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IN THE SUPREME COURT OF FLORIDA

KENNETH ALLEN STEWART,

Appellant,

v. Case No. SC13-1234
Death Penalty Case

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This appeal challenges the denial of a successive motion for postconviction relief premised on Martinez v. Ryan, 132 S. Ct. 1309 (2012). Appellant Kenneth Stewart was convicted of the underlying murder and related offenses and sentenced to death in 1986. In an opinion affirming the convictions but remanding for resentencing, this Court described the facts of this case as follows:

> In April 1985, Michele Acosta and Mark Harris picked up appellant, Kenneth Stewart, while he was hitchhiking. When Acosta stopped to drop Stewart off, he struck her on the head with the butt of a gun and fired three shots, hitting Acosta in the shoulder and Harris in the spine. Stewart then forced Acosta and Harris from the car before driving off and picking up a friend, Terry Smith. The two removed items from the car's trunk and Stewart burned the car after telling Smith that the car belonged to a woman and a man whom he had shot. Acosta recovered from her injuries; Harris later died.
>
> Stewart was arrested and ultimately charged with first-degree murder, attempted first-degree murder, armed robbery, and arson. He consented to a search of his apartment, which yielded the items he and Smith had taken from Acosta's car. When shown a photopack display of suspects, Harris, who had not yet expired, and Acosta identified Stewart as the assailant. Acosta also identified Stewart in person at a preliminary hearing. While in jail, Stewart telephoned his grandparents. Detective Lease, who was visiting the grandparents, obtained their permission to secretly listen in on an extension. Via pretrial motions, Stewart sought to suppress the identifications made by Acosta and Harris, and the telephone conversation overheard by Lease. The court excluded the identification made by Harris, but ruled admissible both of Acosta's identifications and the telephone conversation.

Stewart v. State, 549 So. 2d 171, 172 (Fla. 1989), cert. denied, 497 U.S. 1032 (1990). This Court remanded for entry of written orders to support the sentences imposed. Id., at 176-77.

At his penalty phase, Stewart had presented the testimony of Bruce Scarpo, Stewart's stepfather (DA. V5/634-73)[1]; James Hayward, a friend (DA. V5/675-76); Joyce Engle, a rehabilitative services worker Stewart met in jail (DA. V5/701-04); Lash LaRue, a family friend (DA. V5/705-08); Susan Medlin, Stewart's sister (DA. V5/713-22); Joanne Scarpo, Stewart's stepfather's wife (DA. V5/724-30); and Dr. Walter Afield, a neuropsychiatrist (DA. V5/681-700). The jury recommended a death sentence by a vote of ten to two (DA. V5/756-57).

Upon remand, the trial court entered a written order on the death sentence consistent with the prior oral findings that there were two aggravating circumstances, and ascribing little weight to the mitigation presented. The judge reimposed the life sentence for the robbery, providing written reasons to support the guidelines departure. On appeal, this Court affirmed the death sentence but remanded the robbery sentence with directions to impose a guidelines sentence on that conviction. Stewart v.

[1] Record citations in this brief use "DA." to refer to the record in Stewart's direct appeal, Florida Supreme Court Case No. 70015, and "PC." to refer to the record in Stewart's first postconviction appeal, Florida Supreme Court Case No. SC96177.

State, 588 So. 2d 972, 974 (Fla. 1991), cert. denied, 503 U.S. 976 (1992).

Postconviction review was initiated in 1993, and an evidentiary hearing was held in December, 1998, and concluded in March, 1999. One of the claims on which a hearing was granted asserted that trial counsel had provided ineffective assistance of counsel at sentencing, because counsel failed to discover and present evidence establishing that Stewart suffered from an organic brain impairment (PC. V1/58, 69; V2/302). However, the expert Stewart presented at the hearing opined that Stewart did not have organic brain damage (PC. V6/27, 42).

Following the evidentiary hearing, all relief was denied (PC. V3/373-95). This Court affirmed. Stewart v. State, 801 So. 2d 59 (Fla. 2001). This Court has also denied two state habeas corpus petitions in this case. Stewart v. Crosby, 880 So. 2d 529 (Fla. 2004); Stewart v. Crosby, 905 So. 2d 126 (Fla. 2005). The federal courts have also upheld the constitutionality of Stewart's convictions and sentences. Stewart v. Sec'y, Dept. of Corrections, 476 F.3d 1193 (11th Cir. 2007).

In addition to the sentence challenged in this appeal, Stewart is under a sentence of death for the 1984 murder of Ruben Diaz. See Stewart v. State, 872 So. 2d 226 (Fla. 2003). While litigating postconviction challenges to the sentence in that case, Stewart secured MRI and PET brain imaging testing,

claiming trial counsel should have done this for the 2001 resentencing. Following an evidentiary hearing, the trial court rejected that claim, finding Stewart had failed to demonstrate either deficient performance or prejudice. On appeal, this Court affirmed that ruling. Stewart v. State, 37 So. 3d 243 (Fla. 2010). Stewart filed a federal habeas petition disputing the conviction and sentence on the Diaz murder, but his petition was dismissed on February 27, 2014. That case is currently pending in the Eleventh Circuit Court of Appeals. Stewart v. Sec'y, Florida Dept. of Corrections, Eleventh Circuit Case No. 14-11238-P.

