IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
Criminal Division

STATE OF FLORIDA

v. Case No. CRC 89-11425CFANO

KEVIN RICHARD HERRICK /

ORDER DENYING MOTION FOR POST-CONVICTION RELIEF AND MOTION FOR APPOINTMENT OF COUNSEL

THIS CAUSE comes before the Court on the Defendant's Motion for Appointment of Counsel filed October 20, 1992, Motion for Post-Conviction Relief filed May 20, 1993, Brief in Support of Defendant's Pro Se Motion for Post-Conviction Relief filed May 20, 1993, and Defendant's Notice of Filing Documents, which shall hereinafter be treated as a Supplement to the Defendant's Motion for Post-Conviction Relief, filed June 21, 1993. The Court having considered the Motions, the Brief, the Supplement, the file and record, finds that:

The Defendant alleges nine grounds in support of his Motion for Post-Conviction Relief. As to Ground One, the Defendant alleges he received ineffective assistance of counsel. In support of this Ground the Defendant alleges counsel "failed to make the appropriate motions as to the admissibility of questions and answers posed to Theresa Porrey during her video taped [sic] deposition . . .[which] were beyond the scope of the direct examination." The Defendant further alleges, "[this] allowed the state to impeach my alibi witness. If my alibi witness had not been impeached, my alibi would have been uncontested, unimpeached, and the jury would have rightfully acquitted me. . ."

The scope of a pre-trial deposition in a criminal case may extend

to any matter, not privileged, which is relevant to the subject matter of the pending action. It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Fla. R. Civ. P. 1.280 (b)(1) and 3.190(j)(5). Therefore, counsel did not act improperly in failing to object to questions posed by the State to a witness during a pre-trial deposition which were within the wide permissible scope of discovery.

As to Ground Two, the Defendant alleges he received ineffective assistance of appellate counsel in that counsel failed "to raise the issue of the trial court's fundamental error of permitting the rebuttal of a collateral issue through hearsay testimony . . ." However, the proper method by which to raise the issue of ineffective assistance of appellate counsel is by petition for writ of habeas corpus directed to the appellate court which considered the direct appeal, and not by motion for postconviction relief. White v. State, 456 So. 2d 1302 (Fla. 2d DCA 1984).

As to Ground Three, the Defendant alleges again that he received ineffective assistance of counsel. In support of this ground the Defendant alleges, "[m]y attorney advised me not [to] testify because my alleged prior record would be used against me on cross-examination. . . He said it would be better not to testify to my innocense [sic]. . .He failed to make appropriate motions to suppress my alleged prior record. . .If not for this advice, I would have testified." The Defendant's Brief in support of his Motion further alleges that "it is ineffective assistance of counsel for an attorney to presume that prior convictions may be used against the

defendant without at least making a motion to suppress. . .[S]uch a motion would have likely been successful since there are no similarities to the instant case and the Defendant's prior record."

The State may attack the credibility of a defendant who testifies as a witness by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment. Fla. Stat. s. 90.610. There is no requirement that the prior conviction and the crime for which the Defendant is on trial be of a similar nature in order for the prior conviction to be admissible. The Defendant may not claim ineffective assistance for counsel's failure to raise a claim that has no merit. Card v. State, 497 So. 2d 1169 (Fla. 1986). Therefore, counsel was not ineffective for failing to file a motion to suppress prior convictions which would properly have been admissible against the Defendant if he had testified at trial.

The Defendant fails to allege that counsel refused to allow him to testify. Counsel's alleged statement to the Defendant that it would be better if the Defendant did not testify at trial was merely advice. It was the Defendant's tactical decision not to testify. The Defendant is therefore not entitled to relief under Ground Three.

As to Ground Four, the Defendant alleges he received ineffective assistance of counsel in that counsel failed "to object to instructions and verdict forms that were given to the jury that were not supported by any evidence at trial."

No special instructions were requested or given at the Defendant's trial. (See Exhibit I, transcript of jury charging

conference, R. 249, lines 4 - 7, attached). The Defendant may not claim that failure to object to a jury instruction which was the standard instruction at the time constituted ineffective assistance of counsel. Gorham v. State, 521 So. 2d 1067 (Fla. 1988), appeal after remand, 597 So. 2d 782 (Fla. 1992).

