CAPITAL CASE

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM EARL SWEET,
PETITIONER,

VS.

STATE OF FLORIDA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE FLORIDA SUPREME COURT

APPENDIX

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INDEX OF APPENDICES

Appendix A: The unreported opinion of the Circuit Court in and for Duval County denying Successive Motion for Postconviction under Florida Rule of Criminal Procedure 3.851, issued January 7, 2019.

Appendix B: The opinion of the Supreme Court of Florida affirming the denial of postconviction relief, reported at *Sweet v. State*, 293 So. 3d 448 (Fla. 2020).

Appendix C: Order denying rehearing SC19-195, 2020 WL 1921623 (Fla. 2020), issued April 21, 2020.

Appendix D. The opinion of the Supreme Court of Florida affirming the judgment and sentence, reported at *Sweet v. State*, 624 So. 2d 1138 (Fla. 1993).

Appendix E. The opinion of the Supreme Court of Florida affirming the denial of postconviction relief, reported at *Sweet v. State*, 810 So. 3d 854 (Fla. 2002).

Appendix F. The opinion of the Supreme Court of Florida affirming the denial of postconviction relief, reported at *Sweet v. State*, 248 So. 3d 1060 (Fla. 2018).

WILLIAM EARL SWEET,
PETITIONER,

VS.

STATE OF FLORIDA,
RESPONDENT

Appendix A: The unreported opinion of the Circuit Court in and for Duval County denying Successive Motion for Postconviction under Florida Rule of Criminal Procedure 3.851, issued January 7, 2019.

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IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-1991-CF-02899-AXXX-MA

DIVISION: CR-C

STATE OF FLORIDA

v.

WILLIAM E. SWEET,
Defendant.
_____/

ORDER DENYING DEFENDANT'S EIGHTH SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

This matter came before the Court on "Defendant's Eighth Successive Motion to Vacate Judgments of Conviction and Sentence" ("Motion") pursuant to Florida Rule of Criminal Procedure 3.851, filed on April 24, 2018. The State filed its answer to Defendant's Motion on August 30, 2018. On December 11, 2018, a Case Management Conference was held on Defendant's Motion.

In his Motion, Defendant claims that: (1) postconviction counsel was ineffective for failing to file a claim of ineffective assistance of trial counsel based upon trial counsel's alleged substance abuse; (2) postconviction counsel was ineffective for failing to file a Giglio claim based on Solomon Hansbury's recantation; (3) the State violated Brady when it failed to turnover additional records suggesting Eric Wilridge was not incarcerated at the time of the offenses; and (4) Defendant's sentence of death is unconstitutional because he is innocent of the offenses.

PROCEDURAL HISTORY

After a jury trial, Defendant was convicted of one count of First-Degree Murder, three counts of Attempted First-Degree Murder and one count of Burglary. A jury recommended a sentence of death by a vote of ten-two, and the Court sentenced Defendant to death on August 30, 1991. The judgement and sentence were affirmed by the Florida Supreme Court on August 5, 1993. Sweet v. State, 624 So. 2d 1138 (Fla. 1993).

The relevant facts concerning the offenses Defendant was convicted and sentenced on are recited in the Florida Supreme Court's opinion in the direct appeal:

> On June 6, 1990, Marcine Cofer was attacked in her apartment and beaten and robbed by three men. She could identify two of the men by their street names. On June 26, 1990, she was taken by Detective Robinson to the police station to look at pictures to attempt to identify the third assailant. When Robinson dropped Cofer off at her apartment, William Sweet was standing nearby and saw her leave the detective. Unknown to Cofer, Sweet had previously implicated himself in the robbery by telling a friend that he had committed the robbery or that he had ordered it done. Cofer asked her next-door neighbor, Mattie Bryant, to allow the neighbor's daughters, Felicia, thirteen, and Sharon, twelve, to stay with Cofer in her apartment that night. Mattie agreed, and the children went over to Cofer's apartment around 8 p.m.
>
> At approximately 1 a.m. that evening, Sharon was watching television in the living room of Cofer's apartment when she heard a loud kick on the apartment door. She reported this to Cofer, who was sleeping in the bedroom, but because the person had apparently left, Cofer told Sharon not to worry about it and went back to sleep. Shortly thereafter, Sharon saw someone pulling on the living room screen. She awakened Cofer. The two then went to the door of the apartment, looked out the peephole, and saw Sweet standing outside. Sweet called Cofer by name and ordered her to open the door.
>
> At Cofer's direction, Felicia pounded on the bathroom wall to get Mattie's attention in the apartment next door, and a few minutes later Mattie came over. The four then lined up at the door, with Cofer standing in the back of the group. When they opened the door to leave, Sweet got his foot in the door and forced his way into the apartment. Sweet's face was partially covered by a pair of pants. He first shot Cofer and then shot the other three people, killing Felicia. Six shots were fired. Cofer, Mattie, and Sharon were shot in the thigh, ankle and thigh, and buttock, respectively, and Felicia was shot in the hand and in the abdomen.

