IN THE SUPREME COURT OF FLORIDA

DONN DUNCAN,

Petitioner,

v.

James v. Crosby, Jr., ETC., ET AL.

Respondent.

CASE NO. SC03-145

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Respondent, James v. Crosby, Jr., Secretary, Florida Department of Corrections, will be referenced in this brief as Respondent. Petitioner, Donn Duncan, the defendant in the trial court, will be referenced in this brief as Petitioner or Duncan.

The trial record consists of ten consecutively paginated volumes, which will be referenced by the letter "R," followed by any appropriate page number. "Pet." will designate Petitioner's petition, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

PROCEDURAL HISTORY

Respondent would make the following addition to the procedural history. This Court recounted the facts of the case as follows:

> On the morning of December 29, 1990, Donn A. Duncan murdered his fiancee, Deborah Bauer. At the time of the murder, Duncan was living with Deborah Bauer, Deborah's daughter, Carrieanne Bauer, and her mother, Antoinette Blakeley. During the evening hours of December 28, 1990, Deborah left the house apparently to go drinking. Duncan left a short time later. When Duncan returned home around 8:30 p.m., he told Antoinette that Deborah would not be home until later because she had gone off with a guy who was going to buy her beer because Duncan had refused to do so. Duncan also told Antoinette to ask Deborah to sleep on the couch because he did not want to argue with her and that he would be leaving

in the morning. Duncan then went into the bedroom, where he remained until the next morning.

When Deborah returned around 10:30 p.m., her mother told her not to go into the bedroom because Duncan did not want to be bothered. A short time later Deborah went into the bedroom to get some cigarettes but left the room after a couple of minutes. Neither Antoinette nor Carrieanne heard any arguing or fighting while Deborah was in the room. Deborah slept in the living room with her mother and daughter, neither of whom was aware of any further contact between Duncan and Deborah during the night.

The next morning, Deborah went outside to smoke a cigarette. While Deborah was on the front porch, Duncan got up. Antoinette told him "there is the door," indicating that he should leave. After he and Antoinette exchanged words, Duncan put on a jacket and walked out on the porch where Deborah was sitting, smoking a cigarette. Duncan stood behind Deborah for a few seconds and then stabbed her multiple times with a kitchen knife he had hidden in his jacket. When Carrieanne responded to her mother's screams, Duncan approached Carrieanne with the knife and asked, "You want it too?" Believing Duncan would stab her too, Carrieanne ran and hid in the closet.

When Antoinette asked a neighbor who had witnessed the attack to call 911 because her daughter had been stabbed, Duncan said, "Yeah, I did it on purpose. I'll sit here and wait for the cops." Duncan, who had thrown the knife on the ground, then waited until police arrived. Upon their arrival, Duncan told police, "I stabbed her." After being advised of his rights, Duncan told police that he and the victim had been arguing and that he remembered going outside and stabbing her twice. In a signed statement, Duncan wrote:

I walked out the door with the knife and stabbed Debbie as she was sitting on the stoop. I think I stabbed her twice. I saw her go off with two guys last night she came home about 1:00 a.m. and I guess I went nuts.

Deborah Bauer died two hours after the attack. The cause of death was a stab wound to the right chest. According to the medical examiner, the victim also had suffered two life threatening wounds

to the back and three defensive wounds, one to each arm and one to her leg.

Duncan was charged with and convicted of the first-degree murder of Deborah Bauer and aggravated assault on Carrieanne Bauer. He was sentenced to three and one-half years' imprisonment on the aggravated assault. In accordance with the jury's twelve-to-zero recommendation of death, the trial judge sentenced Duncan to death for the first-degree murder.

Duncan v. State, 619 So.2d 279, 280-81 (Fla. 1993).

ARGUMENT

Jurisdiction

This Court has jurisdiction pursuant to Article V, section 3(b)(9) of the Florida Constitution.

CLAIM I

WHETHER DUNCAN'S APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES THAT WARRANT REVERSAL OF THE CONVICTIONS AND SENTENCES?

