IN THE SUPREME COURT OF FLORIDA

ALBERT HOLLAND,)
)
Appellant,)
)
v.)
) **CASE NO. SC 03-1033**
STATE OF FLORIDA,) **L.T. No. 90-15905 CF10A**
)
Appellee.)
)
____

REPLY BRIEF OF APPELLANT

____

On Appeal from the Circuit Court of the
Seventeenth Judicial Circuit in and
for Broward County, Florida

____

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PRELIMINARY STATEMENT

Appellant ALBERT HOLLAND ("Holland") was the defendant in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Appellee STATE OF FLORIDA ("the State") was the plaintiff.

As there is some variation between the conventions used in citing to the record in the Initial Brief and those used in Appellee's Answer Brief, Appellant will maintain the original conventions used in the Initial Brief:

Record on Appeal = "R," page number(s).

Example: "**(R 152)**."

Transcript of Evidentiary Hearing = "T," page number(s).

Example: "**(T 159)**."

Second Trial = [Volume] - "R" or "SR" - page number(s).

Example: "**(82-R-5959)**."

STANDARD OF REVIEW

Claims III and VIII

A decision following a rule 3.850 evidentiary hearing must be supported by competent substantial evidence. Nixon v. State, 857 So. 2d 172, 176 (Fla. 2003) ("Nixon III") ("in order to affirm the trial court's ruling, the record must contain substantial evidence which would enable this Court to determine that Nixon did more than silently submit to counsel's strategy. . . . [T]here is no competent, substantial evidence which establishes that Nixon *affirmatively* and *explicitly* agreed to counsel's strategy.").

Claims I, II, IV, V, VI and VII

To uphold a trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially insufficient or conclusively refuted by the record. *See* Fla. R.Crim. P. 3.850(d). Where no evidentiary hearing is held below, the Supreme Court must accept the defendant's factual allegations to the extent they are not refuted by the record. Peede v. State, 748 So.2d 253, 257 (Fla. 1999).

STATEMENT OF THE CASE AND FACTS

The State's Answer Brief contains no facts capable of supporting its opposition to this appeal. The State neither accepts nor rejects Defendant's Statement of Facts–and not one of the facts set forth in the State's Statement of the Case and Facts was adduced at the evidentiary hearing on the Motion for Postconviction Relief, the decision pursuant to which this appeal is uniquely based.

This is an appeal of a trial court's order denying a Motion for Postconviction Relief after an evidentiary hearing, which, in order to be affirmed, must be supported by competent substantial evidence. Nixon v. State, 857 So. 2d 172, 176 (Fla. 2003) ("Nixon III"). Though Point I asserts defense counsel unilaterally conceded Holland's guilt of attempted premeditated first-degree murder in closing, the State sets forth no facts germane to the closing. Though Point II asserts counsel failed to investigate facts in mitigation, the State states no facts germane to that investigation.[1]

To the extent the State attempts to reinterpret the facts adduced at trial, rather than set forth those adduced at the collateral evidentiary hearing so as to counter

[1] Point III (error in summarily denying Claims I, II, IV, V, VI and VII), must be decided on whether the claims are conclusively refuted by the record.

the Defendant's assertion that the trial court's order is not based on competent substantial evidence, the State's argument lacks an adequate factual basis.

ARGUMENT

POINT I

THE TRIAL COURT'S DENIAL OF CLAIM III IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AS COUNSEL CONCEDED HOLLAND'S GUILT WITHOUT HIS AUTHORIZATION RESULTING IN INEFFECTIVE ASSISTANCE OF COUNSEL

Though the State omits from its Statement of Facts any fact adduced at the evidentiary hearing, the State injects into its *argument* "facts" unsupported by the transcript of that hearing, which will be clarified after brief review of the trial record.

Claim III alleges trial counsel conceded Holland's guilt of attempted first-degree murder without his consent. Though Holland testified at trial that he had no intent to kill Thelma Johnson (75-R-5182-5183), the trial transcript shows defense counsel conceded Holland's guilt of attempted first degree murder:

> "Is he guilty of attempted first degree murder of Thelma Johnson? By his own admission, yes. Yes."