The Defendant further alleges under Ground Four that counsel "failed to research which lesser includeds he was going to request, which lesser includeds that were proper and supported by the evidence, or which lesser includeds that he should object to."

The transcript of the jury charging conference does not support the Defendant's allegations. (See Exhibit I, attached). Furthermore, during the jury charging conference, counsel specifically requested instructions on lesser included offenses as follows:

> Your Honor, to be perfectly candid, I think this is a win big or lose big situation. However, I would be legally replete in not requesting the lesser included instructions, at the risk of complicating things, elongating things, and all the rest. I'm not crazy about having to give them, but I am requesting them as a matter of law.

(See Exhibit I, R. 251, lines 15 - 21, attached).

The Defendant further alleges in support of Ground Four that counsel "fail[ed] to have a copy of the jury instruction at the charge conference and was unable to effectively follow along." However, to prevail in any claim of ineffective assistance of counsel, the Defendant is required to show 1) that counsel's performance fell below an objective standard of reasonableness, and 2) that there is a reasonable probability that the outcome of his

case would have been different had it not been for counsel's unprofessional errors. Johnson v. Dugger, 523 So. 2d 161 (Fla. 1988), citing Strickland v. Washington, 466 U.S. 668 (1984). The Defendant fails to meet this burden. Even assuming counsel's omission fell below an objective standard of reasonableness, the Defendant does not demonstrate that, had counsel possessed a copy of the jury instructions at the charging conference, the outcome of his trial would likely have been more beneficial to him.

As to Ground Five, the Defendant alleges that his conviction was obtained by use of evidence gained pursuant to an unconstitutional search and seizure. He alleges that two State witnesses overheard on their baby monitor several cordless telephone conversations of a Ms. Porrey. The Defendant further alleges that these witnesses were improperly permitted to testify at trial on rebuttal as to the substance of the conversations they overheard.

A Defendant is procedurally barred from arguing in a motion for postconviction relief that evidence was seized in violation of the Fourth Amendment, Ziegler v. State, 452 So. 2d 537 (Fla. 1984), appeal after remand, 473 So. 2d 203 (Fla. 1985), or that evidence should not have been admissible at trial because it was obtained as a result of an illegal search. Spencer v. State, 259 So. 2d 513 (Fla. 3rd DCA 1972). The Defendant is therefore not entitled to relief on the allegations as stated in Ground Five.

As to Ground Six, the Defendant alleges that the jury was improperly allowed upon their request to take a copy of a videotaped deposition into the jury room during their deliberations. However, the issue in Ground Six should have been brought, if at all, on appeal. Issues which could have, should have, or were raised on

direct appeal may not be raised in a proceeding for postconviction relief. State v. Stacey, 482 So. 2d 1350 (Fla. 1985).

As to Ground Seven, the Defendant alleges that he received an illegal sentence. In support of this Ground the Defendant alleges, "I was sentence [sic] to life imprisionment [sic] with the use of points for two victim injuries, but [there] was only one victim injured. This improper assessment moved me up one cell from a recommended thirty year sentence and into the recommended life sentence cell." In his supporting memorandum the Defendant further alleges that he should not have been assessed additional points for penetration of victim Cheryl Hagan when she was not otherwise injured.

The trial record shows that the Defendant stabbed victim Darren Darfield twice in the chest. (See Exhibit II, R. 154, lines 1 - 3, attached). It further shows that penetration occured on the other victim, Cheryl Hagan. (See Exhibit III, R. 111, lines 2 - 8, attached). No evidence was presented at trial that victim Cheryl Hagan received any physical injury associated with or apart from the penetration. At the time the Defendant was sentenced, he was assessed a total of eighty points for "penetration or slight injury." (See Exhibit IV, attached). The Court assessed forty of these points for the injury to Darren Darfield, and forty points for the penetration of Cheryl Hagan. (See Exhibit V, transcript of sentencing hearing, R. 352, lines 16 - 21, attached).

