in the audience" note. this claim is appropriately brought in a motion for post-conviction relief, not in a habeas petition alleging ineffective assistance of appellate counsel. This is so because the record does not establish the notes were handled without the knowledge and presence of counsel and the defendant. Indeed, this would still be the case if appellate counsel would have taken action to "unseal" the notes. As Whitton's claim centers on his assertion these notes were "secret" and "ex parte" as opposed to an assertion the answers given were error, appellate counsel could not have established error from a silent record.

Whitton must have thought this claim was appropriately brought in a motion for post-conviction relief too because he did just that. [3] Whitton also asked for, and was granted, an evidentiary hearing to explore whether the notes were answered without the knowledge and input of the parties.

After the evidentiary hearing, the collateral court denied the claim on the merits, finding no ex parte or improper communications and Whitton has appealed it. Claims that require evidentiary development are not properly brought in a habeas petition which necessarily must be decided from the record and applicable case law.

Presuming this claim is appropriately brought in a habeas petition, Whitton is not entitled to relief for two reasons. First, trial counsel made no objection to the trial court's response to any of the juror's notes. Accordingly, the claim is not preserved for appeal. Murray v. State, 3 So.3d 1108, 1117 (Fla. 2009). Doorbal v. State, 983 So.2d 464, 492 (Fla.2008)("For an issue to be preserved for appeal, it must be presented to the lower court, and the specific legal argument or ground to be argued on appeal must be part of that

[3] Even if the record did not specifically refute Whitton's allegation that the juror's request for the box was handled without the knowledge and presence of counsel, there would be no

presentation."). Appellate counsel is not ineffective for failing to present an issue that is not preserved for appeal by contemporaneous objection. Id.

Second, Whitton cannot show fundamental error in the way the trial judge responded to the notes. Three of the notes can be quickly disposed of in a fundamental error analysis.

First, the request for the box. Whitton cannot even make a colorable claim the trial court's response to a juror's request for a box for her feet was error, let alone error that reaches 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. Brooks v. State, 762 So.2d 879, 899 (Fla. 2000).

Second, the note from the jury about a lady recording the proceedings from the audience. Nothing about the juror's note associated the crime, the defendant or the victim, with the "lady" making a tape recording. Accordingly, nothing in the anonymous lady's actions threatened to inject impermissible factors into the jury's deliberations. Indeed, without any objection from trial counsel, the judge informed the jury she had taken care of it and the jury voiced no more concerns.

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error because a request for a box for one's feet is entirely administrative.

Absent any connection with the crime, the defendant, or the victim, Whitton cannot show the court's response to the jury's concern about the "lady" audio taping the proceedings was error that reached down into the validity of the trial itself to the extent that a death sentence would not have been imposed. *Compare* Woods v. Dugger, 923 F.2d 1454, 1459 (11th Cir.1991).

Third, the note requesting a copy of the judge's instructions. The record does not establish whether the jury's request for a copy of the instructions was granted. It appears, however, that it was. In another note, the trial court instructed the jury to refer to its instructions. (PCR Vol. IX 1769).

In any event, at the time of Whitton's trial in 1992, the decision to grant or deny a request for written instructions lay within the trial court's discretion. *Florida Rule 3.410, Florida Rules of Criminal Procedure (1995)*. Additionally, the trial judge correctly instructed the jury in accord with the standard instructions and Whitton does not claim otherwise. (TR Vol. XI 2245-2253). As the jury was properly instructed, Whitton cannot show any error, let alone fundamental error, in the way the trial court disposed of the jury's request for a copy of the jury instructions. See Rogers v. State, 511 So.2d 526 (Fla. 1987).

As to the third and fourth notes, where the jury asked for an instruction on whether the defendant can get out before serving 25 years as a result of gain time, and the trial judge responded by telling the jury to refer to the instructions, Whitton cannot show error, let alone fundamental error. In Waterhouse v. State, 596 So.2d 1008 (Fla. 1992) the jury asked "if [the defendant's] sentenced to life, when would he be eligible for parole?" [4] The jury also asked whether time served counts for parole time. The trial judge told the jury to rely on the evidence and its instructions. This Court found no error in telling the jury to rely on its instructions, especially since it had been previously, and properly, instructed that Waterhouse would not be eligible for parole for 25 years. Waterhouse v. State, 596 So.2d at 1015. *See also* Bates v. State, 750 So.2d 6, 11 (Fla.1999) (approving the trial court's decision to refer the jury to the written jury instructions in response to the question "are we limited to the two recommendations of life with minimum 25 years or death penalty ... [o]r can we recommend life without a possibility of parole").

[4] The jury also asked whether the defendant would be returned to New York to finish his sentence there after he was paroled. Waterhouse had previously been convicted in NY of 2d degree murder and was on lifetime parole there. Obviously, conviction in Florida for 1st degree murder would have violated his parole.

In this case, Whitton's jury was properly instructed that the only two possible sentences were death and life without the possibility of parole for 25 years. (TR Vol. XI 2245-2253). Because the trial judge instructed the jury to refer to instructions that properly advised the jury that a life sentence was without the possibility of parole for 25 years, Whitton cannot show any error, let alone fundamental error, in the way the judge responded to the juror's question.

Because any alleged error was not preserved for appeal and because any alleged error does not rise to the level of fundamental error, appellate counsel was not ineffective for failing to ensure these notes were made part of the appellate record or in failing to challenge the judge's actions on appeal. Medina v. Dugger, 586 So.2d 317 (Fla. 1991). *See also* Lebron v. State, 799 So.2d 997, 1017 n.2 (Fla. 2001)(noting that an error in the trial court's response to a request covered by Rule 3.140 must be preserved); Mendoza v. State, 700 So.2d 670 (Fla. 1997)(trial court's error in responding to juror inquiry outside Rule 3.140 subject to harmless error analysis).

CONCLUSION

Whitton has failed to demonstrate appellate counsel was ineffective. The Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

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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 email and U.S. Mail to Mark Olive, Esq., Law Offices of Mark Olive, 320 W. Jefferson Street, Tallahassee, Florida 32302 this 25th day of March 2013. Email address: meolive@aol.com

Meredith Charbula
Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

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

Meredith Charbula