(82-R-5959-5960). Holland's defense counsel testified at the evidentiary hearing that Holland never consented to the foregoing statement. (T 138, 148).

The standard in such circumstances is ***not*** the deficiency-plus-prejudice standard set forth in Strickland v. Washington, 466 U. S. 668 (1984), as urged by the State, but the *per se* ineffectiveness standard of U.S. v. Cronic, 466 U.S. 648 (1984).

See Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000) ("Nixon II") ("[I]f Nixon can establish that he did not consent to counsel's strategy, then we would find counsel to be ineffective *per se* and Cronic would control").

The State's attempts to alter the standard from Cronic to Strickland are embodied in its inaccurate *argument* of the "facts" omitted from its Statement of Facts, including the State's arguments that (1) "Holland took the stand and admitted to every element of the crime of Attempted First Degree Murder"; (2) that "defense counsel Lewis' statements were not concessions of guilt"; and (3) that those statements comprised a reasonable insanity defense. (Answer Brief at 14).

(1) The State's contention (adopted by the trial court) that "Holland took the stand and admitted to every element of the crime of Attempted First Degree Murder" (*id.* at 14) is not supported by the record. Holland testified he did not intend to kill Ms. Johnson. (75-R-5182-5183). The State's earlier endeavors to shroud this fact by reading selectively from Holland's trial testimony was uncovered at the evidentiary hearing. (T 160-161). Indeed, trial counsel agreed at the hearing that, though he told jurors in closing that Holland admitted he was guilty of attempted first-degree murder, Holland had ***not*** testified he attempted to kill Johnson. (T 152).

(2) The State's contention that "defense counsel Lewis' statements were not concessions of guilt" (*id.* at 14) is refuted not only by quotation to those concessions ("Is he guilty of attempted first degree murder of Thelma Johnson? By his own admission, yes. Yes."), but is also refuted by the facts ultimately adduced at the evidentiary hearing, which the State has chosen to ignore:

> [MR. COLLINS] Can you explain to the Court, then, the strategy of conceding that he's guilty of attempted first-degree murder if insanity is actually the defense?

> [MR. LEWIS] I don't know if you'd consider it a strategy. You sometimes try to gain some credibility of the jury on the issues that there seems to be absolutely no contention over by saying, okay, this is what happened, this is what's admitted, now let's go on and talk about the issues that there's really controversy over.

(T 141).

(3) Any notion that counsel's concession was part of a reasonable insanity defense is belied by his inability to explain any benefit to be had by conceding guilt:

> [MR. COLLINS] Would you also agree that it would be incongruous when there's two counts, when there's the murder of the police officer as one of the counts and the attempted murder of Thelma Johnson, it might be incongruous to be insane on one count but able to form the intent and know what you're doing on the other count? Do you agree that that might be incongruous defenses?
>
> [MR. LEWIS] Is it possible? It's possible but I wouldn't think that that would be likely. I think if you're insane for one, you're

insane for the other given the closeness and time, but I guess an argument could be made that he was insane only for one of the incidents

[MR. COLLINS] You weren't trying to make that argument in your defense though, you'd agree; right?

[MR. LEWIS] No. It was our argument throughout that he was insane through all of the criminal episodes that night.

(T 141-143).

The State reliance on Thompson v. State, 839 So.2d 847 (Fla. 4th DCA 2003) to evade the mandates of Nixon II, Nixon III and Cronic, is vacuous. One major difference is that, unlike Thompson's counsel's admission of acts counsel argued were not criminal, *Holland's counsel conceded Holland had committed the crime*.

The State's argument that trial counsel's unilateral election to pursue an insanity defense somehow allowed counsel to tell jurors that Holland was guilty of an act which Holland had denied on the witness stand (*i.e.,* intending to kill Ms.

