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IN THE SUPREME COURT OF FLORIDA

CASE No. SC13-2245

LOWER TRIBUNAL No. 16-2005-CF-010263D

TIFFANY ANN COLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida

Honorable Judge Michael R. Weatherby
Judge of the Circuit Court, Division CR-E

REPLY BRIEF OF APPELLANT

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December 2, 2014

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REPLY ARGUMENT - ISSUE I

TRIAL COUNSEL FAILED TO MOVE TO SUPPRESS STATEMENTS AND EVIDENCE DERIVED FROM UNLAWFUL ARREST AND SEARCH.

The trial court did not set an evidentiary hearing for this post conviction claim (2 PCR 274, 5 PCR 858).

The State argues (Answer p. 51-52), “The record reflects that all defendants filed similar motions to suppress evidence obtained from the motel rooms in Charleston, South Carolina, where Cole and her confederates were captured and arrested, as evidenced by the motion hearing October 12, 2007, where pending motions were under review (TRIII 333-441). Cole's motions were denied as were those motions filed by Jackson and Wade.”

The October 12, 2007, hearing dealt with several pending motions that needed attention for defendants Cole and Wade before individual jury selections set for the following Monday, October 15, 2007. Attorneys for Cole and Wade merely copied defendant Jackson’s earlier suppression motion which had been summarily denied before his trial. (2 SuppTR 240)

Jackson’s suppression transcript shows no witnesses being called, only argument. Jackson had filed a last minute motion to suppress evidence from his motel room safe and jail recorded phone calls. The record is silent as to whether counsel for either Cole or Wade were in attendance (2 SuppTR 243-269).

Jackson's counsel explained, "Mr. Jackson opens the door, immediately secured. They secure Tiffany Cole in the room. They look in. At that point **I will concede** they don't search but they look in the room and they see personal possessions everywhere. They detain them till they get a warrant, so at that point they know there is a safe in the hotel." (2 SuppTR 246)

> THE COURT: **This argument is based on an improper search, not on an illegal arrest**.
>
> MR. STEINBERG: **Correct.**
>
> THE COURT: **So for purposes of our argument they were properly detained.**
>
> MR. STEINBERG: **You know, I would concede that.**
>
> THE COURT: Okay.
>
> MR. STEINBERG: Yes, Your Honor. They are detained while a search warrant is applied for, written up, typed up, signed off on by a judge and received. The warrant is then executed on the hotel rooms where a number of items were taken into effect and the warrant itself specifies –it lists a number of things but makes no mention of a safe. It just says search the hotel room. Doesn't make any mention of a safe in the hotel room. (2 SuppTR 246-247)

On September 21, 2007, even though Jackson stood convicted, Mr. Till copied Jackson's failed suppression motion. The motion voiced no attempt to suppress Cole's confession or the evidence seized from her car (1 R 80-83). 26 months elapsed after Cole's arrest before Mr. Till attempted a suppression motion. There is no known tactical reason for counsel having delayed all potential challenges to hurtful evidence against Cole.

As stated in the initial brief, the search affidavit did not allege any reason to search Cole's Chevrolet other than it belonged to Cole. The search affidavit insufficiently speculated "that there **may** be evidence of the aforementioned crimes under the control of Cole or her accomplices within the locations to be searched." (1 PCR 185)

Although the trial court concluded that Mr. Till's non-attempt to suppress Ms. Cole's confession was well within the reasonable range of assistance provided for in Strickland, Mr. Till did not indicate when he reached the strategic decision during the two-year period before trial. This conclusion should not follow as to suppressing harmful evidence found in Ms. Cole's car when there was no probable cause to search it.

When Mr. Till was asked if he "intentionally didn't want to suppress" Cole's statements, Mr. Till simply acquiesced: "It was there. I could live with it." (5 PCR 868)

The State contends that Cole's detention and eventual search was proper under State v. Hendrix, 855 So.2d 662 (Fla. 1st DCA 2003). However, Hendrix is distinguishable in its facts where Hendrix was a visitor upon the premises when the search warrant was served.

In all other respects, Cole will continue to stand on the argument and authority set forth in the initial brief.

ISSUE II

TRIAL COUNSEL WAS DEFICIENT IN FAILING TO IDENTIFY, CALL, OR PREPARE WITNESSES IN THE PENALTY PHASE.

AND

ISSUE III

COUNSEL WAS DEFICIENT IN MITIGATION AND BACKGROUND INVESTIGATION AND CONSEQUENTIAL FAILURE TO DEVELOP A DURESS AND MITIGATION DEFENSE THROUGH WITNESSES AND MENTAL HEALTH EXPERT.

Defendant states throughout her post-evidentiary hearing memorandum that trial counsel was deficient because *they failed* to discover numerous pieces of mitigation information and present it to the jury. Defendant fails to realize, however, that this burden is not solely on trial counsel; Strickland dictates that trial counsel may base their actions, quite properly, on information *supplied by Defendant.* Thus, the Court cannot find fault in trial counsel's alleged omissions because Defendant withheld the information. To do so, would invite every defendant to withhold evidence and successfully attack their counsel's actions through a postconviction motion.

