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IN THE SUPREME COURT OF FLORIDA

JOSEPH P. SMITH,

Appellant,

v.

Case No. SC13-04

Lower Tribunal No. 2004-CF-2129

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR SARASOTA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Joseph Smith was convicted of the kidnapping, sexual battery and murder of 11-year-old "C.B." and sentenced to death in March, 2006. The facts of the case are recited in Smith's Initial Brief as outlined by this Court on direct appeal, affirming the judgments and sentences imposed. Smith v. State, 28 So. 3d 838 (Fla. 2009). The opinion became final on June 28, 2011, when the United States Supreme Court denied Smith's petition for certiorari review. Smith v. Florida, 131 S. Ct. 3087 (2011), reh. den., 133 S. Ct. 73 (2012). Smith's Motion for Postconviction Relief, pursuant to Florida Rule of Criminal Procedure 3.851, was timely filed below on June 20, 2012 (V2/244-89).

Smith did not request an evidentiary hearing (V2/261; V3/470-73). A case management conference was held on October 29, 2012 (V3/493-520), following the filing of the State's response to Smith's motion (V2/297-307). Smith's motion was then summarily denied on December 26, 2012 (V2/335-69).

SUMMARY OF THE ARGUMENT

The court below properly found that Smith's claims, challenging the constitutionality of statutes and rules governing this case, were procedurally barred and without merit. On appeal, Smith has offered no basis to depart from the well-settled case law supporting the court's rulings or to disturb the rulings entered below. Accordingly, this Court must affirm the denial of postconviction relief.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING SMITH'S CLAIM AS TO THE CONSTITUTIONALITY OF FLORIDA'S RULES ON JUROR INTERVIEWS.

Smith first disputes the trial court's ruling to deny his claim that the Florida Bar and criminal procedural rules relating to juror interviews are unconstitutional. Specifically, Smith claims that because academics and journalists are free to interview jurors, defense attorneys cannot be precluded from the same privilege without offending the constitutional principles of due process, access to the courts, and equal protection. The court below denied this issue as procedurally barred and meritless (V2/336-37). This is a purely legal claim which was summarily denied below, and accordingly is reviewed *de novo*. Henyard v. State, 992 So. 2d 120, 125 (Fla. 2008) (postconviction motion denied solely on the pleadings presents a legal issue with *de novo* review).

This Court has repeatedly held that this claim must be raised on direct appeal, and is procedurally barred from review in postconviction proceedings. Troy v. State, 57 So. 3d 828, 841 (Fla. 2011); Reese v. State, 14 So. 3d 913, 919 (Fla. 2009); Israel v. State, 985 So. 2d 510, 522 (Fla. 2008); Rose v. State, 774 So. 2d 629, 637 n. 12 (Fla. 2000).

This Court has also affirmatively upheld the rules at issue, rejecting the substantive claim of unconstitutionality. Troy; Crain v. State, 78 So. 3d 1025, 1045 (Fla. 2011); Floyd v. State, 18 So. 3d 432, 459 (Fla. 2009); Barnhill v. State, 971 So. 2d 106, 117 (Fla. 2007). As in Crain, there is no indication that Smith ever attempted to secure juror interviews for any permissible reason in this case.

Smith has provided no basis to overturn the ruling entered below to deny this claim. He protests that this Court has not adequately explained, to his satisfaction, why other individuals not connected with a case can interview jurors, but the attorneys associated with the trial cannot contact jurors without any justification, merely to conduct "fishing expeditions." There is, however, a valid reason to treat the case attorneys differently, since the State may reasonably want to protect a juror from future harassment brought by an individual with a vested interest in overturning that juror's verdict.

As the court below properly rejected this claim, this Court must affirm the denial of postconviction relief on this issue.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING SMITH'S CLAIM THAT THE JURY WAS UNCONSTITUTIONALLY MISLED ABOUT ITS ROLE IN SENTENCING.

Smith next asserts that the jury instructions given at his trial were unconstitutional under Caldwell v. Mississippi, 472 U.S. 320 (1985), because the jury was told that its role was "advisory" when, in fact, Smith contends the jury is the sentencer in Florida. The court below denied this issue as procedurally barred and meritless (V2/337-38). This is a purely legal claim which was summarily denied below, and accordingly is reviewed *de novo*. Henyard, 992 So. 2d at 125.

