

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-509
Lower Case No. 2007-CF-2377

JAMES L. DRISCOLL, JR., et al,

Appellant,
v.

DAVID BYRON RUSS,

Appellee.

ANSWER BRIEF OF STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

Appellee was indicted on the following charges for crimes which occurred on or between May 7 and 8, 2007:

- (1) Count I-First degree premeditated murder of Madeleine Leinen;
- (2) Count II-Kidnapping with a weapon;
- (3) Count III-Carjacking with a deadly weapon;
- (4) Count IV-Robbery with a deadly weapon;
- (5) Count V-Burglary of a dwelling with an assault or battery.

(DAR14.1-14.2).¹

At his first appearance on June 10, 2007, Russ pled not guilty and was appointed a public defender. (DAR19). On February 6, 2008, Russ withdrew his not guilty pleas and pled guilty to the following Counts:

- Count One - First Degree Premeditated Murder;
- Count Two - Kidnapping with a Deadly Weapon;
- Count Three - Grand Theft Auto (charged in the indictment as carjacking);
- Count Four - Robbery with a Deadly Weapon;
- Count Five - Burglary with Assault or Battery.

¹ Cites to the record on direct appeal are “DAR”. Cites to the supplemental record on direct appeal are “Supp.DAR.” Cites to the penalty phase in the direct appeal record are “PP.” Cites to record in the current proceeding are “WHR” for “waiver hearing record.”

(DAR426-27). On April 9, 2008, Russ advised the trial court that he wanted to waive a jury for the penalty phase and waive the presentation of all mitigation. (Supp. DAR623-27). On April 30, 2008, Russ renewed his motion to waive both the jury for the penalty phase and the presentation of mitigation by his attorneys. (V12, R485). Trial counsel stated that a competency evaluation had been performed shortly after Russ's arrest, and "there's been no indication that he's not competent." (DAR477, 486-87). The State did not object to Russ's waiver of the jury for the penalty phase. (DAR487).

On May 1, 2008, the trial court found Russ competent to waive the penalty phase jury and granted the request. The court also found Russ competent to waive the presentation of mitigation. (DAR544, 545). The court appointed "special counsel," Michael Nielsen and Jeffrey Dowdy, to present mitigation. (DAR546; 550, 552).

The penalty phase was held January 8-9, 2009, before the Honorable Marlene Alva. (PP1-200; PP201-335).

The *Spencer*² Hearing was held January 15, 2009. (DAR609-616).

On May 13, 2009, Appellee was sentenced to death for the murder of Madeleine Leinen. (DAR617-622). The trial judge made detailed findings in a

² *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

fifteen page sentencing order. (DAR1640-1654). The following aggravating circumstances were found:

- (1) Committed during a kidnapping: significant weight (DAR1642-43);
- (2) Pecuniary gain: moderate weight (DAR1644);
- (3) Heinous, atrocious, or cruel: great weight (DAR1644-46);
- (4) Cold, calculated, and premeditated: great weight (DAR1646-47).

The following mitigating circumstances were considered:

- (1) Abusive childhood: moderate weight (DAR1648-49);
- (2) Severe, long-term drug addiction: some weight (DAR1649-50);
- (3) Remorse: moderate weight (DAR1650);
- (4) Multiple medical problems: very little weight (DAR1651);
- (5) Capacity to form and maintain loving relationships with both family and non-family members: little weight (DAR1651);
- (6) Pursued higher education and skilled in roofing trade: little weight (DAR1652);
- (7) No violent criminal history: little weight (DAR1652);
- (8) Appropriate courtroom behavior: little weight (DAR1653);
- (9) Wrote thank you notes to scholarship donors at Texas Tech University in 1997: little weight (DAR1653).

The trial court found the aggravating factors outweighed the mitigating circumstances and sentenced Russ to death for the murder of Madeleine Leinen. (DAR1653). Russ received concurrent life sentences for kidnapping with a weapon, robbery with a weapon, and burglary of a dwelling. He received a five-year prison term for grand theft of a motor vehicle. (DAR1658-1665).

Russ appealed to this Court, raising the following issues:

- (1) whether the trial court followed this Court's procedures and considered all properly presented mitigation; and
- (2) whether the trial court erred in finding the aggravators and mitigators, that the evidence is sufficient, and that the death sentence is proportionate.

Russ v. State, 73 So.3d 178, 183 (Fla. 2011). This Court affirmed the convictions and death sentence. On October 14, 2011, this Court appointed Capital Collateral Regional Counsel to represent Russ in postconviction proceedings.

On November 7, 2011, Russ filed a Motion to Dismiss Capital Collateral Counsel and to Dismiss Post-Conviction Proceedings beyond the Initial Appeal. (WHR1-4).

Pursuant to Rule 3.851(i), Florida Rules of Criminal Procedure, the lower court held a waiver hearing. (WHR7-29). Attending the waiver hearing were two attorneys from Capital Collateral Regional Counsel, the Assistant State Attorney, and the Assistant Attorney General. Mr. Russ was present in person. (WHR8-9).

