IN THE SUPREME COURT OF FLORIDA

WILLIE JASPER DARDEN

Appellant,

v. Case No. 69481

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

RICHARD W. PROSPECT
ASSISTANT ATTORNEY GENERAL
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR APPELLEE

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SUMMARY OF ARGUMENT

Darden's third motion to vacate his judgment and sentence was properly denied has being procedurally barred from consideration. The racial discrimination claim could have been raised either on direct appeal or in either of the two prior motions. The ineffective assistance of counsel claim, if it is that, was already presented in the first motion. If it is more properly a claim based on newly discovered evidence, then it is not properly brought in a Rule 3.850 motion.

POINT ON APPEAL

WHETHER THE APPEAL COURT CORRECTLY DENIED DARDEN'S THIRD MOTION TO VACATE.

ARGUMENT

In The Florida Bar Amendment to Rules of Criminal Procedure (3.850), 460 So.2d 907 (Fla. 1984), the court amended rule 3.850 so that a second or successive motion to vacate may be dismissed if new and different grounds are alleged and the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constitutes an abuse of the procedure governed by those rules. The instant claim is both new and different and has never been raised in the prior two motions to vacate. As the this court noted in Stewart v. State, Case No. 69,387, 11 F.L.W. 509 (Fla. Oct. 1, 1986) (see also, Stewart v. Wainwright, Case No. 69,338, 11 F.L.W. 508 (Fla. Oct. 5, 1986), since the year of Darden's first death warrant, the instant claim has been cognizable in a 3.850 proceeding, citing to Henry v. State, 377 So.2d 692 (Fla. 1979). The basic claim and the right to raise it have thus been available for years. Statistical evidence to support the claim has been clearly available as early as Smith v. Balkcom, 671 F.2d 858 (5th Cir. 1982). Furthermore, the present claim of a racially discriminatory application of the death penalty is by no means a novel issue. See, Furman v. Georgia, 408 U.S. 238, 98 S.Ct. 2726, 33 L.Ed.2d 346 (1972); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); State ex rel. Copeland v. Mayo, 87 S.Ct. 501 (Fla. 1956). As such, Darden could have and should have raised this issue on direct appeal. See, State

ex. rel. Copeland v. Mayo.

Darden could have and should have presented this claim upon his original conviction and on direct appeal. Having failed to properly present this issue on direct appeal, Darden is forever barred under state law from now presenting it in any state forum. See, e.g., Stone v. State, 481 So.2d 478, at 479 (Fla. 1985); Hargrave v. Wainwright, 388 So.2d 1021 (Fla. 1980); State v. Matera, 266 So.2d 661, at 666 (Fla. 1972); Copeland v. Mayo.

The only reason Darden offers for not having raised it previously is the fact that caselaw on the subject was, and is, squarely against him and the only thing different relative to the claim is the acceptance of two cases by the United States Supreme Court. This is an insufficient reason to justify the failure to raise this claim at any time from 1979 to the present. Therefore, as in Stewart v. State, supra, Darden is procedurally barred from raising this issue now.

Based on the above and foregoing, the state respectfully requests the court to affirm the denial of Darden's third motion to vacate on the grounds that Darden has failed to offer any sufficient reason to explain his failure to present this claim prior to this late date. The defendant's present successive petition presented at this late stage should be therefore rejected as a succesive petition and an abuse of procedure. See, e.g., Witt v. State, 465 So.2d 510, at 512 (Fla. 1985); Arango v. State, 437 So.2d 1099, at 1104 (Fla. 1983); see, also, Davis v. Wainwright, ____ U.S. ____ (September 23, 1986) (Justice Powell, and the Chief Justice concurring).

With regards to the so-called ineffective assistance of counsel it is quickly noted that a claim of ineffective assistance of counsel was presented in Darden's first motion to vacate filed in 1979. At a hearing on that motion, the matter of the time that the crime was committed and Darden's resultant alibi defense was presented, considered and rejected by the trial court. That determination was affirmed by this court on appeal. To that extent, therefore, inclusion of this ground in the motion represents an abuse of the procedure.

Moreover, although there is nothing in the state record to necessarily suggest that defense counsel believed the commission of the crime to be at approximately 6:00 p.m., if such a belief was indeed entertained, then it was a reasonable one based on all reports and evidence gathered by virtue of the investigation. As the Supreme Court has clearly stated, the reasonableness of counsel's conduct on the facts of a particular case must be viewed at of the time of counsel's conduct. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). At that point in time,the attorneys did not have the benefit of what has now just recently come forth.

This claim is more one based on newly discovered evidence than it is on ineffective assistance of counsel. As such, Darden is procedurely barred from presenting it since it must be first presented via a petition for writ of error coram nobis in this court. This has not been done. Even if such a petition had been filed, the very best that the "new evidence" would have provided would be supplemental contradictory evidence to that presented by

the state at trial. It most certainly would not have conclusively prevented the entry of the verdict. Hallman v. State, 371 So.2d 482 (Fla. 1979).

Therefore, both claims made the basis of Darden's latest motion to vacate were properly denied on the basis of a procedural bar. Affirmance of that denial, it is respectfully suggested, should be made on that basis and that basis alone. See, Davis v. Wainwright, _____ U.S. _____, September 23, 1986, (Justice Powell and the Chief Justice concurring).

CONCLUSION

Based on the above and foregoing, the state respectfully requests he court to affirm the denial of Darden's motion to vacate.

Respectfully submited,

Jim Smith
Attorney General

Richard W. Prospect
Assistant Attorney General
125 North Ridgewood Avenue
Daytona Beach, Florida 32014
(904) 252-1067

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by delivery to Robert A. Harper, Jr., Esquire, Counsel for Appellant, this 16th day of October, 1986.

Of Counsel