Once again, this Court has rejected this same issue many times. Smith's cursory argument does not offer any supporting authority, and fails to even acknowledge this Court's well-settled precedent denying this claim. There is no merit to the suggestion that the jury functions as the sentencer in Florida and it is not error to instruct the jurors that their recommendation is advisory since, in fact, that instruction accurately reflects Florida law. See Section 921.141, Florida Statutes; Troy, 57 So. 3d at 842; Barnhill, 971 So. 2d at 117-18 (noting the standard jury instructions correctly state the law and fully advise the jury of its proper role); Dufour v. State, 905 So. 2d 42, 67 (Fla. 2005).

This Court has recognized that any claim for relief premised on Caldwell must be asserted at trial and on direct appeal; accordingly, the finding of a procedural bar below was proper. Troy, 57 So. 3d at 842; Hitchcock v. State, 991 So. 2d 337, 361 (Fla. 2008); Dufour, 905 So. 2d at 67. Moreover, this Court has rejected the assertion that counsel was ineffective for failing to litigate this issue, as it is without merit. Troy; Farina v. State, 937 So. 2d 612, 618, n. 5 (Fla. 2006); Dufour.

As the court below properly rejected this claim, this Court must affirm the denial of postconviction relief on this issue.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING SMITH'S CLAIM AS TO THE CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY STATUTE AS APPLIED.

Smith also claims that the court below should not have denied his claim as to the application of the death penalty statute in this case. Specifically, Smith claims that Florida's death penalty violates constitutional rights as construed in Ring v. Arizona, 536 U.S. 584 (2002). The court below denied this issue as procedurally barred and meritless (V2/338). This is a purely legal claim which was summarily denied below, and accordingly is reviewed *de novo*. Henyard, 992 So. 2d at 125.

Notably, Smith raised this same claim in his direct appeal. In contrast to his current argument in Issue II, Smith asserted at that time that sentencing in Florida is determined solely by the judge, in violation of Ring. This Court denied relief as follows:

In Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the United States Supreme Court invalidated sentencing schemes where the trial court was responsible for (1) the finding of an aggravating circumstance which rendered a defendant eligible for the death penalty, and (2) the ultimate decision to impose a death sentence. According to Smith, Florida constitutes a judge-sentencing state and, therefore, its sentencing scheme violates the Sixth Amendment.

Smith's claim is without merit. This Court has repeatedly held that Florida's capital sentencing scheme does not violate the United States Constitution under Ring. See, e.g., Gore v. State, 964 So.2d 1257,

1276-77 (Fla.2007); *Hannon v. State*, 941 So.2d 1109, 1147 (Fla.2006); *Jones v. State*, 845 So.2d 55, 74 (Fla.2003). Further, in *Owen v. Crosby*, 854 So.2d 182, 193 (Fla.2003), this Court rejected a *Ring* challenge where the trial court found as an aggravating circumstance that the defendant committed the murder during the commission of a burglary or sexual battery. In reaching this determination, the Court noted that this particular aggravator "involve[s] circumstances that were submitted to a jury and found to exist beyond a reasonable doubt." *Id.*

In the instant case, a jury convicted Smith of sexual battery upon a child less than twelve years of age and kidnapping. Since the jury determined beyond a reasonable doubt that Smith committed these crimes, Smith's *Ring* challenge is without merit on this additional basis. Accordingly, this claim is denied.

Smith, 28 So. 3d at 873-74.

Smith's current postconviction argument does not even acknowledge that this Court previously rejected this claim in this case, let alone explain why that rejection should be reconsidered and reversed. As this issue was previously presented and denied, the court below properly found it to be procedurally barred. See Rule of Criminal Procedure 3.851(e)(1); Marek v. State, 8 So. 3d 1123, 1129 (Fla. 2009) (rejecting reconsideration of previously litigated claim of ineffective assistance of counsel); Topps v. State, 865 So. 2d 1253, 1255 (Fla. 2004) (discussing application of *res judicata* to claims previously litigated on the merits).

Smith does acknowledge, however, that this Court has repeatedly rejected the merits of his argument in other cases.

Troy, 57 So. 3d at 843; State v. Steele, 921 So. 2d 538 (Fla. 2005). As the court below properly rejected this claim both procedurally and substantively, this Court must affirm the denial of postconviction relief on this issue.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING SMITH'S CLAIM THAT FLORIDA'S DEATH PENALTY IS UNCONSTITUTIONALLY ARBITRARY AND CAPRICIOUS, AND VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Smith also disputes the trial court's ruling to deny his claim that Florida's death penalty statute is facially unconstitutional because the imposition of a death sentence is arbitrary and capricious, and violates the prohibition against cruel and unusual punishment. The court below denied this issue as procedurally barred and meritless (V2/339). This is a purely legal claim which was summarily denied below, and accordingly is reviewed *de novo*. Henyard, 992 So. 2d at 125.