Russ confirmed that he was requesting to discharge collateral counsel and waive postconviction proceedings. (WHR10-11). The lower court judge conducted a hearing during which she advised Russ he had the right to representation in postconviction proceedings, and the State of Florida would pay for postconviction counsel (WHR11). The lower court judge advised Russ that:

- if he discharged counsel and waived postconviction proceedings, the time limitations on filing for postconviction relief would be waived (WHR12);
- he would be precluded from further relief in state court (WHR13);
- the waiver would affect the time for filing for federal relief (WHR13);
- collateral counsel has experience and special training and knowledge (WHR13);
- it is to Russ' advantage to have legal representation (WHR13);
- the lawyers are familiar with relevant time periods and special in postconviction proceedings (WHR14);
- the lawyers would review transcripts for any legal errors that could benefit him (WHR14);
- discharging counsel and waiving postconviction relief would not result in any special treatment by the Governor or Florida Supreme Court (WHR14);

The lower court judge also questioned Russ about any mental health issues since being incarcerated in Department of Corrections. (WHR15). Russ stated that he could not sleep very well when he first arrived and went to see a psychiatrist

who prescribed medication; however, Russ stopped taking the medication about five days later “and I haven’t taken anything since.” (WHR15). Russ believed the medication was for anxiety/insomnia. (WHR15). Russ did not feel as though he was experiencing any mental health problem which was unrelated to the stress of being on Death Row. (WHR16). Russ advised the judge:

- he felt confident that he could think clearly and exercise good judgment;
- there was nothing clouding or negatively affecting his thinking (WHR16);
- he had a good understanding of his current situation (WHR16-17);
- he takes responsibility for the victim and would not run from the consequences (WHR17-18);
- his conviction is firm (WHR18);
- he would reject any effort of the Court to appoint a mental health expert (WHR18-19).

The lower court judge again advised Russ the discharge of counsel and waiver of postconviction proceedings would end the proceedings. (WHR19). Russ answered “That is my objective.” (WHR19). The lower court judge advised Russ that he had the right to represent himself in postconviction proceedings if he elected to discharge the attorneys (WHR20-21).

Russ advised the lower court judge that his decision was voluntary and based on “personal convictions.” (WHR21-22). Collateral counsel represented that he had met with Russ that day and Russ was “very strong in his belief.” (WHR23).

Russ believed “there has to be one or two guys on death row that are innocent and their [collateral counsel] energies would be better invested to focus on someone who genuinely needs that representation. . .” (WHR 24).

The lower court judge found Russ’ decision to discharge counsel was knowingly, freely, intelligently and voluntarily made and the decision to dismiss all postconviction proceedings was intelligently, knowingly, voluntarily and freely made. (WHR26). The lower court judge entered a written order memorializing those findings. (WHR5-6).

Pursuant to Rule 3.851(i)(8)(B), Florida Rules of Criminal Procedure, collateral counsel filed a Notice of Seeking Review. (WHR30-31).

SUMMARY OF ARGUMENTS

The issue on review is whether the circuit court judge abused her discretion in finding Russ intelligently, knowingly, and voluntarily discharged counsel and waived postconviction proceedings. The lower court judge carefully followed the procedure set forth in Rule 3.851(i), Florida Rules of Criminal Procedure, even citing to *Durocher* and *Trease*. The issues raised by collateral counsel in this review proceeding were not raised at the trial level and are waived. Further, they have no merit. This Court has established the procedure to be followed, and the lower court carefully followed this Court’s directives.

ARGUMENT

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN FINDING RUSS' WAIVERS KNOWING, INTELLIGENT, AND VOLUNTARILY.

The issue to be addressed on review is whether the circuit court abused its discretion in finding Russ knowingly, intelligently, and voluntarily waived his rights to postconviction counsel and proceedings. *Alston v. State*, 894 So.2d 46, 57 (Fla. 2004). In *Durocher v. Singletary*, 623 So.2d 482 (Fla. 1993), this Court directed trial judges forthwith to conduct a *Faretta*³-type evaluation to determine if the defendant understands the consequences of waiving collateral counsel and proceedings. *Durocher* at 484-85. In determining the voluntariness of the waiver, the trial court should inquire into, among other things, the defendant's age, mental status, and lack of knowledge and experience in criminal proceedings. *Alston*, 894 So.2d at 57, citing *Johnston v. State*, 497 So.2d 863, 868 (Fla. 1986).

As in *Alston*, the circuit court judge in the present case questioned the defendant about his age, education, mental health status, and understanding of the purpose of the waiver hearing. See *Alston* at 58. Similarly, Russ exhibited an understanding of the consequences of waiving his rights to postconviction counsel and proceedings. This Court affirmed the waiver in *Alston*, finding the lower court

³ *Faretta v. California*, 422 U.S. 806 (1975).

judge complied with the standards applicable to waiving postconviction counsel and proceedings. *Id* at 58.

