IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,640

ALLEN LEE DAVIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FOURTH JUDICIAL
CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Davis' motion for post-conviction relief. This motion was brought pursuant to Fla. R. Crim. P. 3.850. Thereafter, the circuit court summarily denied Mr. Davis' claims, and this appeal followed.

To designate references to the record in the instant cause "R. ___" will be used and to designate references to the record on direct appeal to this Court "T. ___" will be used. All other citations will be self-explanatory or will be otherwise explained.

INTRODUCTION

Mr. Davis' reply brief specifically addresses Arguments I-II and V-VI. As to the remaining Arguments III-IV and XII-IX, Mr. Davis relies upon his initial brief wherein he stated with specificity why the State is in error in claiming "procedural bar." Where new case law develops which changes the law applied by this Court at the time of direct appeal, no procedural bar can arise. Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). The State fails in its brief to address the new cases relied upon by Mr. Davis, and explain why these cases do not warrant consideration in light of this Court's ruling in Jackson and Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

Mr. Davis does not waive any claim previously discussed. He relies upon the presentations in his initial brief regarding any claims not specifically addressed herein.

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ARGUMENT I

MR. DAVIS' DEATH SENTENCES VIOLATE LOCKETT V. OHIO, EDDINGS V. OKLAHOMA AND HITCHCOCK V. DUGGER BECAUSE THE SENTENCING JUDGE LIMITED HIS CONSIDERATION OF MITIGATING FACTORS TO THOSE LISTED IN FLORIDA'S DEATH PENALTY STATUTE AND BECAUSE THE PARTICIPANTS OPERATED UNDER THIS SAME VIEW; AS A RESULT, MR. DAVIS' SENTENCES OF DEATH WERE OBTAINED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The State in its brief maintains that no error under Hitchcock v. Dugger, 481 U.S. 393 (1987) occurred because the "Hitchcock instruction" was not given. As the State correctly notes in its brief, Florida abolished the "Hitchcock instruction" in 1979. The State would have this Court hold that any trial conducted after 1979 cannot contain Hitchcock error due to no "Hitchcock instruction." This Court has clearly recognized that absence of this particular instruction does not preclude relief on the basis of Hitchcock. Way v. Dugger, 568 So. 2d 1263 (Fla. 1990)(Hitchcock relief granted though trial was not until 1984 and the "Hitchcock instruction" was not given); Waterhouse v. State, 522 So. 2d 341 (Fla. 1988) (Hitchcock relief granted though trial was in 1988); Cheshire v. State, 568 So. 2d 908 (Fla. 1990)(relief granted though trial was not until 1988 and the "Hitchcock instruction" was not given).

In fact this Court in Waterhouse specifically held that Hitchcock overturned the notion that "mere presentation" of nonstatutory mitigation was enough to satisfy the eighth amendment. This Court concluded that Hitchcock required the sentencer to actually consider the nonstatutory mitigation. In Cheshire this Court again relied upon this reading of Hitchcock. Though the trial court in Cheshire did mention non-statutory mitigation in its oral statements at sentencing, there was no mention of nonstatutory mitigation in the written sentencing order. This Court held that "the trial court may not constitutionally limit itself solely to considering statutory factors, as the court below apparently did in its written order." Cheshire, 558 So. 2d at 912 citing Hitchcock. This is virtually identical to Mr. Davis' case, but Mr. Davis' sentencing judge did not mention non-statutory mitigation in either the oral pronouncements at sentencing or the written sentencing order.

In Woods v. Dugger, 711 F. Supp. 586 (M.D. Fla. 1989),[1] the District Court found Hitchcock error even though Mr. Woods' trial occurred in 1983, long after the "Hitchcock instruction" had been abolished. The Court in Woods found that though the jury was not prevented from considering the nonstatutory mitigation, "the sentencing judgment indicate[d] that the state trial judge [] committed the same error as did the state trial judge in Hitchcock." Woods v. Dugger, 711 F. Supp at 602. This same Hitchcock error, failure by the judge to consider the nonstatutory mitigation, was present in Mr. Davis' trial. The State's conclusion that there can be no Hitchcock violation without the "Hitchcock instruction" is in error. When it is apparent from the record that the sentencing judge did not consider non-statutory mitigating evidence, a new sentencing proceeding is mandated. Foster v. State, 518 So. 2d 901, 902 (Fla. 1987) citing Hitchcock; Copeland v. Dugger, 565 So. 2d 1348, 1349 (Fla. 1990)(trial court's written order expressly confined its consideration to statutory mitigation).

