

Supreme Court of Florida

No. SC06-1998

RORY ENRIQUE CONDE,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[February 11, 2010]

PER CURIAM.

This case is before the Court on appeal from an order denying Rory E. Conde's first motion to vacate his first-degree murder conviction and sentence of death under Florida Rule of Criminal Procedure 3.851 after an evidentiary hearing. Because the order concerns postconviction relief from a capital conviction for which a sentence of death was imposed, this Court has jurisdiction. See Art. V, § 3(b)(1), Fla. Const. We affirm the postconviction court's order denying relief.

I. FACTS AND PROCEDURAL HISTORY

The facts of the underlying crime are set out in this Court's opinion on Conde's direct appeal, Conde v. State, 860 So. 2d 930 (Fla. 2003). We summarize

them here only briefly. On January 13, 1995, Conde picked up Rhonda Dunn, a prostitute, and took her to his apartment. After engaging in sexual relations, Conde followed her out of the room and strangled her to death. Conde then drove to another location and left her body on the side of the road. Conde had done the same on five prior occasions to five other prostitutes. This series of murders was preceded by the breakup of Conde's marriage, which occurred when his wife discovered that Conde was using the services of prostitutes. Conde was arrested in June 1995, after fire rescue personnel discovered a woman, naked and bound in duct tape, trapped in his apartment. Conde later confessed to all six murders and stated that after each murder, he knelt over the deceased body and verbally blamed the victim for his marital problems.

Conde was charged with the first-degree murder of all six victims. The counts were severed and his first trial, held in October 1999, was for Dunn's murder. The trial court permitted the State to introduce Williams¹ rule evidence of the other five murders. The jury found Conde guilty of first-degree murder and recommended the death penalty by a nine-to-three vote. The trial court imposed a

1. Williams v. State, 110 So. 2d 654 (Fla. 1959) (permitting introduction of evidence of other crimes in particular circumstances).

sentence of death, finding three aggravating circumstances,² one statutory mitigating circumstance,³ and five nonstatutory mitigating circumstances.⁴ Conde, 860 So. 2d at 937-38. On direct appeal, Conde raised thirteen claims.⁵ This Court affirmed. See id. at 959. Conde then filed the present rule 3.851 motion, wherein

2. The trial court found the following aggravators: (1) heinous, atrocious, or cruel (HAC); (2) cold, calculated, and premeditated (CCP); (3) and prior violent felony.

3. The trial court found the following statutory mitigator: Conde had no significant history of prior criminal activity (moderate weight).

4. The nonstatutory mitigation was as follows: (1) Conde's positive influence on family despite adversity (moderate weight); (2) his good employment background (moderate weight); (3) his relationship with his children (given moderate weight); (4) Conde's mental and emotional problems (given little weight); and (5) his status as model inmate (little weight).

5. Conde alleged error in the guilt phase, arguing that the trial court erred when it (1) denied his cause challenges to prospective jurors; (2) granted the State's motion to strike a prospective juror for cause; (3) denied Conde's motion for judgment of acquittal; (4) admitted Williams rule evidence of the other five murders; (5) admitted certain testimony concerning other crimes, a police officer's warning to the victim about "the Tamiami strangler," and Conde's alleged flight at the time of his arrest; (6) failed to limit certain prosecutorial comments during the guilt-phase opening and closing arguments; and (7) denied Conde's motion to suppress his confession.

Conde also alleged error in the penalty phase, claiming that the trial court erred by (8) finding the CCP and HAC aggravators; (9) rejecting certain mitigating circumstances; (10) allowing the admission of details regarding Conde's prior violent felony and allowing prosecutorial arguments regarding collateral crimes; (11) excluding mitigation testimony from a jail chaplain on the basis of a discovery violation; (12) imposing a disproportionate death sentence; and (13) not recognizing Florida's capital sentencing scheme as unconstitutional.

he raised seven claims.⁶ The postconviction court conducted a Huff⁷ hearing and then held an evidentiary hearing.⁸ The postconviction court ultimately denied relief on all grounds and this appeal followed, wherein Conde raises five claims.⁹

