IN THE SUPREME COURT OF FLORIDA

NO. 71286

FILED
SID J. WHITE
OCT 15 1987
CLERK, SUPREME COURT
By ____________
Deputy Clerk

ANTHONY BERTOLOTTI,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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Capital Collateral Representative

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I. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents issues which directly concern the judgment of this Court on appeal and hence jurisdiction lies in this Court. See, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981). In addition, Mr. Bertolotti presents, inter alia, issues of ineffective assistance of appellate counsel. Since the claim of ineffective assistance of counsel stems from acts and omissions before this Court, this Court has jurisdiction. Knight v. State, 394 So. 2d 997, 999 (Fla. 1981). While the extraordinary writ of habeas corpus may not be used as a routine vehicle for a second or substitute appeal, this and other Florida courts have consistently recognized that the writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), aff'd, 290 So. 2d 30 (Fla. 1974). The proper means of securing a belated hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powe v. State, 216 So. 2d 446, 448 (Fla. 1968). Petitioner will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the writ.

Furthermore, this Court has consistently maintained an especially vigilant control over capital cases. The Court does not hesitate to exercise its inherent jurisdiction to remedy

errors which undermine confidence in the fairness and correctness of capital proceedings before this Court. Wilson, supra. This Court must and does have the power to do justice. Fundamental error is presented, and this Court should correct the error pursuant to its inherent habeas corpus jurisdiction.

II. FACTS UPON WHICH PETITIONER RELIES

CLAIM I

APPELLATE COUNSEL WAS INEFFECTIVE FOR ARGUING THAT HER CLIENT WAS GUILTY OF RAPE, AS WELL AS MURDER, WHEN THE TRIAL COURT FOUND THAT THE STATE HAD NOT PROVEN RAPE BEYOND A REASONABLE DOUBT.

> There is strong evidence that the capital crime was committed while the Defendant was also engaged in a burglary and rape, but these factors were not proven beyond every reasonable doubt.

(R. 2351, Trial Judge's Sentencing Order).

> BRYNN NEWTON: Well, what I am saying is the evidence showed the judge, I believe he found, he was convinced in any event that there had been a rape, although he did not make that one of the aggravating factors.
>
> I think it is apparant the evidence supports a finding that she was raped. What I am pointing out is he denied it and he also, in the other situation, downplayed any sexual motivation.
>
> THE COURT: What's your point? That he is a liar?

(Mr. Bertolotti's attorney, arguing before the Florida Supreme Court).

In Florida, the usual form of indictment for first-degree murder under Section 783.04, Florida Statutes (1977) is to "charg[e] murder...committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So.2d 618, 624 (Fla. 2d DCA 1968). See also Buford v. Wainwright, 428 So.2d

1389, 1391 (Fla. 1983); State v. Pinder, 375 So.2d 836, 839 (Fla. 1979); Knight v. State, 338 So.2d 201, 204 (Fla. 1976). Such an indictment by long-standing Florida practice, charges felony-murder as well as premeditated murder, despite the apparent absence of felony-murder language in the body of the indictment. Larry v. State, 104 So.2d 352 (Fla. 1958); Southworth v. State, 125 So. 345, 346 (Fla. 1929)(An indictment "charging [only] murder to have been committed with a premeditated design to effect the death" of the victim "charge[s] murder in the first degree, when committed in the perpetration of robbery."); Hargrett v. State, 255 So.2d 298, 300 (Fla. 3d DCA 1971). The absence of felony murder language is of no moment: when a defendant is charged with a killing through premeditated design, he or she is also charged with felony-murder, and the jury is free to return a verdict of first-degree murder on either theory. Hill v. State, 133 So.2d 68 (Fla. 1961); Larry v. State, 104 So.2d 352 (Fla. 1958); Blake v. State, 156 So.2d 571 (Fla. 1963).

The state argued felony-murder, and premeditated murder:

> To take someone's property at the point of a knife is called robbery in this State, and a homicide committed in the course of a robbery is murder in the first degree.
>
> We've got a little nice name for rape now, we call it sexual battery, but a homicide committed in the course of a rape is murder in the first degree in this State, and a murder committed from a premeditated design to affect death is murder in the first degree in this state.

(R. 1108).

The jury was then instructed regarding robbery, rape, and burglary first-degree felony-murder. The jury returned a general verdict of guilty, allowed to base their decision on one of four different theories (premeditation, robbery, rape, burglary).