Standard of Review

This Court's habeas corpus standard of review for ineffective assistance of appellate counsel mirrors the Strickland standard for trial counsel ineffectiveness. See Rutherford v. Moore, 774 So.2d 637, 643 (Fla.2000). This Court said in Rutherford:

> [T]his Court's ability to grant habeas relief on the basis of appellate counsel's ineffectiveness is limited to those situations where the petitioner establishes first, that appellate counsel's performance was deficient because "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 second, that the petitioner was prejudiced because appellate counsel's deficiency "compromised the appellate

process to such a degree as to undermine confidence in the correctness of the result."

Id. at 643 (quoting Thompson v. State, 759 So.2d 650, 660 (Fla.2000)). Further, "Counsel cannot ordinarily be considered ineffective under this standard for failing to raise issues that are procedurally barred because they were not properly raised during the trial court proceedings." Lawrence v. State, 27 Fla. L. Weekly S877 (Fla. Oct. 17, 2002). "Moreover, appellate counsel cannot be deemed ineffective for failing to raise non-meritorious claims on appeal." Id.

CLAIM I(2)

In Duncan's subsection 2[1], he claims that appellate counsel's failure to raise a clear Nixon error was ineffective assistance of counsel. (Pet., 7). Respondent respectfully disagrees.

A close reading of Duncan's quotes from the record and from the cases he relies upon, shows that any Nixon claim would have been without merit. In Nixon, counsel conceded that "the State has proved every element of the crimes charged...." (Pet., 10)(quoting Nixon v. State, 572 So.2d 1336 (Fla. 1991). In McNeal, the Eleventh Circuit Court of Appeals distinguished McNeal's claims from those in Wiley v. Sowders, 647 F.2d 642 (6th Cir.), cert. denied, 454 U.S. 1091 (1981), wherein counsel had "repeatedly stated that his

[1]Duncan's subsection 1 merely contains an introduction.

clients were guilty of the offenses charged, that the state had proven their guilt....” (Pet., 12). From the trial record, Duncan quotes his counsel’s statement that the State has “not proven first degree murder, because they have not proven it was premeditated.” (Pet., 9)(quoting the trial record at p. 794). Counsel may have misspoken once and referenced first degree instead of second degree, but a review of the entire argument[2] shows that the defense’s position was that the State had not proven Duncan guilty of the charged offense of first degree premeditated murder. (Pet., 8; R, 761-74, 789-795).

Here, as in Jones v. State, 2003 WL 297074 (Fla. Feb. 13, 2003), Duncan’s counsel conceded guilt to second degree murder as a trial strategy intended to save Duncan’s life. Also, unlike in the cases cited by Duncan, in this case there were eyewitnesses to the murder and a written confession to the murder by Duncan. Thus, in this case, as in Jones, Duncan’s argument cannot succeed because it would have required counsel to present arguments with no credibility and contrary to the facts to satisfy his theory of representation. Id. This Court has declined to follow such a path, and has previously determined that “‘[t]o be effectual, trial counsel should be able to do this without express

[2]Trial counsel closed his opening argument by stating he was sure the jury would return the correct verdict, “and that is he is not guilty of first degree murder.” (R, 516).

approval of his client and without risk of being branded as being professionally ineffective because others may different judgments or less experience.'" Id. (quoting Atwater v. State, 788 So.2d 223, 230 (Fla. 2001)[3]). Therefore, Duncan cannot show entitlement to relief on the instant claim, because appellate counsel would not have been able to show that this trial strategy was unreasonable nor would appellate counsel have been able to show that there was an alternate strategy with a chance of success.

CLAIM I(3)

In Duncan's subsection 3, he claims that appellate counsel's failure to raise the reversible error caused by the introduction of improper evidence was ineffective assistance of counsel. (Pet., 15). Respondent respectfully disagrees.