> Sweet was convicted of first-degree murder, three counts of attempted first-degree murder, and burglary. The jury recommended a sentence of death by a vote of ten to two, and the trial court followed this recommendation.

Sweet v. State, 624 So. 2d 1138, 1139 (Fla. 1993) (Sweet I). In imposing the death sentence, the Court found the following aggravating factors: (1) Defendant had previously been convicted of several violent felonies, including armed robbery, possession of a firearm by a convicted felon, riot, resisting arrest with violence, and the contemporaneous attempted murders and burglary; (2) the murder was committed to avoid arrest; (3) the murder was committed during a burglary; and (4) the murder was cold, calculated, and premeditated. The Court found no statutory mitigating circumstances, but found as non-statutory mitigation that Defendant lacked true parental guidance as a teenager, which was given slight weight. Defendant's conviction and sentence were affirmed on direct appeal. Id. The United States Supreme Court denied certiorari on February 28, 1994. Sweet v. Florida, 510 U.S. 1170 (1994) (Sweet II).

Defendant filed his initial motion for postconviction relief on August 1, 1995, which was denied by the Court. On January 31, 2002, the Florida Supreme Court affirmed the Court's order denying the motion. Sweet v. State, 810 So. 2d 854 (Fla. 2002) (Sweet III). While the appeal of the initial postconviction motion was pending, Defendant filed a petition for writ of habeas corpus in the Florida Supreme Court. Defendant's petition was denied on June 13, 2002. Sweet v. Moore, 822 So. 2d 1269 (Fla. 2002) (Sweet IV).

On May 8, 2003, Defendant filed a successive motion for postconviction relief with the Court, raising a claim under Ring v. Arizona, 536 U.S. 584 (2002). The Court denied the motion, finding the motion was "untimely and facially insufficient. Fla. R. Crim. P. 3.851(d)(1); 3.851(e)(1)(E); 3.851(e)(2)(A); 3.851(e)(2)(B) (2000)." Sweet IV, at 1313. Further, the Court held, "even assuming, *arguendo,* that Defendant's motion was timely and sufficient, on the merits the motion had to be denied because the Supreme Court of Florida had already rejected

this claim in other cases." Id. (internal page numbers omitted). The Florida Supreme Court affirmed. Sweet v. State, 900 So. 2d 555 (Fla. 2004) (Sweet V).

Defendant then filed a petition for habeas relief in the United States District Court for the Middle District of Florida on January 18, 2005. The district court concluded the petition was barred by the statute of limitations under 28 U.S.C. § 2244 (d). The Eleventh Circuit Court of Appeals affirmed the denial. Sweet v. Sec'y, Dept. of Corr., 467 F.3d 1311 (11th Cir. 2006) (Sweet VI).

On March 8, 2005, Defendant filed a third motion for postconviction relief. This time, Defendant claimed he was entitled to relief pursuant to the United States Supreme Court decision in Crawford v. Washington, 541 U.S. 36 (2004). On July 14, 2005, the Court denied the motion. On June 16, 2006, the Florida Supreme Court affirmed. Sweet v. State, 934 So.2d 450 (Fla. 2006) (Sweet VII)

On April 30, 2008, Defendant filed a fourth successive motion. The Court denied the motion. Defendant did not appeal the denial of the motion. On March 19, 2013, Defendant filed his fifth successive motion, raising a claim under Martinez v. Ryan, 132 S. Ct. 1309 (2012). On September 20, 2013, the postconviction court denied that motion. Once again, Sweet did not appeal the denial of his motion. On October 28, 2016, Defendant filed his sixth successive postconviction motion, which was denied by the Court on September 29, 2017. [1]

At the time Defendant filed his eighth successive postconviction motion, the order denying his sixth successive postconviction motion was on appeal before the Florida Supreme Court, rendering this Court without jurisdiction to address the instant motion. Defendant filed a

[1] At the same time of his sixth successive motion, Defendant filed a seventh successive motion raising a claim of relief pursuant to Hurst, which was denied by the Court and affirmed by the Florida Supreme Court.