Johnson) if the jury did not accept counsel's insanity defense, is just another way of saying that counsel conceded Holland's guilt provided he was capable of forming the requisite intent.[2]

Counsel's unauthorized concession of guilt ("Is he guilty of attempted first degree murder of Thelma Johnson? By his own admission, yes. Yes.") (82-R-5959-5960) denied Holland a fair trial, requiring he be granted a new one.

POINT II

THE TRIAL COURT ERRED IN DENYING CLAIM VIII AS DEFENSE COUNSEL'S FAILURE TO PROPERLY INVESTIGATE EVIDENCE IN MITIGATION DENIED ALBERT HOLLAND THE EFFECTIVE ASSISTANCE OF DEFENSE COUNSEL GUARANTEED BY THE SIXTH AMENDMENT DURING THE PENALTY PHASE

[2] As the presumption was always one of sanity, the logical consequence of the State's argument is that if Holland's counsel did not meet *his* burden of proving insanity, he conceded Holland's guilt of attempted premeditated murder in a trial in which the State also proceeded on a theory of premeditated murder of Officer Winters.

Claim VIII alleges penalty phase counsel failed to properly investigate evidence in mitigation of the death penalty (R 179-183), pointing out that no testimony about Holland's birth, childhood, upbringing or school years was presented through any witness other than his father. Baron went no further than Holland's father to "investigate" his school and personal life. (T 106-111, 117-118). This overwhelming lack of mitigating evidence was the result of penalty phase counsel's wholesale failure to investigate evidence in mitigation of the death penalty. Counsel spoke to Holland's father only briefly. (89-R-6502).

This Court set the showing required by Strickland in such an event in Gaskin v. State, 737 So.2d 509, 516, n.14 (Fla. 1999) ("Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different ***or the deficiencies substantially impair confidence in the outcome of the proceedings***") (emphasis added); State v. Lewis, 838 So.2d 1102, 1113 (Fla. 2002) ("[P]rejudice is established by a finding that, but for the ineffective assistance of counsel, a reasonable probability exists that the outcome of the proceeding

would have been different, ***or that, as a result of the ineffective assistance the proceeding was rendered fundamentally unfair***") (emphasis the Court's).

The State's suggestion that Holland had told trial counsel to communicate solely with his father about his birth, childhood, upbringing or school years and that this constitutes some sort of waiver of additional mitigation strains credulity. Not only was it counsel's theory that Holland was mentally ill (and conceivably unable to make such a decision), but a reasonable decision not to put on other mitigating evidence could only be made after reasonable investigation. *See* Deaton v. State, 635 So. 2d 4 (Fla. 1993) (new penalty phase required as counsel's failure to adequately investigate facts in mitigation rendered defendant's waiver of his right to put on mitigating evidence unknowing and involuntary); State v. Lewis, 838 So. 2d at 1113-14 ("Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision. [Defense counsel] never sought out Lewis's background information and never interviewed other members

of Lewis's family; therefore, he was unable to advise Lewis as to potential mitigation which these witnesses and records could have offered.”).

The State’s contention that penalty phase counsel Evan Baron “was surprised when the mother, brother and sister did not show up to testify” (Answer Brief at 30) does not excuse the fact that Baron had never even spoken with them. Baron impermissibly “delegated” his duty to investigate Holland’s family background and social history to Holland’s father, and took the father’s word about Holland’s relationship with his other family members who lived separate lives, the content of their expected testimony and their readiness and availability to testify.

Counsel's investigations "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Wiggins v. Smith, ___ U.S. ___, 123 S.Ct. 2527, 2537 (2003) (Failure to have a professional prepare a detailed social history shows counsel failed to perform the level of investigation that would allow them to make a reasonably informed decision not to present it). The Wiggins Court explained that “[e]ven assuming [trial counsel] limited the scope of their

investigation for strategic reasons, Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." Id. at 2538. *See also* Id. at 2538 (rejecting argument that counsel made a strategic decision based on the limited investigation they had conducted not to introduce mitigation); Id. at 2537 ("counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources"); Id. at 2538 ("counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.").