Initially, although Duncan complains that Officer Nazarchuck's testimony amounted to double hearsay and improper anticipatory rebuttal, that claim was not preserved for review on appeal as he only objected on the grounds that the testimony would be "repetitive;" and, the trial court ruled "[i]t would not be appropriate to sustain an objection based on that." (Pet., 16-18). See Spann v. State, 28 Fla. L. Weekly S293, S295 (Fla. Apr. 3, 2003)("To be preserved for appeal, 'the specific legal ground upon which a claim is based must be raised at trial and a claim different than that

[3]Quoting McNeal v. State, 409 So.2d 528, 529 (Fla. 5th DCA 1982)

will not be heard on appeal.'" (quoting Rodriguez v. State, 609 So.2d 493, 499)). Absent a showing of fundamental error[4], appellate counsel could not have shown error in this ruling based on any argument other than the one raised by trial counsel. Lawrence v. State, 27 Fla. L. Weekly S877 (Fla. Oct. 17, 2002).

In addition to the procedural bar, this claim is refuted by the record. Duncan claims, based on this Court's ultimate legal conclusion that the record was devoid of evidence supporting the challenged statutory mental mitigating circumstance, that he "presented absolutely no evidence of that mitigator." (Pet., 20). However, the record reflects that Sarah Martin testified that Duncan had told her about his drinking problem. (R, 932). The record also reflects Una Liebig, Duncan's sister, testified about Duncan's abuse of drugs and alcohol, and how its effect made Duncan "like a Jeckyl and Hyde." (R, 955-56). Further, during closing argument, trial counsel referenced this testimony, and the testimony of the victim's mother and daughter that Duncan had been drinking before the murder, in support of his argument that the jury could find either the statutory, or non-statutory, mitigator that Donn was unable "to conform his conduct to the requirements of the laws." (R, 145-48).

[4]Duncan doe not allege that the admission of this "improper evidence" rose to the level of fundamental error.

Duncan is apparently relying on the argument "if the evidence was insufficient to establish the statutory mitigator, then there was no evidence." However, the record reflects that Duncan did present evidence of alcohol and drug abuse in support of the defense argument that Duncan was incapable of conforming his conduct to the requirements of the law. That this argument was ultimately unsuccessful doe not mean it was not made or that evidence was not presented to support it. In this case, unlike in the cases relied upon by Duncan[5], there was no representation by Duncan, before the State presented the contested evidence, that he would not rely on that mitigating circumstance. Therefore, this claim must fail as it is attempting to establish ineffective assistance of appellate counsel on an argument that was not raised below and because it relies upon factual assertions refuted by the record.

CLAIM I(4)

In Duncan's subsection 4, he claims that appellate counsel was ineffective for failing to raise a due process claim based on the "cumulative spectacle of a witness reenacting the crime with a dummy." (Pet., 15). Respondent respectfully disagrees.

> Demonstrative exhibits to aid the jury's understanding may be utilized when relevant to the issues in the case, but only if the exhibits

[5]Maggard v. State, 399 So.2d 973 (Fla. 1981); Fitzpatrick v. State, 490 So.2d 938 (Fla. 1986).

> constitute an accurate and reasonable reproduction of the object involved. See Wade v. State, 204 So.2d 235 (Fla. 2d DCA 1967); Alston v. Shiver, 105 So.2d 785 (Fla.1958). The determination as to whether to allow the use of a demonstrative exhibit is a matter within the trial court's discretion. See generally, First Federal Savings & Loan v. Wylie, 46 So.2d 396 (Fla.1950).

Brown v. State, 550 So.2d 527, 529 (Fla. 1989).

Duncan relies on "Brown,[6]" and Taylor v. State, 640 So.2d 1127 (Fla. 1994), to argue that the trial court abused its discretion by permitting the demonstration. However, in Brown, as the record did "not establish any alleged inaccuracy of th[e] replication sufficient to demonstrate error," the decision to allow the use of the demonstrative exhibits was held to be within the trial court's discretion. And, in Taylor, there was only a finding of an abuse of discretion because the demonstration had "little or no bearing on the question for the jury, *i.e.*, the issue of appellant's sanity at the time of the offense." Id. at 1134.

Although the witness's demonstration would have, of course, duplicated his own testimony as he was demonstrating that testimony, it was not cumulative of the testimony of the other eyewitnesses. Both of the other eyewitnesses viewed the stabbing from inside the house and from behind Duncan and the victim, and could not see the victim attempting to fend off Duncan's attack. (R, 536, 588-90). Here, the witness simply

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[6]Although Duncan relies on "Brown," Brown v. State, 550 So.2d 527, 529 (Fla. 1989), his table of authorities does not contain the citation.

demonstrated his testimony, and there is no claim that the demonstration was irrelevant or inaccurate. Therefore, on this record, no abuse of discretion can be shown. Brown v. State, 550 So.2d 527, 529 (Fla. 1989).