Motion to Relinquish Jurisdiction with the Florida Supreme Court, which was denied on May 3, 2018. A status hearing was held before this Court on May 10, 2018, at which time the Motion was stricken from this Court's calendar until jurisdiction was returned.

On May 24, 2018, the Florida Supreme Court rendered its Opinion affirming this Court's order denying Defendant's sixth successive motion for postconviction relief. The Mandate affirming the Opinion was issued by the Florida Supreme Court on July 25, 2018. At that time, jurisdiction was returned to this Court to address Defendant's pending Motion.

TIMELINESS

When a claim for postconviction relief is filed beyond the time limitation provided for in Florida Rule of Criminal Procedure 3.851(d)(1), the claim must rely upon one of the following enumerated exceptions:

> (A) The facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) The fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) Postconviction counsel, through neglect, failed to file the motion.

Fla. R. Crim. P. 3.851(d)(2). Any claim filed pursuant to the exception provided for in subsection (A) must be filed within one year of when the facts could have been discovered by the exercise of due diligence. Reed v. State, 116 So. 3d 260, 264 (Fla. 2013). Additionally, subsection (C) only applies when counsel fails to file a "timely *motion* for postconviction relief, not file a specific *claim*." Howell v. State, 145 So. 3d 774, 775 (Fla. 2013).

Grounds One and Two

In Grounds One and Two, Defendant claims postconviction counsel was ineffective for failing to file claims of ineffective assistance of trial counsel. In Ground One, Defendant argues postconviction counsel was ineffective for failing to file a claim about trial counsel's alleged substance abuse. In Ground Two, Defendant argues postconviction counsel was ineffective for failing to file a Giglio claim based on Solomon Hansbury's recantation. These claims are clearly untimely because the claims were filed more than one year from when Defendant's conviction and sentence became final and when the underlying facts of the claims could have been discovered with due diligence. Thus, subsection (A) cannot be relied upon to exempt these claims from the timeliness requirement.

Defendant, therefore, relies on subsection (C) in arguing that the claims should be exempted from the timeliness requirement because postconviction counsel negligently failed to timely file them. Similar to the defendant in Howell, Defendant's argument for why these claims should be exempt is without merit. In Defendant's case, postconviction counsel timely filed a motion for postconviction relief pursuant to Rule 3.851 in 1995. Thus, Defendant is precluded from utilizing the narrow exemption provided for in subsection (C). Therefore, Defendant's claims do not qualify for the exemptions provided for in Rule 3.851(d)(2) and are procedurally barred as untimely.

Assuming *arguendo* Defendant's claims were exempt from the timeliness requirement, the Florida Supreme Court has repeatedly held that claims of ineffective assistance of postconviction counsel are not cognizable. See Kokal v. State, 901 So. 2d 766, 777 (Fla. 2005); Foster v. State, 810 So. 2d 910, 917 (Fla. 2002); King v. State, 808 So. 2d 1237, 1245 (Fla. 2002); Waterhouse v. State, 792 So. 2d 1176, 1193 (Fla. 2001); Lambrix v. State, 698 So. 2d

247, 248 (Fla. 1996). Instead, the Florida Supreme Court has held that a capital defendant is only entitled to meaningful access to judicial process during postconviction proceedings. Kokal, 901 So. 2d at 777. Considering this is Defendant's *eighth* Rule 3.851 Motion, it is clear that Defendant has had ample meaningful access to judicial process during the postconviction stage of his case. Thus, the merits of Defendant's claims that postconviction counsel was ineffective are not only untimely, but are also not cognizable. Therefore, Defendant's Grounds One and Two are denied.

