IN THE SUPREME COURT OF FLORIDA

CHARLES WILLIAM FINNEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Case No. SC08-2137
Lower Tribunal No. 91-1611
DEATH PENALTY CASE

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

ANSWER BRIEF OF APPELLEE

BILL MCCOLLUM
ATTORNEY GENERAL

CAROL M. DITTMAR
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0503843
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

This appeal presents the denial of a successive motion for postconviction relief challenging the constitutionality of lethal injection as a method of execution. The appellant, Charles Finney, was convicted of the 1991 robbery and murder of Sandra Sutherland and sentenced to death. This Court upheld his convictions and sentences on direct appeal. Finney v. State, 660 So. 2d 674, 678-79 (Fla. 1995), cert. denied, 516 U.S. 1096 (1996):

> According to the testimony at trial, Sandra Sutherland was discovered stabbed to death in her apartment shortly after 2 p.m. on January 16, 1991. The victim was found lying face down on her bed. Her ankles and wrists were tied and she had been gagged. On a nightstand near the bed was an open jar of face cream. The lid was lying next to the jar. The victim's bedroom had been ransacked, the contents of her purse had been dumped on the floor, and her VCR was missing.
>
> According to the medical examiner the cause of death was multiple stab wounds to the back. Of the thirteen stab wounds, all but one penetrated the lungs causing bleeding and loss of oxygen, ultimately resulting in death. No bruises or other trauma was observed.
>
> Numerous fingerprints were gathered from the victim's apartment, including prints from a piece of paper with German writing and from the jar on the nightstand. Fingerprints also were taken from the missing VCR, which was located at a local pawn shop. Pawn shop records indicated that the VCR was brought in on January 16 at 1:42 p.m. by Charles W. Finney for a loan of thirty dollars. Finney's fingerprints matched prints taken from the pawn ticket, the VCR, the jar lid, and the paper with German writing.
>
> After it was determined that Finney had pawned the victim's VCR, Detective Bell of the Tampa Police

Department interviewed Finney on the afternoon of January 30, 1991. Finney told Bell that he knew the victim due to the fact that they had lived near each other in the same apartment complex. Finney told Bell that he had seen the victim twice since she moved to another apartment in the complex. Once, he had talked to her about putting a screened porch on the back of her new apartment and then about two months prior to the murder he talked to her by the mailboxes at the complex. When asked about his whereabouts on the day of the murder, Finney told Detective Bell that he was home sick all day and never left his apartment. Upon being confronted with the fact that he had pawned the victim's VCR, Finney told the detective he found it near the dumpster when he took out the garbage and then pawned it.

Finney called a witness who testified that the day before the murder he saw the victim arguing with a white male near the mailboxes at the apartment complex. Another defense witness testified that around 10 a.m. on the day of the murder, he saw William Kunkle, who worked as a carpenter at the apartment complex, come out of the victim's apartment. According to the witness, when Kunkle saw him, Kunkle came out of the door very quickly, locked the door with a key, and walked around the corner. The witness's girlfriend offered similar testimony as to Kunkle's conduct. In rebuttal, Kunkle testified that on January 16 he worked in the building next door to Ms. Sutherland's apartment, but had not been in her apartment that day. He denied ever having any conversation or interaction with the victim. The fingerprint examiner also testified during rebuttal that Kunkle's fingerprints did not match those found in the victim's apartment.

The defense sought to recall the medical examiner, Dr. Diggs, to testify that the crime scene was consistent with both a consensual sexual bondage situation and a situation where the victim consented to being bound and gagged out of fear. The State objected to the testimony as speculative. During proffer, Dr. Diggs told the court that whether a bondage situation was consensual was not something that a medical examiner would typically testify about or try to determine. The trial judge disallowed any testimony about the circumstances being consistent

> with sexual bondage, but allowed Dr. Diggs to testify concerning the probable positions of the victim and of the attacker and about the fact that there were no defensive wounds or other signs of a struggle.
>
> Finney took the stand in his own defense. He testified that he had lived near Ms. Sutherland in the same apartment complex until she moved about eight months prior to the murder. A couple of months after she moved, Ms. Sutherland talked to him about screening in the patio of her new apartment. At that time, she handed him a piece of paper to write down measurements but took the paper back. Finney testified that he returned about a week or two later but Ms. Sutherland had decided not to screen the patio. On that occasion he was in the victim's apartment, helped her move boxes and took various items out of the boxes. According to Finney the last time he saw Ms. Sutherland was a day or two before the murder. She was coming out of her apartment early one morning. She came over to his car and they talked. He further testified that he found the VCR near the dumpsters at the complex and had pawned it the same day for pocket cash. He stated that he did not steal the VCR and that he did not kill Ms. Sutherland.

Finney was convicted of first degree murder, armed robbery, and dealing in stolen property (V1/29-30). At sentencing, the State presented the testimony of Judy Baker, the victim of Finney's prior violent felony conviction (DA. V6/820-839). The defense presented the testimony of Finney's common law wife, Tammy Gallimore (DA. V6/839-859); a close friend and co-worker, Joseph Williams (DA. V6/860-869); and a forensic psychologist, Dr. Michael Gamache (DA. V6/869-892).

The jury recommended death by a vote of nine to three (DA. V6/921). The trial judge followed the recommendation, finding three aggravating factors: 1) Finney previously had been

convicted of a violent felony; 2) the murder was committed for pecuniary gain; and 3) the murder was especially heinous, atrocious or cruel; and five nonstatutory mitigating factors: 1) Finney's contributions to the community as evidenced by his work and military history; 2) Finney's positive character traits; 3) Finney would adjust well to a prison setting and had potential for rehabilitation; 4) Finney had a deprived childhood; and 5) Finney's bonding with and love for his daughter (V1/40-44).