6. Conde argued that (1) certain public records were withheld from him; (2) application of rule 3.851 violated his rights because he could not file shell motions; (3) his counsel was ineffective for failing to object to prosecutorial comments in closing arguments; (4) his counsel was ineffective for failing to investigate mitigating evidence involving Dan Bazarro, a chaplain at the jail where Conde was held after his arrest, and for failing to sufficiently prepare and use family members in Colombia, and Conde's rights under Ake v. Oklahoma, 470 U.S. 68 (1985), were violated; (5) counsel was ineffective for failing to sufficiently address the witness disinterest that resulted from the retracted plea agreement; (6) Florida's death penalty is unconstitutional; and (7) lethal injection and electrocution are cruel and unusual punishments and Conde is entitled to the protection of international treaties.

7. Huff v. State, 622 So. 2d 982, 983 (Fla. 1993) (requiring a hearing in postconviction cases "for the purpose of determining whether an evidentiary hearing is required and to hear legal argument relating to the motion.").

8. During the Huff hearing, Conde withdrew claim 1 (public records). The postconviction court summarily denied claim 2 (3.851 shell motions), part of claim 4 (ineffectiveness in investigating mitigation), claim 5 (plea offer fallout), and claims 6 and 7 (death penalty and methods of execution unconstitutional). However, Conde presented extensive testimony during the evidentiary hearings that addressed some of the summarily denied claims, including claim 4 (ineffectiveness of counsel regarding Chaplain Bazarro) and claim 5 (witness disinterest resulting from the retracted plea offer), because they were interrelated.

9. Conde argues that the postconviction court erred in denying the following five claims: (1) counsel was ineffective for failing to preserve the record on appeal and object to certain prosecutorial comments made at trial; (2) the postconviction court erred in denying Conde's use of an expert's testimony as to counsel's ineffectiveness; (3) counsel was ineffective for failing to discover Chaplain Bazarro; (4) counsel was ineffective for failing to properly address the negative impact on possible mitigation that resulted from the plea agreement

II. APPLICABLE STANDARDS

Pursuant to the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), we have held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied:

First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). This requires that the defendant show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Next, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result would have been different. Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Under the Strickland standard, the Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported

retraction; and (5) Florida's death penalty sentencing procedures are unconstitutional. We deny relief on all of the claims.

by competent, substantial evidence, but reviewing legal conclusions de novo.

Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

III. ISSUES ON APPEAL

First, Conde contends that trial counsel was ineffective for failing to object to several allegedly improper prosecutorial statements made during closing arguments. The postconviction court summarily denied this claim, stating that the “[d]efendant cannot show prejudice pursuant to Strickland, supra.” We find that the prosecutor’s comments were insufficient to undermine confidence in the outcome as required under the Strickland prejudice standard. See Maxwell, 490 So. 2d at 932; see also Hitchcock v. State, 755 So. 2d 638, 643 (Fla. 2000) (“Any error in prosecutorial comments is harmless if there is no reasonable probability that those comments affected the verdict.”) (citing King v. State, 623 So. 2d 486, 487 (Fla.1993)). “Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.” Strickland, 466 U.S. at 700. Having reviewed this claim, we find that Conde has failed to demonstrate that trial counsel was ineffective under Strickland. Accordingly, we affirm the postconviction court’s denial of relief.

In his second claim, Conde argues that the postconviction judge erred by not allowing Conde’s expert to testify to the prevailing norms of effective representation in capital cases relevant to Conde’s proceeding. Because we resolve

the ineffectiveness issues in this case based on the prejudice prong of Strickland, we decline to address this issue. Accordingly, we deny relief on this claim.