Ground Three

In Ground Three of Defendant's Motion he alleges that the State *possibly* committed a Brady violation when it presented Eric Wilridge's arrest records at the Evidentiary Hearing on Defendant's sixth successive Rule 3.851 motion. The State claimed these records showed that Mr. Wilridge was incarcerated at the time of Defendant's offenses and, thus, he could not have witnessed the offenses occur.[2] The State argued Mr. Wilridge was incarcerated because records showed he had been arrested prior to the date of the offenses, a substantial bond amount was set, and the charges were dropped on a date after the offenses had occurred. The records did not have a release date for Mr. Wilridge and it is possible he was able to post bond prior to the offenses occurring.

Defendant claims additional records he obtained from Jacksonville Sherriff's Office, allegedly not disclosed by the State, cast doubt on the State's inference about Mr. Wilridge's incarceration. Because knowledge by law enforcement is imputed to the State, Defendant argues

[2] In his sixth successive motion for postconviction relief, Defendant claimed that Eric Wilridge had come forward and was willing to testify that he had witnessed the offenses and Defendant was not the perpetrator.

this information should have been disclosed to the defense as exculpatory evidence and failure to do so could be a Brady violation.

"Brady requires the State to disclose material information within its possession or control that is favorable to the defense." Riechmann v. State, 966 So. 2d 298, 307-08 (Fla. 2007). To establish a Brady claim, a defendant has the burden to show: (1) favorable evidence, either exculpatory or impeaching; (2) which was willfully or inadvertently suppressed by the State; and (3) because the evidence was material, the defendant suffered prejudice. Id.

To establish the materiality prong, the defendant must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Wickham v. State, 124 So. 3d 841, 851 (Fla. 2013), as revised on reh'g (Oct. 17, 2013).

Without addressing the first two prongs of Brady, Defendant's claim is without merit because he is unable to prove any prejudice resulting from the State's alleged failure to disclose these additional records. As discussed in the Court's Order Denying Defendant's Sixth Successive Motion for Postconviction Relief, Mr. Wilridge's arrest records were given little to no weight in assessing his credibility because they could not conclusively demonstrate he was incarcerated at the time of the offenses. See Sweet v. State, 248 So. 3d 1060, 1065-66 (Fla. 2018)(discussing this Court's reasoning for not finding Mr. Wilridge credible and concluding that even if the introduction of the arrest records had been inappropriate, the effects were harmless). Instead, this Court focused on Mr. Wilridge's inconsistencies between the affidavit and his testimony, his statements that he fabricated his affidavit, and the multi-decade gap

between witnessing the events and deciding to come forward. Thus, even if the additional records conclusively demonstrate that Mr. Wilridge was not incarcerated at the time, they would have little to no effect on the Court's decision in light of the ample evidence suggesting Mr. Wilridge did not witness the offenses and fabricated his affidavit and testimony. Therefore, Defendant's claim in Ground Three is denied.

Ground Four

In Ground Four of Defendant's Motion, he alleges his sentence of death is unconstitutional because he is actually innocent of the offenses. Defendant's claim of actual innocence is not cognizable in a postconviction proceeding, as Florida does not recognize a freestanding actual innocence claim. Tompkins v. State, 994 So. 2d 1072, 1089 (Fla. 2008); see Elledge v. State, 911 So. 2d 57, 78 (Fla. 2005). Therefore, Defendant's claim in Ground Four is denied. Accordingly, it is:

ORDERED AND ADJUDGED that Defendant's Eighth Successive Motion to Vacate Judgments of Conviction and Sentence" ("Motion") pursuant to Florida Rule of Criminal Procedure 3.851, filed on April 24, 2018, is **DENIED.** Defendant shall have thirty (30) days from the date that this Order is filed to take an appeal, by filing Notice of Appeal with the Clerk of Court.

DONE in Jacksonville, Duval County, Florida on January 7, 2019.

ANGELA M. COX
Circuit Judge

Copies furnished via e-service to:

Lara Mattina & Sheila Ann Loizos
Assistant State Attorney
Office of the State Attorney

Lisa A. Hopkins
Assistant Attorney General

Margaret Russell, Julie A. Morley, & Jami Chalgren
Assistant CCRC
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Copy furnished to via USPS Mail:

William Earl Sweet
DC# 100063
Florida State Prison
7819 N.W. 228th St.
Raiford, Florida 32026

CERTIFICATE OF SERVICE

I do certify that a copy hereof has been furnished to Defendant by United States mail this 7th day of January, 2019.