The State argues that the only distinguishing feature to be found in Hitchcock is its criticism of the jury instruction. By arguing this, the State conveniently ignores the fact that the sentencing judge in Hitchcock improperly refused to consider evidence of nonstatutory mitigating circumstances as evidenced by the judge's statement during the sentencing proceedings that "there were insufficient mitigating circumstances as enumerated in Florida Statute 921.141(6) . . ." Hitchcock, 481 U.S. at 398. The Supreme Court in Hitchcock was clearly concerned with the trial judge's failure to consider the nonstatutory mitigation. Again, as this Court has previously held, Hitchcock was a rejection of "mere presentation" of nonstatutory mitigation as adequately protecting eighth amendment guarantees.

This Court immediately recognized in its post-Hitchcock decisions that Hitchcock was a substantial change in Florida law. Downs v. Dugger, 514 So. 2d 1069, 1070 (Fla. 1987). The mere opportunity to present non-statutory mitigating evidence does not meet constitutional requirements if the judge or jury believes

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[1]Woods was reversed on appeal on other grounds. See Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991). In fact the State had conceded Hitchcock error and conducted a resentencing hearing before the appeal to the Eleventh Circuit occurred.

that some of the evidence may not be weighed during the formulation of the advisory opinion or during sentencing. Downs, 514 So. 2d at 1071.

The State maintains that Mr. Davis' mitigating evidence was insignificant, and in support of this inaccurately reports that Mr. Davis told Deputy Terry that he would cooperate so long as cooperation was to his advantage. What Deputy Terry actually testified to at trial is that in response to the statement "Allen, you know you ought to do what's right," Allen said "I know if this doesn't work, then I will try something else." The State does not and cannot deny that Mr. Davis offered to take a polygraph, agreed to a nuetron activation test, went to the police station voluntarily, consented to having both his truck and apartment searched and even gave the police directions to, and the keys to, his apartment.

The State relies upon Hall v. State (sic), 531 So. 2d 76 (Fla. 1988), for the proposition that this court did not grant relief in Hall where the mitigation offered was as "insignificant as that proffered" in Davis. The decision that the State is referring to is actually Hall v. Dugger, 531 So. 2d 76 (Fla. 1988). This Court subsequently ruled in Hall v. State, 541 So. 2d 1125 (Fla. 1989), that the Court could not say beyond a reasonable doubt that the aggravating factors found at Mr. Hall's original sentencing proceeding would have outweighed all of the mitigating factors and ordered a new sentencing before a jury.

Hitchcock requires reversal of a death sentence where the sentencer does not provide meaningful consideration and does not give effect to the evidence in mitigation. Penry v. Lynaugh, 109 S. Ct. 2934 (1989). This case is identical to Woods, and as the State conceded there, a new sentencing is required.

ARGUMENT II

BECAUSE THE MENTAL HEALTH EXPERT RETAINED TO EVALUATE HIM BEFORE TRIAL FAILED TO CONDUCT A FULL AND CONFIDENTIAL EVALUATION FOR AVAILABLE MENTAL HEALTH MITIGATION AS WELL AS COMPETENCY AND SANITY, AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE, RESULTING IN A TRIAL AT WHICH MR. DAVIS WAS INCOMPETENT AND ENTITLED TO A COMPETENCY HEARING, THERE WAS A FAILURE TO ESTABLISH AN AVAILABLE INSANITY DEFENSE, AND A DEPRIVATION OF MR. DAVIS' RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION, WHICH, UNDER THE FACTS OF THIS CASE, RESULTED IN EVALUATIONS WHICH VIOLATED MR. DAVIS' RIGHTS TO CONFIDENTIALITY.

Due to counsel's constrained view of mitigation, the mental health experts did not pursue or consider non-statutory mitigation in this case. As a result, Mr. Davis' jury and sentencing judge did not consider critical non-statutory mitigation. Therefore the proceedings did not comport with the requirements of Hitchcock v. Dugger, 481 U.S. 393 (1987). The situation here is no different from that in State v. Michael, 530 So. 2d 930 (Fla. 1988), where Rule 3.850 relief was granted because trial counsel failed to obtain a mental health expert's assistance on penalty phase issues.