Once again this Court has previously held that this claim is procedurally barred in postconviction proceedings, and that it is without any substantive merit. Troy, 57 So. 3d at 843-44; Jones v. State, 928 So. 2d 1178, 1182-83, n. 5 (Fla. 2006); Miller v. State, 926 So. 2d 1243, 1259-60 (Fla. 2006); Elledge v. State, 911 So. 2d 57, 78-79, n. 28 (Fla. 2005).

As the court below properly rejected this claim, this Court must affirm the denial of postconviction relief on this issue.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON FLORIDA'S LETHAL INJECTION PROCEDURES.

Smith next challenges the denial of his claim disputing the constitutionality of Florida's procedures for execution by lethal injection. Specifically, Smith claims that the confidentiality provided to members of the execution team deprives capital defendants of the ability to establish that lethal injection violates the Eighth Amendment. The court below denied this issue as meritless (V2/339). This is a purely legal claim which was summarily denied below, and accordingly is reviewed *de novo*. Henyard, 992 So. 2d at 125.

Notably, Smith's appellate argument is an expanded version of the claim offered in the motion filed below. The challenge presented below did not dispute the validity of lethal injection or Florida's procedures for execution, it only attacked the facial constitutionality of Section § 945.10, Fla. Stat. Florida Statutes, requiring that the identification of execution team members remain confidential (V2/271-74). Thus, while the heading of Smith's appellate issue asserts that the court below erred by "refusing to allow" an evidentiary hearing, that suggestion is not properly before this Court. Smith's motion stated directly - twice in the presentation of this issue - that no evidentiary

hearing was required on this claim, and no evidentiary hearing was requested at the case management conference (V2/272, 274). Any argument that an evidentiary hearing should have been conducted has not been preserved for appellate review. Kokal v. State, 901 So. 2d 766, 778-780 (Fla. 2005) (finding postconviction claim to be procedurally barred where specific issue had not been presented to trial court); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Similarly, many of the allegations now offered in Smith's brief to this Court, which relies heavily on the December, 2006 execution of Angel Diaz, were never presented to the court below, and are similarly barred from consideration on appeal (V2/271-74).

At any rate, this claim is without merit. This Court has previously rejected the assertion that Section 945.10, Florida Statutes, is unconstitutional. In Troy, this Court upheld the denial of an evidentiary hearing on this claim, noting that this statute has repeatedly been upheld in constitutional challenges. Troy, 57 So. 3d at 840-41; see also Darling v. State, 45 So. 3d 444, 448 (Fla. 2010); Ventura v. State, 2 So. 3d 194, 197, n. 3 (Fla. 2009); Henyard, 992 So. 2d at 130.

As the court below properly denied this claim, this Court must affirm the denial of postconviction relief on this issue.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING SMITH'S CLAIM OF CUMULATIVE ERROR.

Smith's final claim asserts that his convictions and sentences should be reversed due to cumulative error. Smith does not identify any particular claims to accumulate, but relies entirely on the unspecified "number and types of errors" as demanding relief. The court below denied this issue as legally insufficient and meritless (V2/340). This is a purely legal claim which was summarily denied below, and accordingly is reviewed *de novo*. Henryard, 992 So. 2d at 125.

The court below properly found that this issue failed to offer any basis for relief. This Court has recognized that claims which are procedurally barred or were rejected on direct appeal cannot be considered in a postconviction claim of cumulative error. Troy, 57 So. 3d at 844; Rogers v. State, 957 So. 2d 538, 553-54 (Fla. 2007); Hannon v. State, 941 So. 2d 1109, 1148 (Fla. 2006); Philmore v. State, 937 So. 2d 578, 590 (Fla. 2006). Smith's postconviction litigation only challenges the constitutionality of the rules and statutes that govern his case. Accordingly, there was no error in the summary denial of this claim. As it was properly denied below, this Court must affirm the denial of postconviction relief on this issue.

CONCLUSION

WHEREFORE, this Court must affirm the order entered below denying Smith's motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail to Robert T. Strain, Assistant CCRC-Middle at strain@ccmr.state.fl.us [and] Craig J. Schaeffer, Assistant State Attorney at cschaeff@scgov.net this 4th day of September, 2013.

/s/ Carol M. Dittmar
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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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