Donna Gonzalez,
Judicial Assistant

Case No.: 16-1991-CF-02889-AXXX-MA
/jlb

WILLIAM EARL SWEET,
PETITIONER,

VS.

STATE OF FLORIDA,
RESPONDENT

Appendix B: The opinion of the Supreme Court of Florida affirming the denial of postconviction relief, reported at *Sweet v. State*, 293 So. 3d 448 (Fla. 2020).

293 So.3d 448
Supreme Court of Florida.

William Earl SWEET, Appellant,
v.
STATE of Florida, Appellee.

No. SC19-195
|
February 27, 2020

Synopsis

Background: After conviction for first-degree murder and sentence of death was affirmed on direct appeal, 624 So.2d 1138, movant filed successive motion to vacate conviction and sentence and motion to compel production of public records. The Circuit Court, 4th Judicial Circuit, Duval County, Angela M. Cox, J., summarily denied motion to vacate and entered order denying motion to compel. Movant appealed.

Holdings: The Supreme Court held that:

[1] movant failed to describe evidence that was material to his guilt or punishment, precluding relief on newly discovered evidence claim alleging spoliation of evidence and a *Brady* violation;

[2] postconviction counsel's failure to file ineffective assistance of trial counsel claim did not render claim timely under exception to one-year deadline for filing motion to vacate; and

[3] trial court did not abuse its discretion by denying motion to compel.

Affirmed.

West Headnotes (12)

[1] Criminal Law Review De Novo

Summary denial of a postconviction claim is subject to de novo review. Fla. R. Crim. P. 3.851(f)(5)(B).

[2] Criminal Law Materiality and probable effect of information in general

Brady requires the state to disclose material information within its possession or control that is favorable to the defense.

[3] Criminal Law Constitutional obligations regarding disclosure

Criminal Law Impeaching evidence

To establish a *Brady* violation, defendant must show: (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the state, and (3) because the evidence was material, the defendant was prejudiced.

[4] Criminal Law Materiality and probable effect of information in general

In assessing *Brady* materiality and ensuing prejudice from alleged *Brady* violation, court reviews the net effect of the suppressed evidence and determines whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

[5] Criminal Law Materiality and probable effect of information in general

Evidence that is too little, too weak, or too distant from the main evidentiary points to meet standards under *Brady* is not material, and thus suppression of such evidence would not establish *Brady* violation.

[6] Criminal Law Other particular issues

Criminal Law Excuse or justification for destruction or loss

Even if movant sufficiently alleged evidence that was favorable to defense and suppressed by the state, movant failed to describe evidence that was material to his guilt or punishment, precluding relief on claim seeking to vacate first-degree murder conviction and death sentence on basis of newly discovered evidence of *Brady* violation and spoliation of evidence related to jail records showing that purported witness to murder who could exonerate movant was not incarcerated at time of shooting; determination that witness was not credible was based on inconsistencies in his accounts, not whether he was incarcerated at time of shooting, any discrepancy in witness's jail records was too little or too weak to be material under *Brady*, and records would not undermine confidence in the verdict. Fla. R. Crim. P. 3.851.

[7] **Criminal Law** Excuse or justification for destruction or loss

As to spoliation of evidence allegations, the effect of state's failure to satisfy its discovery obligations is the same that applies to a *Brady* violation, namely whether there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

[8] **Criminal Law** Other proceedings following conviction

Ineffective assistance of postconviction counsel is not a viable basis for relief under rule governing collateral relief after death sentence has been imposed and affirmed on direct appeal. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.851.

[9] **Criminal Law** Proceedings

Postconviction counsel's failure to file ineffective assistance of trial counsel claim did not render claim for ineffective assistance of trial counsel filed in successive motion to vacate first-degree murder conviction and death sentence timely under exception to one-year deadline for filing motion to vacate judgment of conviction and sentence of death on basis that postconviction counsel, through neglect, failed to file motion; exception applied where counsel's neglect resulted in postconviction motion not being filed and did not contemplate failure to raise specific claims within a year. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.851(d)(1), 3.851(d)(2)(C).

[10] **Criminal Law** Criminal liability; innocence

State does not recognize an independent claim of actual innocence in postconviction proceedings.

