IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1619

WAYNE TOMPKINS,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

CROSS REPLY/ANSWER BRIEF OF THE APPELLEE/CROSS-APPELLANT

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STATEMENT OF THE CASE AND FACTS

The state will rely upon the Statement of the Case and Facts contained in the Answer Brief of Appellee/Cross-Appellant.

SUMMARY OF ARGUMENT

The lower court erred in granting Tompkins a re-sentencing proceeding. Defendant did not act diligently in investigating and presenting his claim. The entry in the case progress notes should have alerted post-conviction defense counsel that investigation and inquiry need be made of the request for order to prosecutor Benito. It is irrelevant whether a subsequently-assigned prosecutor Ms. Vollrath engaged in a complete review of the entire court file.

Tompkins' contention that the failure to disclose Benito's participation in drafting a sentencing order to be used by Judge Coe amounts to a violation of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny such as Strickland v. Greene, 527 U.S. 263 (1999) is mistaken. There can be no "Brady" violation since the undisclosed matter is not favorable or exculpatory to Tompkins. The facts recited in the order are based on the testimony and evidence addressed at trial, and thus subject to review by an appellate court. If Tompkins is asserting an error analogous to a violation of Gardner v. Florida, 403 U.S. 349 (1977), that type of error can be subject to harmless error analysis. Consalvo v. State, 697 So. 2d 805, 818 (Fla. 1996); Vining v. State, _So. 2d_, 27 Fla. L. Weekly S655, 565 (Fla. 2002); Lockhart v. State, 655 So. 2d 69, 73-74 (Fla. 1995).

In any event, the result of the proceeding - the imposition of a sentence of death - would not have been different. Substantial aggravation was presented (prior violent felony convictions, murder committed while engaged in an attempt to commit a sexual battery on teenage victim, HAC) and the mitigation evidence offered was weak - age at the time of the offense, an assertion of his good work record and shy and non-violent personality (the latter of which was refuted by the evidence of his involvement in separate rape incidents in Pasco County).

ARGUMENT

Tompkins in his Cross-Answer/Reply Brief alludes to Judge Perry's oral pronouncements at the hearing and his subsequent written order and argues that deference must be accorded to his conclusions. While it is true that a trial judge has a superior vantage point to make credibility findings than that of an appellate court, the conclusion reached that there was a failure by the sentencing court to independently weigh aggravating and mitigating circumstances in this case is not supported by the record considered in its entirety. Judge Coe's sentencing order recites a consideration of and finding of certain mitigation that was presented by the defense. The trial court found the age of the defendant as a statutory mitigating circumstance (DAR 680) and as to non-statutory mitigating circumstances explained:

> "None, notwithstanding testimony to the affect that the defendant was a good family member and a good employee". (DAR 681)

Prosecutor Benito testified he prepared the order "citing the three aggravating circumstances that Judge Coe let me argue" (TR 192). He couldn't say that Judge Coe signed the order as is or "whether he made any changes in that order I couldn't tell you" (TR 193). Benito reiterated that "I knew what aggravating circumstances he wanted in the record based on what he let me argue during the trial." (TR 197) Thus, it would seem that Judge Coe did independently weigh, as indicated by the reference

to proposed mitigation in Judge Coe’s order.

As to collateral counsel’s due diligence, Tompkins cites the testimony of assistant state attorney Vollrath that she had no reason to believe Benito had participated in writing the sentencing order. But Vollrath had not been involved either in Tompkins’ trial in 1985 or the first round of post-conviction collateral litigation in 1989. Mr. Benito testified that he was the only prosecutor in the case at the time of trial (TR 191). Ms. Vollrath became involved in the Tompkins’ trial after the latest warrant was signed (TR 210). Thus, it is unremarkable that she would not be aware of what transpired a decade and a half earlier or what the case progress notes on file indicated. Whether and to what extent Ms. Vollrath had reviewed the court file is irrelevant as to whether Tompkins’ post-conviction collateral counsel who represented him at an evidentiary hearing and thereafter in this Court on post-conviction as well as subsequent federal habeas corpus proceedings had sufficient opportunity in their more demanding role to investigate and pursue evidence suggested by the trial court record regarding Benito’s possible involvement in the sentencing order.