Contrary to the State's assertion of a procedural bar, this claim is premised upon the pre-Hitchcock constrainment which warranted post-Hitchcock relief in Hall v. State, 541 So. 2d 1125 (Fla. 1989) (this Court found counsel's misunderstanding of the law "precluded [] counsel from investigating, developing, and presenting possible nonstatutory mitigating circumstances"). In fact, pre-Hitchcock, Hall sought 3.850 relief and was denied. Following Hitchcock, Hall again sought 3.850 relief and a new sentencing was ordered.[2]

The State maintains that there was no non-record, secret evaluation as Dr. Miller's report was sent directly to defense counsel. The non-record undisclosed report referred to in Mr. Davis' initial brief is obviously not the report of Dr. Miller but is the report of the neurologist. This report was sent directly to the judge and the record does not reflect that copies were sent to counsel. In fact,

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[2]A similar case is pending on appellate review. See State v. Mason, Case No. 75,797. There on a second 3.850, filed after Hitchcock, the circuit court granted Hitchcock relief because a 1980 defense attorney was constrained by his misunderstanding of the law. ("The Defendant's trial counsel was also restricted by the then statutory construction of the mitigating factors which resulted in trial counsel's failure to investigate, develop, and present the abundance of available nonstatutory mitigating evidence." Order granting relief, State v. Mason, Hillsborough County No. 80-7632).

the first mention of this neurological report on the record is during the judge's oral statements at sentencing when he uses the report to negate mitigation (T. 1869). The use of this non-record report was a violation of Mr. Davis' eighth amendment rights. Gardner v. Florida, 430 U.S. 349 (1977).

The fact that counsel for Mr. Davis was present at the "Amytal interview" is irrelevant. What is relevant is that counsel, because of his constrained view of mitigation, did not provide Dr. Miller or the neurologist with any background information, guidance or direction. This is clear from the report of Dr. Miler:

> The examination was conducted by me on May 20, 1982 during which time history was provided by the patient and mental status and neurologic screening examinations done.

(R. 820)(emphasis added). There is no mention anywhere in the report of material or information related to him by counsel, nor is there any indication of independent efforts on behalf of the mental heath expert to discover background information to aid him in his evaluation. Through ineffective assistance of counsel and failings on the experts' parts, the evaluations were inadequate. Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991).

The State asserts that, in any event, Mr. Davis was examined by competent doctors prior to trial. However, the State ignores that the assistance an expert provides must be "adequate". Cowley, 929 F.2d at 645. It is difficult to imagine that had Mr. Davis been "thoroughly examined" by mental health experts prior to trial as the State asserts, this wealth of mitigation would not have been discovered. Adequate assistance of a mental health expert would have produced a plethora of mitigating factors. Rule 3.850 relief is warranted.

ARGUMENTS V - VI

THE APPLICATION OF THE AGGRAVATING FACTORS OF "HEINOUS, ATROCIOUS AND CRUEL" AND "COLD, CALCULATED AND PREMEDITATED" VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE NO LIMITING INSTRUCTION WAS PROVIDED TO THE JURY OR EMPLOYED BY SENTENCING JUDGE.

A Florida jury must be correctly instructed at the penalty phase proceedings. Hitchcock v. Dugger, 481 U.S. 393 (1987). The jury instructions given to the jury in Mr. Davis' case did not correctly explain the law relating to the aggravating factors of "heinous, atrocious or cruel" or "cold, calculated or premeditated." No limiting instruction was given to guide the jury in their deliberations. See Hitchcock v. Dugger; Maynard v. Cartwright, 108 S. Ct. 1853 (1988). The State asserts that Hitchcock is either a jury instruction case or is not a jury instruction case. Perhaps the State should re-read Hitchcock v. Dugger. The Supreme Court in Hitchcock addressed both the trial judge's failure to give adequate and correct jury instructions and the judge's failure to consider evidence of nonstatutory mitigating circumstances. Hitchcock, 481 U.S. at 398-99. The judgment was reversed on the basis of both of these. Id. The errors committed in Mr. Davis' case cannot be found to be harmless beyond a reasonable doubt. This is a claim of fundamental error and a new sentencing proceeding should be ordered.

CONCLUSION

For each of the foregoing reasons, the summary denial of each of Mr. Davis' Rule 3.850 claims was erroneous, and this Court should reverse and remand the case for an evidentiary hearing on the claims.

I HEREBY CERTIFY that a true copy of the foregoing reply brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 15, 1991.

Respectfully submitted,

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