Beyond a brief chat with his father, penalty phase counsel failed to investigate Holland's family and social history and never used the investigator. His knowledge of the available facts in mitigation was insufficient to make an informed strategic choice not to investigate. As the "deficiencies substantially impair confidence in the outcome of the proceedings," Gaskin, "the proceeding was rendered fundamentally unfair," Deaton; Lewis, requiring a new penalty proceeding. Wiggins.

A new penalty phase proceeding, after adequate investigation of mitigating evidence, is required. Reversal, at the very least, is necessary for such a proceeding.

POINT III

THE TRIAL COURT ERRED IN SUMMARILY DENYING CLAIMS I, II, IV, V, VI & VII AS THEY ARE FACIALLY SUFFICIENT AND NOT CONCLUSIVELY REFUTED BY THE RECORD

The State argues that since counsel agreed to evidentiary hearings on Claims III and VIII, while the purely legal claims would be decided on the face of the record "he cannot claim now that the trial court erred by summarily denying the other claims." (Answer Brief at 40).

The State's reasoning is flawed. Agreeing that the record contains sufficient facts to support a ruling *on the merits* does not waive appeal of a summary denial. To uphold a summary denial, the claims must be shown to be either facially invalid or conclusively refuted by the record. McLin v. State, 827 So.2d 948 (Fla. 2002). Yet no files or records are attached to the order, which cites no part of the record, and the trial court's adoption of the State's Response is insufficient. Roberts v.

State, 678 So.2d 1232, 1236 (Fla. 1996). The State's contentions that these Claims are facially insufficient are frivolous, as more clearly appears from the following.

Claim I. The State's contention that "Claim I fails to allege how the results of Holland's **trial** would have been different had defense counsel objected to Deputy McDonald's testimony" (Answer Brief at 42) is inaccurate. The Introduction to Holland's Memorandum of Law, incorporated into the sworn motion, explicitly applies to each of the ineffective assistance of counsel claims:

> The following acts and omissions of Holland's trial counsel demonstrate a breakdown in the adversarial testing process ***rendering his trial, conviction and sentence of death fundamentally unfair***. Counsel's most egregious instances of ineffectiveness will be presented herein *seriatim*:

(R 145) (emphasis added).

Claim I of Holland's Motion also alleges:

> [B]ut for ineffective defense counsel's failure to object to Deputy McDonald's testimony, there remains a reasonable probability (reaffirmed by the Supreme

> Court's application of existing case law to Dr. Martell's testimony) that the trial court would have excluded it. There also remains the reasonable probability that the outcome of Holland's appeal would have been different given the timely objection as the Supreme Court's rationale for affirmance on this issue would have been negated.

(R 148).

The State's contention that "Claim I is a re-cast or sub-claim of the objection to Dr. Martell's testimony into an ineffectiveness claim" (Answer Brief at 43) seeks to deny Holland access to the courts. If Holland is precluded from obtaining review of this issue (as he was) on direct appeal as unpreserved by counsel, yet precluded (as the State now argues) from showing counsel's failure to preserve the issue denied him the effective assistance of counsel, he would be denied any remedy whatsoever for redress of the unfairly prejudicial admission of a police opinion on his intent.

Though the State goes on to conclude that "[b]ecause Deputy McDonald's testimony was clearly admissible, any objection would have been overruled and any motion for mistrial denied" (Answer Brief at 46), this Court implicitly disagreed with such a contention by finding the admission of similar testimony by Dr. Martell

was error, though harmless ***because it was cumulative to the police opinion testimony to which counsel failed to object***. Holland v. State, 773 So. 2d 1065, 1075-1076 (Fla. 2000). Though the State points out that there were eyewitnesses, however conflicting, to the struggle between Holland and Officer Winters, it is equally significant that there were no eyewitnesses to Holland's having intentionally placed or hidden Officer Winters' service weapon where it was found and on which the offending police opinion testimony was based.