Tompkins next contends that the prosecution violated its responsibility under Brady v. Maryland, 373 U.S. 83 (1963) and

Strickler v. Greene, 527 U.S. 263 (1999).[1] But prosecutor Benito's participation in the drafting of the sentencing order does not qualify as Brady material. There was no exculpatory or impeaching evidence favorable to the accused involved. And as stated in Strickler:

> "Thus the term 'Brady violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence - that is, to any suppression of so-called 'Brady material' - although strictly speaking, there is never a real 'Brady violation' unless the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.
> (Emphasis supplied) (527 U.S. at 281)

There is nothing in the questioned item that if not suppressed would have yielded a different verdict or result. While it is true that there can be a Brady violation when the prosecution suppresses favorable evidence applicable to the penalty phase proceeding which is not material to the conviction - see, e.g. Young v. State, 739 So. 2d 553 (Fla. 1999) - nevertheless, the requirement that the material be exculpatory or favorable to the accused persists.

Perhaps the more appropriate analogy is not the Brady

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[1] A defendant must demonstrate the following elements before a Brady violation has been proven: (1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence has been suppressed by the state, either wilfully or inadvertently; and (3) the defendant has been prejudiced by the suppression of this evidence. T. Johnson v. State, 804 So. 2d 1218, 1222 (Fla. 2001).

jurisprudence but rather decisions like Gardner v. Florida, 403 U.S. 349 (1977) and this Court has held that Gardner - type errors can be harmless. See, e.g. Consalvo v. State, 697 So. 2d 805, 818 (Fla. 1996); Vining v. State, _So. 2d_, 27 Fla. L. Weekly S655, 656 (Fla. July 3, 2002); Lockhart v. State, 655 So. 2d 69, 73-74 (Fla. 1995). Obviously, the information contained in the sentencing order pertained to matters proven at trial.

Tompkins argues that had the information about Benito's participation in drafting the sentencing order been revealed earlier he would have sought to disqualify Judge Coe from the 1989 proceedings. In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), the defendant successfully urged that the trial court improperly delegated a judicial function by requesting the state attorney to prepare the sentencing order and erred by considering unauthorized aggravating factors and by failing to consider non-statutory mitigating circumstances during sentencing. The Court found that it was insufficient to state generally that the aggravating circumstances occurring at trial outweighed the mitigating factors.

> "It is our view that the judge must specifically identify and explain the applicable aggravating and mitigating circumstances". (Id at 1263)
>
> * * * *
>
> "We find that this sentencing order must be vacated and a new sentencing hearing before the judge must be held for consideration of

> the appropriate aggravating and mitigating circumstances." (Id at 1263)

The Court did not require that the sentencing judge be disqualified. Similarly in Rose v. State, 601 So. 2d 1181 (Fla. 1992), this Court remanded for evidentiary hearing on certain allegations in his motion for post-conviction relief and also held that under the facts of the case it must be assumed that the trial court in an ex parte communication had requested the state to prepare the proposed order denying relief. While noting that the most insidious result of ex parte communications is their effect on the impartiality of the tribunal, Id at 1183, the Court did not require that on remand the trial judge be disqualified.[2]

Finally, the result of the proceeding would not have been different even if the trial defense counsel had been informed that the prosecutor had played a role in drafting the sentencing order. In light of the strong and overwhelming aggravation proven at trial and established by the record - which included

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[2] In Nibert v. State, 508 So. 2d 1 (Fla. 1987), the Court rejected a claim that the trial court did not actually prepare the order of findings in support of the death sentence, finding that the record reflected the judge made the findings and conducted the weighing process necessary to satisfy the requirements of Section 921.141. The court noted also that defense counsel did not object when the court instructed the state attorney to reduce his findings to writing and "although we strongly urge trial courts to prepare the written statements of the findings in support of the death penalty, the failure to do so does not constitute reversible error so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing." (Id. at 4)

prior violent felony convictions, the homicide was committed while Tompkins was engaged in an attempt to commit a sexual battery on a teenage victim, and especially heinous, atrocious or cruel - and the insubstantial mitigating evidence that had been presented at trial (including age, good work record, and his being shy and non-violent[3]), the only relief Tompkins might have received earlier would be a mere appellate order to rewrite the sentencing order. Tompkins would not have received a sentence less than the imposition of death.

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[3] Tompkins' non-violence was refuted by the evidence of his prior sexual assaults.

CONCLUSION

Based on the foregoing arguments and authorities, the lower court's order denying post-conviction relief should be affirmed. That portion of the order granting a new sentencing proceeding should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to, Martin McClain, Special Assistant Capital Collateral Regional Counsel, Suzanne Myers, Assistant Capital Collateral Counsel - South, 101 NE 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301 this ___ day of October, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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