The judge at sentencing determined that the state had failed to prove beyond a reasonable doubt either burglary or rape (R. 2352). However, for some inexplicable reason, appellate counsel

chose to argue before this Court to the contrary, against her client's best interest:

BRYNN NEWTON:	His violent acts have all been against women, they have all been very strange situations where he tends to deny any sexual motivation. The psychologist said, "no, he's not around women in prison." The prosecutor's objective was to show that Mr. Bertolotti does not fit in well to society. But he does fit in well to prison. Prison is all that's needed. Life in prison is what's being contemplated by our argument. And I think it's all that's necessary to punish him.
THE COURT:	But in this particular instance, he was convicted of a prior aggravating, I mean, a prior crime of violence --
BRYNN NEWTON:	(interrupting) Two prior crimes of violence.
THE COURT:	(interrupting) which would be two, well, that were similar in nature. Am I correct?
BRYNN NEWTON:	The first person was someone he knew, a girlfriend. And I don't -- all the testimony that came in about those details did not indicate what the motivation was, except she didn't want to see him again. So I think in all three cases there were some sexual undercurrent, or even motivation. The second one, uh, where he posed --
THE COURT:	But it didn't involve murder?
BRYNN NEWTON:	No.
THE COURT:	But there was crime of violence and there was sexual, there was an, as you say, an undercurrent of some sexual violence involved. Am I correct?
BRYNN NEWTON:	I think it was significant that he -- in the second case, he confessed to all three. He, uh, well in all three circumstances, he confessed fully, except in the second case he very oddly downplayed any sexual motivation. He

said he flirted with the woman whose house he came into as a -- posing as a meter man. And he denied all together any sexual assault in this case. Uh, I can't offer any explanation for the significance of that, because the record shows there was no presentence investigation and there was no psychological evaluation of Mr. Bertolotti.

THE COURT: If there was not a sexual motivation, and the woman had recently been involved in sex; who was the other participant?

BRYNN NEWTON: Well, <u>what I am saying is the evidence showed the judge, I believe he found, he was convinced in any event that there had been a rape, although he did not make that one of the aggravating factors</u>.

<u>I think it is apparent the evidence supports a finding that she was raped. What I am pointing out is he denied it and he also, in the other situation, downplayed any sexual motivation</u>.

THE COURT: <u>What's your point? That he is a liar</u>?

BRYNN NEWTON: I think he's denying -- he's, uh, in a clinical sense I -- I just said I can't offer the clinical significance of that because I don't have a report evaluating him. I think there's -- even in general terms -- there's apparently a problem. He was apparently out of control and in a frenzy in this situation. It is not a coldblooded designed murder. <u>There was something wrong -- something went wrong, but that's all I can offer</u>.

<u>Thank you</u>.

(Mr. Bertolotti's attorney, arguing before the Florida Supreme Court).

There was no tactic or strategy for appellate counsel urging that Mr. Bertolotti was a rapist.

CLAIM II

APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT ARGUING ON APPEAL THAT THE VERDICT WAS VOID BECAUSE 1) THERE IS NO WAY OF KNOWING WHETHER THE VERDICT WAS BASED ON A CONSTITUTIONALLY PERMISSIBLE GROUND, AND 2) THERE IS NO WAY OF DETERMINING WHETHER THERE WAS JUROR UNANIMITY, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Bertolotti was prosecuted for permeditated and for felony-murder. The jury was instructed that rape and burglary felony-murder would support a conviction. A general verdict was returned with no specification of the theory. The trial judge found that rape and burglary had not been proven beyond a reasonable doubt. If either was the basis for the guilty verdict, then the verdict is based upon insufficient evidence and violates the fourteenth amendment. Appellate counsel would testify that she did not know about this argument, and that she had not heard of Stromberg v. California, 283 U.S. 359 (1931).

The jurors could have been unanimous for guilt, but not for the theory of guilt. For example, six jurors may have believed proof of premeditated murder was sufficient, while six other did not, but the six others may have believed that rape was proven. Under these circumstances, the requirement of juror unanimity is not followed, and Mr. Bertolotti's rights under the fourteenth amendment were violated.

Appellate counsel unreasonable failed to raise either issue on appeal. Had she, there is a reasonable probability that the result would have been different.

III. NATURE OF RELIEF SOUGHT

Petitioner requests that this Court stay his scheduled execution, so as to allow full and complete consideration of his petition for writ of habeas corpus. In the alternative, Petitioner requests that a new appeal be granted, a stay of execution be entered, and a briefing schedule be ordered.

Finally, Petitioner requests that his sentence be vacated and that this matter be remanded to the trial court for resentencing before a jury.

