

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,174

THE STATE OF FLORIDA,

Appellant,

-vs-

BERNARD BOLENDER,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

ANSWER BRIEF OF APPELLEE

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INTRODUCTION

The appellant will be referred to as the prosecution and the appellee as the defendant. The symbol "R." represents the record on appeal. The symbol "S.T." represents the supplemental transcript of the evidentiary hearing on the appellant's motion for post conviction relief, which was filed with the appellant's brief. All emphasis has been added.

STATEMENT OF THE CASE

The statement of the case in the prosecution's brief is accurate and acceptable to the defendant.

STATEMENT OF THE FACTS

The statement of facts contained in the prosecutor's brief requires further elucidation. The testimony presented by the defendant at the evidentiary hearing of his motion to vacate the death sentences was as follows:

Beatrice Bolender, the defendant's mother, testified that the defendant was one of her three children. The defendant's father was an alcoholic from the time the defendant was a child. When the defendant was nine years old, his father deserted his family and was never heard from again. The defendant was very upset but continued on in school. (S.T. 9). He was a very good student and became the state wrestling champion while in high school. His picture is still hanging in the hall of fame at West Babylon High School. The defendant was given an athletic scholarship to attend Iowa State. The defendant turned the scholarship down and left school to help support his family. He drove a school bus and did clamming. The defendant was a very good son. (S.T. 11). He served as an altar boy and still goes to church. She has never known him to be violent. He objected to anyone cursing in front of her. He was like a father to his two sisters. (S.T. 12). He got married and had two children to whom he was a very good father.

During the defendant's trial, Mrs. Bolender was in court every day. She told his trial lawyer about his background and she asked him to let her testify. (S.T. 13). She was never given a chance to say anything. (S.T. 14).

Denise Crane testified that the defendant is her older brother. He was an excellent student and was offered a wrestling scholarship. He turned it down so he could support the family. (S.T. 24). The defendant was like a father to her. He would listen to her problems and advise her. He was a wonderful father to his two children. After he married, he continued to help support her and her mother and sister. (S.T. 26). She was present during the entire trial of the defendant. She asked his attorney several times to let her testify. (S.T. 26). She was never called as a witness. (S.T. 27).

The prosecutor presented the following testimony:

G.P. Della Ferra testified that he was the defendant's attorney during the trial of this cause. The case originally fell in Judge Durant's division but was transferred to Judge Fuller. "The scouting report around the courthouse was that Judge Fuller would send an individual to the electric chair while Judge Durant had his reservations about that". (S.T. 33). His argument to the jury at the sentencing phase was that the defendant should not receive the death penalty because the state made a deal with the equally culpable co-defendant in exchange for a life sentence. (S.T. 34). The jury recommended life imprisonment by a 12-0 vote. (S.T. 35). He thought that presenting mitigating circumstances to Judge Fuller would not have "mattered that much." He felt that testimony of the defendant's mother and sister would not have meant a "hill of beans to Judge Fuller." (S.T. 36).

On cross, he testified that this was the first first degree murder case he had defended. He was aware that the defendant's mother and sister were available to testify at all times. He knew that mitigating circumstances are not limited to those delineated in the statute. He was also aware that the defendant's mother and sister would testify that the defendant was a good husband, father and person. (S.T. 42).

POINT INVOLVED ON APPEAL

WHETHER THE LOWER TRIBUNAL WAS CORRECT IN
VACATING THE DEATH SENTENCES BASED ON INEFFEC-
TIVENESS OF DEFENSE COUNSEL AT THE SENTENCING
PHASE OF THE TRIAL?

SUMMARY OF ARGUMENT

The trial court's findings of fact concerning ineffectiveness of trial counsel at the sentencing phase and the prejudicial effect thereof are presumed to be correct and should not be disturbed on appeal.

The vacating of the death sentence by the lower tribunal is supported by several decisions of the United States Supreme Court and this Court. The failure of defendant's trial counsel to present any mitigating evidence before sentencing when such evidence was readily available was a serious deficiency which resulted in the most grievous prejudice of all - the imposition of death sentences in spite of a unanimous jury recommendation of life imprisonment.

ARGUMENT

THE LOWER TRIBUNAL WAS CORRECT IN VACATING THE DEATH SENTENCES BASED ON INEFFECTIVENESS OF DEFENSE COUNSEL AT THE SENTENCING PHASE OF THE TRIAL.

After conducting the evidentiary hearing on the motion to vacate the death sentences, the trial court made factual findings that the defendant had ineffective assistance of counsel at the sentencing phase of his trial. (R. 22, 23-24), and that such ineffectiveness affected the ultimate sentence. (R. 33, 39). Such findings were based on substantial evidence and this Court has said that where a post conviction court's findings of fact on ineffective assistance of counsel are based on substantial evidence, such findings will not be disturbed on appeal. Stewart v. State, 481 So.2d 1210 (Fla. 1986).

It is also the defendant's contention that the lower tribunal's findings and ultimate ruling are supported by case law emanating from this Court and the United States Supreme Court.

The focus of the defendant's claim of ineffective assistance of counsel was trial counsel's failure to adequately investigate, prepare and present testimonial evidence relating to various, legitimate mitigating circumstances that were present in the defendant's case and which, if presented to the jury at the sentencing hearing and to the trial court, would have dictated a sentence of life in prison rather than the sentences of death.

The United States Supreme Court has repeatedly held that the Constitution requires stricter adherence to procedural safeguards in a capital case than in other cases.

"The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding differences in the need for reliability in the determination that death is the appropriate punishment in a specific case."

Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed. 2d 944 (1976).

The performance of defense counsel is a crucial component of the system of protections designed to ensure that capital punishment is administered with some degree of rationality. "Reliability" in the imposition of the death sentence can be approximated only if the sentencer is fully informed of "all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). The job of amassing that information and presenting it in an organized and persuasive manner to the sentencer is entrusted principally to the defendant's lawyer. (See, Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L. Rev. 299, 303 (1983)). The importance to the process of counsel's efforts combined with the severity and irrevocability of the sanction at stake, require that the standards for determining what constitutes "effective assistance" be applied especially stringently in capital sentencing proceedings.

In the case at bar, trial counsel failed to call the defendant's mother and sister as witnesses. As previously outlined in

this brief, the mother testified at the evidentiary hearing that the defendant was only nine years old when his alcoholic father abandoned him, his mother and two sisters; that nevertheless, the defendant remained in school and earned athletic honors in high school; that the defendant gave up an athletic scholarship to Iowa State to help support his mother and two sisters; that he was a wonderful son and like a father to his sisters. Trial counsel also failed to call the defendant's sister as a witness. Her testimony corroborated the mother's testimony and both the mother and sister testified that the defendant is not a man of violence. Such testimony was clearly relevant as mitigating factors. Thompson v. State, 456 So.2d 444 (Fla. 1984).

The United States Supreme Court has addressed the issue of the value of presenting character and background circumstances in the sentencing phase of a capital trial. In Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Court stated:

"The fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

Counsel's failure to present evidence of mitigating factors to the jury and the court was even noticed by this Court in its opinion affirming the defendant's conviction and sentence of death. In Bolender v. State, 422 So.2d 833, 838 (Fla. 1982), this Court addressed the imposition of the death penalty and stated:

"Bolender presented no testimony showing any mitigating circumstance, statutory or nonstatutory. In the absence of any mitigating circumstance disapproval of two aggravating factors does not require reversal of the death sentence."

The United States Supreme Court defined the Sixth Amendment's requirement of effective assistance of counsel in Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Strickland, the Court held that in adjudicating a claim of ineffectiveness of counsel, a court should keep in mind that the principles the Court had set down for ineffective assistance of counsel claim did not establish mechanical rules. The Court stated:

"Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the Court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results."

In the case at bar, counsel's failure to investigate, prepare and present the mitigating factors in the defendant's case to the jury and trial court amounts to a breakdown in our adversarial process and the end result is the unreliability of the outcome of the sentencing phase of the trial. Strickland, Jurek, supra. The state's contention that these mitigating factors were presented to the trial court in a presentence investigation report in another case is not substantiated by the record.

In the recent case of Smith v. State, 457 So.2d 130 (Fla. 1984), this Court held that a claimant like the defendant here

". . . must establish that the deficiency was such that there is a reasonable probability that the result of the proceeding would have been different. The United States Supreme Court explained that this second element of the necessary showing - prejudice - was shown by a failure of the adversarial testing process sufficient to undermine confidence in the outcome.'

That the result of the defendant's sentence in the case at bar would have been different if the trial attorney had presented testimony of the mother and sister of the defendant is conclusively shown by the following statement of the trial judge:

"I have reviewed the aggravating circumstances in this case and find sufficient of them to warrant a consideration as to whether or not there are any, and I, for the life of me, cannot find a single mitigating circumstance on Mr. Bolender's behalf that would cause me to but otherwise overrule that decision, the recommendation made by the jury in this case.

I do impose the sentence of death."

(P. 1154 of trial transcript).

In Holmes v. State, 429 So.2d 297 (Fla. 1983) we find the following, pertinent statements:

"The second category of arguments is that defense counsel's representation throughout the sentencing proceedings was substantially deficient. Specific acts which appellant points to in claiming that counsel was ineffective are: the waiver of the right to an advisory sentencing jury, the failure to contest or negate the existence of aggravating circumstances, and the failure to present available expert evidence of appellant's mental and emotional condition in support of mitigating circumstances.

We find defense counsel's representation during the proceedings on sentencing to have been substantially deficient and measurably below the standard for competent counsel. Instead of concentrating on the particular mitigating

aspects of the case, defense counsel made a general argument against capital punishment and expressed the hope that the judge had 'mellowed' since the last time he had sentenced an offender to death. Furthermore we find that under the circumstances the deficiency was so substantial as to have probably affected the outcome of the proceedings on the question of sentencing. Since the response of the state in the proceeding below and on appeal has not shown beyond a reasonable doubt that Holmes was not prejudiced by the ineffectiveness of the legal counsel he received, we find that Holmes is entitled to relief on his motion to vacate the sentence of death."

Finally in Tedder v. State, 322 So.2d 908 (Fla. 1975) this Court held that:

"In order to sustain a sentence of death following a jury recommendation of life the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

In the case at bar, twelve reasonable people, without hearing the mitigating testimony at issue, unanimously recommended mercy. The trial court overrode that recommendation because of the dearth of mitigating factors. Ergo, the failure of trial counsel to bring forth the mitigating testimony was ineffective assistance of counsel that grievously prejudiced the defendant.

CONCLUSION

Based on the cases and authorities cited herein, the appellee respectfully requests this honorable Court to affirm the judgment of the lower court.

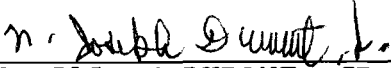
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee was delivered by mail to the Office of the Attorney General, Randi Klayman Lazarus, Assistant, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 3rd day of June, 1986.



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