Points may not be assessed for penetration under victim injury in calculating the sentencing guidelines scoresheet for Category Two sexual offenses. Karchesky v. State, 591 So. 2d 930 (Fla. 1992), overruled by Ch. 135, s. 1, 1992 Fla. Laws. Although Karchesky was

decided after the Defendant was convicted and sentenced, this issue may be raised in any case where the fundamentally flawed Category Two scoresheet was employed. Harrelson v. State, 616 So. 2d 129 (Fla. 2d DCA 1993). If the forty points incorrectly assessed against the Defendant for penetration of Cheryl Hagan were subtracted from the scoresheet, the Defendant would have scored 692 points, still 109 points more than necessary to place him in the recommended life category. The Defendant is therefore incorrect in his allegation that the assessment of the forty points for the penetration of Cheryl Hagan moved him from the recommended thirty-year sentence cell into the recommended life sentence cell.

Even if a defendant's sentence would lie within the same range if the incorrect "victim injury" points were deleted, a defendant is entitled to be resentenced if there is no conclusive declaration in the record indicating that the trial court would have extended the sentence into the farthest reach of the permitted range had it considered an accurate scoresheet. Harrelson at 129. However, the Defendant scored "life", which cannot be calculated in terms of a range of years. Furthermore, he would still have scored well within the recommended life cell even if the incorrect forty points had not been considered. Therefore, the incorrect assessment of the additional forty points against the Defendant was harmless error.

Further in support of Ground Seven, the Defendant alleges the Court was "led to believe that 'life' was mandatory under the sentencing guidelines for my composite score." He also alleges, "[i]t appeared that the Court did not know it had much more discretion than it was led to believe."

There is nothing in the record to support the Defendant's

allegation that the Court believed it had no discretion to sentence the Defendant to a term other than life imprisonment. (See Exhibit V, transcript of sentencing hearing, attached).

As to Ground Eight, the Defendant alleges, "[t]he Court never conducted a hearing or ruled upon the merrits [sic] of my motion for a new trial." The record shows that the Defendant filed a Motion for New Trial on October 25, 1990, twenty-two days after he was found guilty in a jury trial on October 3, 1990. The records of the Clerk of the Criminal Court contain no documentation that the Defendant's Motion was ever set for hearing or ruled upon by the Court. However, a motion for a new trial must be filed within ten days after rendition of the verdict. Fla. R. Crim. P. 3.590(a). The Defendant's motion was therefore untimely filed. Furthermore, the Defendant filed a Notice of Appeal on July 24, 1991. When the Defendant filed this direct appeal, it constituted an abandonment of his Motion for New Trial; the Court no longer had jurisdiction to hear and consider the Motion. Fuller v. Williams, 393 So. 2d 651 (Fla. 5th DCA 1981). The Defendant is therefore not entitled to relief on the allegations as stated in Ground Eight.

As to Ground Nine, the Defendant alleges in his Supplemental Motion that he received ineffective assistance of counsel. In support of this Ground the Defendant attached a copy of a newspaper article dated May/June 1993 indicating that counsel was on probation for cocaine charges, and that he was facing suspension from the Florida Bar as a result of these criminal charges.

The Defendant's Supplemental Motion is not properly sworn and therefore the facts alleged therein may not be considered by this Court. Daniels v. State, 450 So. 2d 601 (Fla. 4th DCA 1984).

Furthermore, the Defendant's Supplemental Motion fails to allege that the alleged cocaine charges and pending suspension of counsel occurred during the time counsel represented Defendant. Even if this were the case, a defendant may not claim ineffective assistance of counsel based solely on the fact that his attorney was subject to disciplinary proceedings at the time of trial. O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989).

WHEREFORE, IT IS ORDERED AND ADJUDGED that the Defendant's Motion for Post-Conviction Relief be, and the same is hereby, DENIED. Therefore, the Defendant's Motion for Appointment of Counsel is also hereby DENIED.

The Defendant is hereby advised of his right to appeal the Order of this Court within thirty (30) days of the date of this Order.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida on this 24 day of November, 1993.

/s/ [illegible]
CIRCUIT JUDGE

cc: State Attorney

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