In his third claim, Conde argues that his trial counsel was deficient in failing to timely discover and introduce the testimony of Chaplain Bazarro. Bazarro allegedly would have testified that Conde confided to him that Conde had been sexually abused as a child. Conde alleges that this testimony would have refuted the State's claim that he recently fabricated his claims of abuse. We affirm the postconviction court's denial of relief. This Court has already considered this claim in another form. In Conde's direct appeal, he alleged that the trial court erred by excluding Chaplain Bazarro's testimony. He raised the same substantive reasons there that he raises now in the guise of an ineffective assistance claim. This Court denied relief on direct appeal, explaining that "even if the trial court erred in excluding the chaplain's testimony, the error was harmless beyond a reasonable doubt under the standard set forth in State v. DiGuilio." Conde, 860 So. 2d at 958. Because this Court has already held that the exclusion of Bazarro's testimony was harmless error, Conde cannot establish prejudice in his ineffective assistance of counsel claim. See, e.g., Cox v. State, 966 So. 2d 337, 347-48 (Fla. 2007). Accordingly, this claim is meritless.

Conde next alleges that his trial counsel was ineffective for failing to convey the negative impact on possible mitigation which resulted from a retracted plea offer of life imprisonment and for failing to seek enforcement of the plea offer. The postconviction court denied this claim. We affirm that denial. Though the postconviction court originally denied an evidentiary hearing on this issue at the Huff hearing, the court nevertheless received evidence at the evidentiary hearing over the State's objection. The postconviction court noted the testimony from the evidentiary hearing claiming generally that once the plea offer was revoked, other potential witnesses in the case lost interest and stopped volunteering to help the defense team. Id. The postconviction court then denied relief because Conde had not alleged which witnesses lost interest and failed to testify or allege what their testimony would have been. The court further held that the claim was refuted by the record since coworkers as well as neighbors testified at trial on Conde's behalf. Id.

In making an ineffective assistance of counsel claim, Conde was required to "identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards." Maxwell, 490 So. 2d at 932. Further, he had to show that some deficiency "so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined." Id. Conde has not done either. He has

not established what, if any, negative result occurred. He has not established who the additional witnesses were, what they would have testified to, or otherwise established how any disinterest resulting from the retracted plea agreement prejudiced him. He has also failed to explain what information the additional witnesses or additional evidence would have provided that was not already given by the witnesses who did testify in his defense.

By failing to demonstrate that additional witnesses would have testified and what those witnesses would have said, failing to explain how that testimony would improve on the testimony that was given in his case, and failing to explain how the additional testimony would interact with the other evidence and circumstances of his case, Conde has also failed to establish that he suffered any prejudice from counsel's alleged deficiencies. These burdens of proof and of pleading were Conde's to carry. See Strickland, 466 U.S. at 687; see also Chavez v. State, 12 So. 3d 199, 213 (Fla. 2009) ("The defendant has the burden of affirmatively establishing each prong of the Strickland standard."). Accordingly, because Conde failed to establish prejudice under Strickland, we affirm the postconviction court's denial of relief.

In Conde's final claim, he argues that the postconviction court improperly denied his Ring v. Arizona, 536 U.S. 584 (2002), claim. This claim is procedurally barred as it was raised and rejected in Conde's direct appeal. See Conde, 860 So.

2d at 959 (“Conde asserts that Florida’s capital sentencing scheme violates the United States Constitution under the holding of Ring v. Arizona We find that Conde is . . . not entitled to relief on this claim.”). Even if this claim were not barred, this Court has consistently rejected Ring claims similar to those Conde raises. See, e.g., Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003). Finally, Conde’s case involved the prior violent felony aggravator. This Court has held that this aggravator satisfies the requirements of Ring. See, e.g., Rodgers v. State, 948 So. 2d 655, 673 (Fla. 2006). Thus, we affirm the postconviction court’s rejection of this claim.

Conde has failed to demonstrate that he was prejudiced by any of the alleged deficiencies below and is not entitled to the requested relief. Accordingly, we affirm the postconviction court’s order denying Conde’s 3.851 motion.

It is so ordered.

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, LABARGA,
and PERRY, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND
IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Dade County,
Jerald Bagley, Judge – Case No. F95-019816

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