Assuming for the sake of argument that counsel was deficient, Defendant's claim still fails because she does not meet the prejudice prong of Strickland. The potential mitigation evidence presented at the evidentiary hearing is not strong enough to shake the Court's confidence in the outcome of Defendant's penalty phase. The jury found Defendant guilty of the murder, kidnapping, and robbery of Carol and Reggie Sumner. The Court found numerous aggravators, including one of the weightiest aggravators: that the murder was cold, calculated, and premeditated. The jury recommended the death penalty by a 9-3 vote for the death of Carol Sumner, and by a 9-3 vote for the death of Reggie Sumner. Evidence that Defendant engaged in prostitution to support her drug habit or that she wet the bed would not have been *nearly* enough to counterbalance the powerful aggravating factors in this case.
(3 PCR 498-499)

Thus, according to the trial court, it was Cole's fault that her trial lawyers failed to find the needed mitigation that was not included in their strategy. This would be consistent with trial counsel's strategy to overlook any attempt to suppress evidence or understand Cole or her intellect.

Cole's intellect should not have been overlooked. At the evidentiary hearing, Mr. Till explained that he had a difficult time explaining the principal theory to Cole in a lengthy attempt to convince her to enter a plea agreement (5 PCR 719-722, 851-854). Mr. Till made numerous attempts to negotiate the plea with Cole between January 2007 and May 2007 (1 PCR 166).

For whatever reason, Cole's trial counsel did not avail themselves to request Cole's school records which easily at hand. No basic mitigation inquiry here. These records should have been given to Dr. Miller to assist him in his evaluation. The records would have disclosed that Cole began to show problems as early as kindergarten, functioning at the 15th percentile at grade five, poor grades thru the ninth grade until dropping out. Cole was disciplined and suspended a number of times for bad behavior (8 PCR 1234-35).

Inexplicably, Dr. Miller reported to trial counsel that Cole had a ninth grade education, stating, "Her grades were generally good. She was not suspended or expelled." This is part of the Cole picture and strategy at penalty hearing.

Dr. Miller's report at page 5 concluded, "She is functioning in the average intellectual range per the RAIT test." (PCR Ex. 16)

Nevertheless, at the penalty hearing, Dr. Miller stated that Cole was at least of average intelligence by the Rapid Assessment Intelligence Test. Dr. Miller was concerned that something physical was disturbing Ms. Cole's processing of information and administered a test for dementia. The dementia test is basically a memory test. (14 R 1650)

When asked about an I.Q. test, Dr. Miller stated, "As I mentioned the rapid assessment intelligence test was used." "She's high average, 100 to 110." (14 R 1651) This finding is not mentioned or supported anywhere in Dr. Miller's report or elsewhere in the record.

Dr. Herkov pointed out that Dr. Miller's report placed Cole and having average intellect. However, at trial, Dr. Miller stated that Cole had an IQ of 100 to 110. Dr. Herkov explained that this would place Cole in the 90th percentile. However, Dr. Herkov administered a proper intelligence test and scored Cole's I.Q. at 81 which falls in the low-average range or 10th percentile (8 PCR 846). This rest is consistent with Cole's 15th percentile score from her fifth grade record.

An intellectual difference of 90th percentile versus 10th percentile, or I.Q. of 110 versus 81, is significant.

In addition, as argued in the initial brief, Dr. Miller made a serious error in misinterpreting Coles Global Assessment Function score as being a good score when it was a poor score that reflected a person with flat affect, lack of emotional expression, circumstantial speech and who would have difficulty in social, occupational, or school functioning (8 PGC 1252).

Neither Mr. Till, Mr. Messsore, the judge, or the jury had a proper perspective of Cole and were woefully misled and meets the prejudice prong of Strickland. A proper mitigation, as shown at post conviction, would have prevented this error.

In all other respects, Cole will continue to stand on the argument and authority set forth in the initial brief.

ISSUE IV

THE ERRORS OF TRIAL COUNSEL WHEN COUPLED WITH THE ERROR OF THE TRIAL COURT'S HEINOUS ATROCIOUS AND CRUEL INSTRUCTION CONSTITUTE SUFFICIENT CUMULATIVE ERROR AND PLACES THE JURY'S DEATH RECOMMENDATION IN DOUBT.

The Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment.

Cole was given inadequate representation throughout the trial and penalty phase. After appointment in August 2005, trial counsel did very little to conduct a proper discovery and mitigation theme. An early contested suppression hearing would have been beneficial to all even if denied. Cole had no real

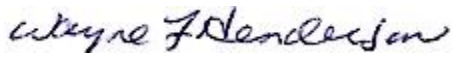
understanding of the principal theory and rejected all plea offers. Would an early proper mental evaluation have made a difference? There is no tactical reason to delay all reasonable trial preparation until after Michael Jackson was convicted.

Cole's above-stated claims were made worse by the fact that the trial court erroneously instructed the jury that the HAC aggravator applied to Ms. Cole. As such, the validity of the jury's death recommendation is now placed in doubt.

CONCLUSION

Based upon the foregoing, Ms. Cole respectfully requests this Court vacate her Judgments of Conviction and grant her a new guilt phase and a new penalty phase.

Respectfully submitted,



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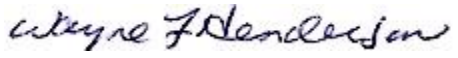
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered via email to the Office of the State Attorney, Jacksonville, Florida and to the Office of the Attorney General, Tallahassee, Florida this 2nd day of December 2014. A copy was mailed to Appellant, Tiffany Anne Cole, DOC No. J35212, Lowell Correctional Institute Annex, 11120 Gainesville Road, Ocala, FL 34482-1479.



Wayne Fetzer Henderson, Attorney

CERTIFICATE OF COMPLIANCE AS TO FONT

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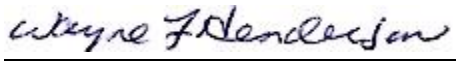

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