CLAIM I(5)

In Duncan's subsection 5, he claims that he was prejudiced by appellate counsel's failure to raise the above arguments on direct appeal. (Pet., 24). Respondent respectfully disagrees for the reasons argued in claims I (2)-(4).

CLAIM II

WHETHER DUNCAN CAN USE THE INSTANT HABEAS PETITION TO CHALLENGE THE CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY STATUTE UNDER APPRENDI/RING?

Duncan argues that the applicability of Ring to the Florida death penalty statute is plain and that he should be granted relief. Respondent respectfully disagrees.

Initially, Respondent would note that Duncan's reliance on Ring is misplaced, because Ring has no application to cases not on direct review.

> Decided in June 2002, Ring, and its holding that a jury, not a judge, must make any factual findings which increase a sentence from imprisonment to death, is not implicated in this case. The Supreme Court did not, and has not, expressly made the ruling in Ring retroactive. See, e.g., Ring, 122 S.Ct. at 2449-50 (O'Connor, J., dissenting) (noting that current state death row inmates will not be able to invoke the principles of Ring and citing Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)). Absent an express pronouncement on retroactivity from the Supreme Court, the rule from Ring is not

> retroactive. See Tyler v. Cain, 533 U.S. 656, 663, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001) (holding that "a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive") (quoting 28 U.S.C. S 2244(b)(2)(A)).

Moore v. Kinney, 320 F.3d 767, 771 n3 (3rd Cir. 2003).

Moreover, the Ring decision is not retroactively applicable under Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Under Witt, Ring is not retroactively applicable unless it is a decision of fundamental significance, which so drastically alters the underpinnings of Duncan's death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52, 53 (Fla. 2001), *cert. denied,* 122 S.Ct. 2626 (2002). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). The First District Court of Appeal recently conducted this analysis and concluded that:

> (1) the Apprendi ruling does not operate to prevent any individual miscarriages of justice, (2) the courts have long-enjoyed the freedom to find sentence-enhancing factors beyond a preponderance of the evidence, and (3) retroactive application of the rule would result in an administrative and judicial maelstrom of postconviction litigation, we hold that the decision announced in Apprendi is not of sufficient magnitude to be fundamentally significant, and thus, does not warrant retroactive status.

Hughes v. State, 826 So.2d 1070, 1074-75 (Fla. 1st DCA 2002) (certifying the question "Does the ruling announced in

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), apply retroactively?"); see also Figarola v. State, 2003 WL 1239911 (Mar. 19, 2003).

Next, Respondent would note that Ring, an extension of the Supreme Court's holding in Apprendi v. New Jersey, 530 U.S. 466 (1999), to death penalty cases, is not implicated in Florida, because the maximum penalty for a capital felony in Florida is death. See e.g., Porter v. Moore, 27 Fla. L. Weekly S606 (Fla. June 20, 2002)(noting that this Court has repeatedly held that the maximum penalty under the statute is death).

Finally, Respondent would note that Ring, should it ever be applied retroactively, has no application to the facts of this case. Duncan's death sentence was based in part on his previous conviction for a felony involving the use or threat of violence. Duncan, 619 So.2d at 281. Further, Duncan's jury recommended his death unanimously. Id.

CLAIM III

Duncan argues that he did not receive the fundamentally fair trial to which he is entitled under the Fifth, Sixth, Eighth and Fourteenth Amendments. (Pet., 29). However, Duncan's argument must fail for the reasons previously stated.

CONCLUSION

Wherefore, the State, based on the foregoing arguments and authorities, respectfully requests that this Honorable Court deny the Petition for Writ of Habeas Corpus.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to: Leslie Anne Scalley, Assistant CCC, and Kevin T. Beck, Assistant CCC, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136, by MAIL on April ____, 2003.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____

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