IV. LEGAL BASIS FOR RELIEF

This Court is especially vigilant in its policing of counsel's performance on appeal. When this Court learns of unreasonable attorney omissions, it does not hesitate to act:

> [T]he role of an advocate in appellate procedures should not be denigrated. Counsel for the state asserted at oral argument on this petition that any deficiency of appellate counsel was cured by our own independent review of the record. She went on to argue that our disapproval of two of the aggravating factors and the eloquent dissents of two justices proved that all meritorious issues had been considered by this Court. It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of the advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged derivations from due process.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985).

The appellate-level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, __ U.S. ___, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate on behalf of his client," Anders v. California, 386 U.S. 738 (1967), who must receive "expert professional . . . assistance . . . [which is] necessary in a legal system governed by complex rules and procedure. . . ." Lucey, 105 S. Ct. 830 n.6. An indigent, as well as "the rich man, who appeals as of right, [must] enjoy[] the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf. . . ." Douglas v.

California, 372 U.S. 353, 358 (1965) (equal protection right to counsel on appeal).

The process due appellant is not simply an appeal with representation by "a person who happens to be a lawyer. . . ." Lucey, 105 S. Ct. at 835 (quoting Strickland v. Washington, 104 S. Ct. 2052 (1984)). The attorney must act as a "champion on appeal," Douglas, 372 U.S. at 356, not "amicus curiae." Anders, 386 U.S. at 744. Regardless of what appellate counsel may have accomplished competently or effectively, a single error by counsel may be sufficient for relief to be granted under the right to effective assistance of appellate counsel guaranteed by the sixth, eighth, and fourteenth amendment. Strickland.

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Appellate counsel informed this Court that Mr. Bertolotti raped in this case, and that he had a sexual problem. The proof did not demonstrate that Mr. Bertolotti was guilty of rape. Appellate counsel's obligation is to present Mr. Bertolotti's case in the light most favorable to him, as a zealous advocate. Particularly in a capital case, it is unfathomable that appellate counsel would tell this Court that her client was a rapist liar, as well as a convicted murderer. This is per se ineffective, and requires a new appeal.

CLAIM II

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The Supreme Court in Stromberg v. California, 283 U.S. 359 (1931), held as a matter of due process that a verdict which might be based on an unconstitutional ground cannot stand, even if there are alternative theories to support the verdict. The principle of Stromberg has been consistently reaffirmed by the United States Supreme Court. Leary v. United States, 395 U.S. 6 (1969); Thomas v. Collins, 323 U.S. 516, 528=29 (1945); Terminiello v. Chicago, 337 U.S. 1, 5 (1949); Yates v. United States, 354 U.S. 298, 311-12 (1957); Street v. New York, 394 U.S. 475, 585-88 (1969); Bacgellar v. Maryland, 397 U.S. 564, 570-71 (1970). See also Zant v. Stephens, 462 U.S. 862, 77 L.Ed. 2d 235, 103 S.Ct. 2733 (1983). The Stromberg rule is that when the jury is instructed on alternative theories, "it is impossible to say under which cclause of the statute the conviction is obtained." Id. at 368 (emphasis added). Thus Stromberg teaches that the reviewing courts are not to look at whether there is sufficient evidence to support a jury verdict on a legal ground where one of the grounds charged is unconstitutional.

There is no equivocation in the Stromberg holding. Under Stromberg, the appropriate analysis is not whether there was sufficient evidence of premeditation but whether under the jury instructions the jury was permitted to convict for an unconstitutional and/or nonexistent charge. A conviction in this case based on rape or burglary felony-murder would violate due process of law -- the judicial finding is that neither theory was proven beyond a reasonable doubt. If the jury's verdict is so based, the fourteenth amendment is violated, see Jackson v.

Virginia, 443 U.S. 307 (1979), and the guilty verdict is invalid under Stromberg.

Appellate counsel did not know this, and unreasonably so. The error is plainly prejudicial. Further, counsel unreasonably failed to raise the claim that juror unanimity cannot be guaranteed under the facts of the case.

CONCLUSION

Petitioner respectfully requests that this Court enter a stay of his execution scheduled for Monday, November 16, 1987, and grant the writ so as to allow a new direct appeal. In the alternative, Petitioner requests that his conviction and sentence of death be vacated. If fact resolution is necessary for the decision of this Court, Petitioner requests that a magistrate be appointed to take evidence.

Respectfully submitted,

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By: ______________________
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by (U.S. Mail)(Hand Delivery) to Robert Martell, Assistant Attorney General, Beck's Building, Fourth Floor, 125 North Ridgewood, Daytona Beach, Florida 32014, this 16 day of October, 1987.

Attorney