Following this Court's affirmance, Finney sought certiorari review in the United States Supreme Court, challenging this Court's finding of a procedural bar on his claim of improper shackling. Review was denied on January 22, 1996. Finney v. Florida, 516 U.S. 1096 (1996).

This Court affirmed the summary denial of postconviction relief in October, 2002. Finney v. State, 831 So. 2d 651 (Fla. 2002). Finney filed a successive postconviction motion, also summarily denied; this Court affirmed that ruling in May, 2005. Finney v. State, 907 So. 2d 1170 (Fla. 2005). Federal courts have also denied relief. See Finney v. McDonough, 2006 U.S. Dist. LEXIS 48789 (M.D. Fla. July 17, 2006); Finney v. McDonough, 127 S. Ct. 2944 (June 11, 2007).

On June 21, 2007, Finney filed another successive motion for postconviction relief, alleging that lethal injection in

Florida violates the Eighth Amendment ban on cruel and unusual punishment, based on the December, 2006 execution of Angel Diaz (V1/47-93). The motion also alleged that newly discovered evidence of a September, 2006 American Bar Association Report titled "Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Report," demonstrated that Florida's system was arbitrary and capricious, violating the Eighth and Fourteenth Amendments (V1/60-92).

The State filed a Response (V1/101-108), and a Huff hearing was held on April 23, 2008 (V2/336-339). The motion was summarily denied at that time (V1/109-112; V2/338). Rehearing was sought and denied on October 23, 2008 (V2/200-208, 215-218). This appeal follows.

SUMMARY OF THE ARGUMENT

This Court has repeatedly rejected Finney's claims that lethal injection procedures in Florida are unconstitutional and that the ABA Report on the death penalty provides newly discovered evidence of the unconstitutionality of the death penalty.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING FINNEY'S LETHAL INJECTION CLAIM

Finney first challenges the trial court's summary denial of his claim that Florida's lethal injection procedures violate the Eighth Amendment prohibition against cruel and unusual punishment. This claim is reviewed *de novo*. Tompkins v. State, 994 So. 2d 1072, 1080-81 (Fla. 2008).

Finney's claim of unconstitutionality is premised on the December, 2006 execution of Angel Diaz. This Court has repeatedly rejected this claim, and Finney offers no basis for reconsideration of the well established law conclusively refuting his allegations. See Ventura v. State, 34 Fla. L. Weekly S 71 (Fla. Jan. 29, 2009); Sexton v. State, 997 So. 2d 1073 (Fla. 2008); Tompkins, 994 So. 2d at 1080-82; Power v. State, 992 So. 2d 218, 220-21 (Fla. 2008); Schwab v. State, 995 So. 2d 922, 924-33 (Fla. 2008); Henyard v. State, 992 So. 2d 120, 129-130 (Fla. 2008); Woodel v. State, 985 So. 2d 524, 533-34 (Fla.), cert. denied, 129 S. Ct. 607 (2008); Lebron v. State, 982 So. 2d 649, 666 (Fla. 2008); Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), cert. denied, 128 S. Ct. 2485 (2008); Schwab v. State, 969 So. 2d 318 (Fla. 2007), cert. denied, 128

S. Ct. 2486 (2008); see also Baze v. Rees, 128 S. Ct. 1520 (2008).

Finney's claim of a due process violation based on the denial of an evidentiary hearing has also been considered and rejected. In Tompkins, this Court addressed this argument, including the presentation of the same witnesses which Finney asserted should have been presented. This Court concluded that no error was shown; "the trial court did not err in not allowing Tompkins to present additional witnesses because the proposed testimony of these witnesses does not support a departure from this Court's precedent." Tompkins, 994 So. 2d at 1082. Notably, in Tompkins, relief was denied even though the pleading requirements under Florida Rule of Criminal Procedure 3.851 were satisfied. In the instant case, the postconviction motion did not meet the pleading requirements of the rule. Even if it had, relief would have been denied, consistent with Tompkins.

Finney's reliance on Teffeteller v. Dugger, 676 So. 2d 369 (Fla. 1996), is misplaced. In Teffeteller, this Court held that due process required individual evidentiary hearings, because the defendants presented "factually specific claims" with regard to their particular representation. Id., at 371. In this case, while Finney asserts that this Court is only considering the facts litigated in Lightbourne, he has not taken issue with

those facts or alleged that he would offer a different factual scenario. The witnesses he identifies, and their purported testimony, were directly addressed and refuted in Tompkins. No error has been shown.

As Finney's claim is without merit, relief must be denied.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING FINNEY'S NEWLY DISCOVERED EVIDENCE CLAIM

Finney next asserts that the American Bar Association Report of September, 2006 provides newly discovered evidence of the unconstitutionality of Florida's death penalty. This claim it also considered *de novo*. It has also been repeatedly rejected by this Court. See Tompkins, 994 So. 2d at 1082-83; Power, 992 So. 2d at 222-23; Rolling v. State, 944 So. 2d 176, 181 (Fla. 2006); Rutherford v. State, 940 So. 2d 1112, 1117, 1118 (Fla. 2006)). Once again Finney has offered no basis for a different result. The summary rejection of this claim must be upheld, and relief must be denied.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court affirm the Order rendered below summarily denying postconviction relief.

Respectfully submitted,

BILL MCCOLLUM
ATTORNEY GENERAL

CAROL M. DITTMAR
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0503843
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
carol.dittmar@myfloridalegal.com

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Pamela Izakowitz, Backhus & Izakowitz, P.A., 13014 N. Dale Mabry Hwy., #746, Tampa, Florida 33618-2808, this _____ day of March, 2009.

CERTIFICATE OF FONT COMPLIANCE

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).

_____
COUNSEL FOR APPELLEE