In April, 2009, Stewart filed a successive motion for postconviction relief, alleging that the results of his brain imaging tests conducted for the Diaz case provide newly discovered evidence which required his sentence in this case to be vacated (V1/13). The motion was denied on July 15, 2009, as untimely (V1/13). Stewart filed a motion for rehearing, which was ultimately denied on July 1, 2010 (V1/14). Stewart did not appeal.

On March 21, 2013, Stewart filed a second successive motion, leading to the ruling challenged in this appeal, asserting that Martinez compelled reconsideration of the prior rejection of Stewart's claim of ineffective assistance of counsel (V1/17-40). The State filed a motion to dismiss,

asserting that the motion should be struck as untimely (V1/41-47). A case management conference was held on May 2, 2013, and Stewart's attorney indicated, consistent with the motion, that he was aware of this Court's decisions on the issue, but he felt it was necessary to raise the claim in state court in order to exhaust it before it could be asserted in federal court (V2/7-8). The State advised that exhaustion of the claim was not necessary as there was no procedure in Florida authorizing substantive consideration of a claim of ineffective assistance of collateral counsel (V2/7). Stewart's motion was thereafter denied with prejudice as untimely (V1/51-54; V2/8).

This appeal follows.

SUMMARY OF ARGUMENT

The court below properly dismissed Stewart's successive motion for postconviction relief as untimely. As this Court has repeatedly recognized, Martinez v. Ryan did not provide any basis to disregard state procedural rules for postconviction proceedings.

ARGUMENT

ISSUE I

THE COURT BELOW PROPERLY DENIED STEWART'S SUCCESSIVE POSTCONVICTION MOTION AS UNTIMELY.

Stewart challenges the trial court's dismissal of his second successive motion for postconviction relief. Because this was a legal ruling, review is *de novo*. Henyard v. State, 992 So. 2d 120, 125 (Fla. 2008) (postconviction motion denied solely on the pleadings presents a legal issue, reviewed *de novo*).

Stewart's motion asserted that his initial collateral review attorneys at the Office of Capital Collateral Regional Counsel provided ineffective assistance when they failed to present a claim of ineffective assistance of trial counsel for failing to obtain brain scans and investigate Stewart's purported brain damage for mitigation purposes (V1/17-40). The State filed a motion to dismiss (V1/41-47), and a case management conference was held on May 2, 2013 (V2/1-10). At that hearing, Stewart's attorney did not offer any argument but relied on his motion, and indicated the motion had been filed simply to preserve the claim for federal court (V2/6-8). The court dismissed the motion as untimely (V1/51-54; V2/8).

This ruling was proper. Pursuant to Florida Rule of Criminal Procedure 3.851(d), a motion for postconviction relief must be filed within one year of when a defendant's conviction

and sentence became final. Stewart's case became final in 1992, when the United States Supreme Court denied certiorari review of the opinion affirming his convictions and death sentence. The rule provides an exception for claims that are based on newly discovered evidence or a newly recognized constitutional right that has been held to apply retroactively. Fla. R. Crim. P. 3.851(d)(2)(A) & (B). However, Stewart's motion fails to fall within the scope of this exception.

Stewart claims that his motion is timely pursuant to Rule 3.851(d)(2)(B), "because the fundamental constitutional right asserted herein was not established within the one-year time period provided in (d)(1) of the Rule, and those rights have been held to apply retroactively" (Appellant's Initial Brief, p. 9; V1/23). The problem with this explanation is that Martinez did not create or recognize any new constitutional right, and it has not been held to apply retroactively. To the contrary, Martinez expressly denied that it was recognizing any new constitutional right. Martinez, 132 S. Ct. at 1315 ("This is not the case, however, to resolve whether that exception [to the rule there is no right to counsel in collateral proceedings] exists as a constitutional matter"); Id., at 1319 (outlining the differences between "a constitutional ruling and the equitable ruling of this case").

This Court has unequivocally rejected any application of Martinez to overcome the clear dictates of Rule 3.851. Martinez establishes a doctrine of federal habeas law which permits federal courts to review new allegations of ineffective assistance of counsel in very limited circumstances. Howell v. State, 109 So. 3d 763, 773-74 (Fla. 2013); Gore v. State, 91 So. 3d 769 (Fla.), cert. denied, 132 S. Ct. 1904 (2012) ("It appears that Martinez is directed toward federal habeas proceedings and is designed and intended to address issues that arise in that context"). It does not authorize the untimely filing of a state motion for postconviction relief.

Stewart's brief does not provide any basis for a different outcome. He does not even address the timeliness of his motion, or offer any suggestion of error in the ruling below. He merely repeats, verbatim, the allegations in the untimely motion.

Stewart acknowledges that this Court has held that Martinez did not create any avenue for further state postconviction review, but claims that, since Martinez and Gohel v. Ryan, 2012 WL 1378678 (D. Ariz. April 20, 2012), both started with claims originally pled in the state court, that his motion should have been granted. However, since neither of those cases is from Florida, they cannot speak to the issue of how Florida's procedural rules apply.