Subsequent to *Alston*, this Court, for purposes of uniformity, asked the Criminal Rules Committee to draft a proposed rule of procedure addressing the appeal of circuit court orders finding death-sentenced inmates competent to waive postconviction proceedings and counsel. *In re Amendments to Florida Rules of Criminal Procedure 3.851 And 3.590*, 945 So.2d 1124, 1125 (Fla. 2006).

Pursuant to this Court's request, Rule 3.851(i), Florida Rule of Criminal Procedure was enacted. That Rule provides:

(i) Dismissal of Postconviction Proceedings.

(1) This subdivision applies only when a prisoner seeks both to dismiss pending postconviction proceedings and to discharge collateral counsel.

(2) If the prisoner files the motion pro se, the Clerk of the Court shall serve copies of the motion on counsel of record for both the prisoner and the state. Counsel of record may file responses within ten days.

(3) The trial judge shall review the motion and the responses and schedule a hearing. The prisoner, collateral counsel, and the state shall be present at the hearing.

(4) The judge shall examine the prisoner at the hearing and shall hear argument of the prisoner, collateral counsel, and the state. No fewer than two or more than three qualified experts shall be appointed to examine the prisoner if the judge concludes that there are reasonable grounds to believe the prisoner is not mentally competent for purposes of this rule. The experts shall file reports with the court setting forth their findings. Thereafter, the court shall conduct an evidentiary

hearing and enter an order setting forth findings of competency or incompetency.

(5) If the prisoner is found to be incompetent for purposes of this rule, the court shall deny the motion without prejudice.

(6) If the prisoner is found to be competent for purposes of this rule, the court shall conduct a complete (*Durocher/Faretta*) inquiry to determine whether the prisoner knowingly, freely and voluntarily wants to dismiss pending postconviction proceedings and discharge collateral counsel.

(7) If the court determines that the prisoner has made the decision to dismiss pending postconviction proceedings and discharge collateral counsel knowingly, freely and voluntarily, the court shall enter an order dismissing all pending postconviction proceedings and discharging collateral counsel. But if the court determines that the prisoner has not made the decision to dismiss pending postconviction proceedings and discharge collateral counsel knowingly, freely and voluntarily, the court shall enter an order denying the motion without prejudice.

(8) If the court grants the motion:

(A) a copy of the motion, the order, and the transcript of the hearing or hearings conducted on the motion shall be forwarded to the Clerk of the Supreme Court of Florida within 30 days; and

(B) discharged counsel shall, within 10 days after issuance of the order, file with the clerk of the circuit court 2 copies of a notice seeking review in the Supreme Court of Florida, and shall, within 20 days after the filing of the transcript, serve an initial brief. Both the prisoner and the state may serve responsive briefs. Briefs shall be served as prescribed by rule 9.210.

(9) If the court denies the motion, the prisoner may seek review as prescribed by Florida Rule of Appellate Procedure 9.142(b).

In *James v. State*, 974 So.2d 365, 368 n. 4 (Fla. 2008), this Court noted that the *Durocher* hearing procedure had been codified in both Rule 3.851(i), Florida Rule of Criminal Procedure and Rule 9.142, Florida Rules of Appellate Procedure. This Court noted that the review of the waiver of counsel is now automatic. *James*, at 368, n.4. Subsequently, in *Trease v. State*, 41 So.3d 119, 123 (Fla. 2010), this Court held:

Because the trial court properly followed the procedures outlined in *Durocher* and Rule 3.851(i), we affirm its order granting Trease's motion to waive postconviction counsel and proceedings.

Additionally, this Court repeated the abuse-of-discretion standard of review for 3.851(i) waivers, as stated in *Alston*. *Trease*, 41 So.3d at 124.

As in *Trease* and *Alston*, the circuit court judge followed the procedures established in Rule 3.851(i) and *Durocher*. The lower court judge made all relevant inquiries, followed up on Russ' answers, and insured that Russ' waivers of postconviction counsel and proceedings were knowing, intelligent and voluntary.

To the extent collateral counsel has now raised issues which were not raised in the lower court, those issues (1) were waived; (2) are not properly before this court in a Rule 3.851(i)/9.142(c) proceeding; and (3) have no merit. This Court's adoption of Rule 3.851(i) and case law both before and after that adoption establish the procedure to be followed. The lower court followed this procedure, explicitly citing to Rule 3.851(i), *Durocher*, and *Trease*. (WHR9, 20).

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the State of Florida respectfully requests that this Honorable Court affirm the trial court order.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to David Hendry and James Driscoll, CCRC-Middle, 3801 Corporex Dr., Ste 210, Tampa, FL 33619; on this ___th day of April, 2012.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.

BARBARA C. DAVIS
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