The trial court attached no record portion justifying a summary denial and its alternative theory of denial (*i.e.,* that it is procedurally barred for not being raised on direct appeal) fails as a matter of law as counsel may be said to have been ineffective for failing to object to prejudicial matters at trial despite the unpreserved error's consideration on direct appeal. Jackson v. State, 711 So.2d 1371 (Fla. 4th DCA 1998); Corzo v. State, 806 So.2d 642 (Fla. 2nd DCA 2002).

If Holland is precluded from raising this issue on direct appeal as unpreserved by defense counsel, yet also precluded from showing he was denied the effective assistance of defense counsel by counsel's failure to properly preserve

the issue, he would, in effect, be denied any remedy whatsoever to redress the improper and unfairly prejudicial admission of evidence that went to the heart of his defense: Intent. *See* Wells v. State, 598 So.2d 259 (Fla. 1st DCA 1992) (condemning denial of 3.850 claim on basis that matter should have been challenged on direct appeal while overlooking that claim was counsel's failure to object, barring direct review).

Claim II. The State's suggestion that Claim II is "conclusory" is itself conclusory. The State does not explain ***why*** or ***how*** Holland's claims are conclusory. The summary denial of Claim II simply adopted the State's Response, though it failed to attach record portions refuting Holland's allegations. A review of the trial transcript fails to show conclusively that Holland is entitled to no relief. As for the particular arguments counsel failed to object to:

A. The State has finally conceded that it falsely told jurors the victim stated over his police radio: "he's got my gun." (Answer Brief at 51-52). Rather than confessing error, however, and rather than urging this Court to grant relief for having so blatantly misstated the evidence on this pivotal issue, the State attempts to obscure the clearly prejudicial impact of this false statement of the evidence

which goes to the heart of the State's case. No amount of argument or citation of authorities is capable of altering the fact that the State Attorney put the most damning words imaginable into the victim's mouth in the very breath after he broadcast over the radio that he had been shot in what Holland testified was a struggle with both of the men's hands on the gun–and what the State claimed was the act of a man who had already taken away the officer's firearm. On this issue alone, the Court should vacate and remand this case for a new trial.

B. Defendant stands on the argument and citations of authority on this matter contained in the Initial Brief on Appeal.

C. The State's claim that its comment that "[t]he reason that the robbery is in the indictment is because the robbery occurred; he took the gun away by force, violence and assault" (83-R-5998) was a "fair reply" to a defense argument that the robbery was charged in order to proceed on a felony murder theory (Answer Brief at 55) is strained. The State's argument in this regard constituted an assurance to jurors, under the authority of office, that the State had brought the robbery charge because it was warranted and suggested the State only charged persons who were truly guilty.

D thru I. Defendant stands on the argument and citations of authority in this regard contained in the Initial Brief on Appeal.

Claims IV - VII. Defendant stands on the argument and citations of authority in this regard contained in the Initial Brief on Appeal.

CONCLUSION

I. As competent substantial evidence fails to support the denial of relief in the face of defense counsel's unauthorized concession of Holland's guilt in

Claim III, the judgment and sentence should be set aside and Holland accorded a new trial.

II. As competent substantial evidence fails to support denial of relief despite counsel's failure to adequately investigate evidence in mitigation in Claim VIII, the sentence should be vacated and Holland granted a new penalty proceeding.

III. As the order fails to show conclusively that Holland is entitled to no relief in Claims I, II, IV, V, VI and VII, their summary denial should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was furnished to: (1) Assistant Attorney General Debra Rescigno, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL 33401, (2) Susan Bailey, Esquire, Office of the State Attorney, 201 S.E. Sixth Street, Suite 675, Fort Lauderdale, FL 33301,(3) Hon. Charles M. Greene, 201 S.E. Sixth Street, Fort Lauderdale, FL 33301, and (4) Albert Holland, #122651, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026-4410, by U.S. Mail, this _____ day of ______________, 2004.

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