In addition, Stewart is incorrect about Gohel's procedural history. In that case, the initial state postconviction motion was due in December, 2003, but was not filed until May 13, 2005. There was an ineffective assistance of counsel claim that was denied as untimely, and the rest of the motion was ultimately dismissed. State appellate courts declined to review that ruling. Gohel filed a federal habeas petition and his ineffective assistance of counsel claim was characterized as procedurally barred, and at that point the Martinez decision was released. He claimed his IAC issue was cognizable under Martinez and the State of Arizona disagreed, noting that Martinez had brought a claim of ineffective assistance of collateral counsel in state court but that Gohel had never done so (see at p. *8). The habeas judge, notwithstanding the unexhausted nature of the claim, ruled on the merits that the claim of IAC-trial counsel was not substantial but was meritless because there was no possible prejudice.

Accordingly, Gohel actually supports the State's position that there is no requirement that this claim be exhausted in state court, not that the need to exhaust a federal claim satisfies any exception to the time requirements of Rule 3.851. Moreover, even if Stewart's motion had been considered on the merits, a summary denial would have been compelled. Stewart's Martinez claim would fail substantively because (1) collateral

counsel cannot be deemed ineffective for having failed to raise a claim where that claim was actually raised and litigated and (2) even if collateral counsel had performed deficiently, Stewart has not identified any substantial claim that his trial counsel rendered ineffective assistance.

In reviewing collateral counsel's performance, Martinez counsels that the standard of Strickland v. Washington, 466 U.S. 668 (1984), apply. See Martinez, 132 S. Ct. at 1318. In this case, the claim that trial counsel was ineffective because he did not investigate and present evidence of brain damage in mitigation was actually included in Stewart's initial postconviction motion, and Stewart was granted an evidentiary hearing on that claim. At the hearing, Dr. Faye Sultan testified that Stewart did not have brain damage (PC. V6/27, 42). Although by 2006, Stewart had found a mental health expert with a more favorable opinion on that particular issue, this Court has repeatedly recognized that a later discovery of a more favorable expert does not demonstrate that an attorney performed deficiently in relying on the earlier expert. Diaz v. State, 132 So. 3d 93, 113 (Fla. 2013); Floyd v. State, 18 So. 3d 432, 454 (Fla. 2009); Darling v. State, 966 So. 2d 366 (Fla. 2007); Asay v. State, 769 So. 2d 974, 986 (Fla. 2000). Therefore, Stewart's initial collateral attorneys were not deficient with regard to the brain damage issue.

In addition, the claim that Stewart's trial attorney should have secured PET and MRI scans is not a substantial claim. Stewart's penalty phase was held in 1986. There has been no showing that all reasonable attorneys were obtaining brain scans for their capital murder defendants in 1986. In Stewart's Diaz case, Stewart was granted a new sentencing proceeding, which was conducted in 2001. Yet even when Stewart alleged in postconviction in 2006 that his attorney should have obtained brain scans in 2001, the claim was denied as meritless. This Court upheld that ruling. Stewart, 37 So. 3d at 251-55.

While Stewart asserts that the issue "remains unresolved" the Diaz case because it remains pending in the federal district court, the issue was fully resolved when this Court upheld the trial court's rejection of the claim. In addition, the claim is no longer pending in district court, as Stewart's habeas petition was dismissed as untimely on February 27, 2014. The case is currently pending in the Eleventh Circuit Court of Appeals, but the issue of the IAC claim for failing to obtain brain scans is not before the court in that case.

Finally, the record in this case fully refutes any claim of ineffective assistance of Stewart's 1986 attorney. Prior to the 1986 trial and penalty phase, Stewart's mental functioning was thoroughly explored. In addition to pretrial competency evaluations, his attorney secured an examination by Dr. Walter

Afield, a neuropsychiatrist with a great deal of experience in capital cases (DA. V5/681-700; V6/765-90). Dr. Afield testified at the penalty phase, and the trial court found and weighed the statutory mental mitigating factors based on the evidence he provided. Stewart, 588 So. 2d at 973, n.2. Stewart has not identified any basis for counsel to have believed it was necessary to obtain brain scans in 1986, which were not suggested or recommended by Dr. Afield. This Court did not even reference PET scans for mitigation purposes until 1997. Hoskins v. State, 702 So. 2d 202 (Fla. 1997) (finding trial court erred in denying defendant's request for a PET scan). On these facts, no colorable claim of ineffective assistance of counsel exists.

The court below properly dismissed Stewart's second successive postconviction motion as untimely. Accordingly, this Court must affirm that ruling.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the Order entered below dismissing the successive postconviction motion as untimely.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of August, 2014, I electronically filed the foregoing with the Clerk of the Court by using the e-filing portal which will send a notice of electronic filing to the following: Daniel Hernandez, Esq., 902 No. Armenia Ave., Tampa, FL 33609-1707, **dhernandezlaw@aol.com**.

/s/ Carol M. Dittmar
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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).

Respectfully submitted,

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