[11] **Criminal Law** Discovery and disclosure

Trial court did not abuse its discretion by denying motion to compel Office of the State Attorney to produce a files from former assistant state attorney in postconviction proceedings challenging first-degree murder conviction and death sentence; request, which included decades of voluminous notes regarding scores of criminal cases, was overly broad and amounted to a fishing expedition, and request was not reasonably calculated to lead to the discovery of admissible evidence in support of postconviction claims, given that attorney did not prosecute movant's case or discuss movant's case with witness who allegedly gave false testimony. Fla. R. Crim. P. 3.852(i).

[12] **Criminal Law** Preliminary proceedings

Appellate court reviews denials of public records requests under the abuse of discretion standard. Fla. R. Crim. P. 3.852(i).

***449** An Appeal from the Circuit Court in and for Duval County, Angela M. Cox, Judge - Case No. 161991CF002899AXXXMA

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Collateral Regional Counsel, Middle Region, Temple Terrace, Florida, for Appellant

Ashley Moody, Attorney General, and Lisa A. Hopkins, Assistant Attorney General, Tallahassee, Florida, for Appellee

Opinion

PER CURIAM.

William Earl Sweet challenges an order summarily denying his eighth successive motion to vacate the judgment of conviction and sentence of death, filed under Florida Rule of Criminal Procedure 3.851. Sweet also challenges an order denying his motion to compel production of public records. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

FACTS AND PROCEDURAL BACKGROUND

In the opinion on direct appeal, we summarized the facts of the incident underlying Sweet's conviction and death sentence:

> ***450** On June 6, 1990, Marcine Cofer was attacked in her apartment and beaten and robbed by three men. She could identify two of the men by their street names. On June 26, 1990, she was taken by Detective Robinson to the police station to look at pictures to attempt to identify the third assailant. When Robinson dropped Cofer off at her apartment, William Sweet was standing nearby and saw her leave the detective. Unknown to Cofer, Sweet had previously implicated himself in the robbery by telling a friend that he had committed the robbery or that he had ordered it done. Cofer asked her next-door neighbor, Mattie Bryant, to allow the neighbor's daughters, Felicia, thirteen, and Sharon, twelve, to stay with Cofer in her apartment that night. Mattie agreed, and the children went over to Cofer's apartment around 8 p.m.
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> At approximately 1 a.m. that evening, Sharon was watching television in the living room of Cofer's apartment when she heard a loud kick on the apartment door. She reported this to Cofer, who was sleeping in the bedroom, but because the person had apparently left, Cofer told Sharon not to worry about it and went back to sleep. Shortly thereafter, Sharon saw someone pulling on the living room screen. She awakened Cofer. The two then went to the door of the apartment, looked out the peephole, and saw Sweet standing outside. Sweet called Cofer by name and ordered her to open the door.
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> At Cofer's direction, Felicia pounded on the bathroom wall to get Mattie's attention in the apartment next door, and a few minutes later Mattie came over. The four then lined up at the door, with Cofer standing in the back of the group. When they opened the door to leave, Sweet got his foot in the door and forced his way into the apartment. Sweet's face was partially covered by a pair of pants. He first shot Cofer and then shot the other three people, killing Felicia. Six shots were fired. Cofer, Mattie, and Sharon were shot in the thigh, ankle and thigh, and buttock, respectively, and Felicia was shot in the hand and in the abdomen.

Sweet v. State, 624 So. 2d 1138, 1139 (Fla. 1993).

The jury found Sweet guilty of first-degree murder and recommended a sentence of death. *Id.* at 1139. After finding the existence of four statutory aggravating circumstances and one nonstatutory mitigating circumstance (which was assigned slight weight), the trial court sentenced Sweet to death. *Id.* at 1142. On direct appeal, we affirmed Sweet's conviction and death sentence. *Id.* at 1143.

In the twenty-five years following his direct appeal, Sweet filed numerous postconviction motions—the latest being his eighth successive motion to vacate the judgment of conviction and sentence. Along with his eighth successive motion, Sweet filed a motion to compel discovery documents from the Office of the State Attorney for the Fourth Judicial Circuit. The postconviction court summarily denied Sweet's eighth successive postconviction motion and denied his motion to compel.

In this appeal, Sweet challenges the postconviction court's order summarily denying his eighth successive motion to vacate the judgment of conviction and sentence. Sweet argues that he was entitled to an evidentiary hearing on a newly discovered evidence claim alleging spoliation of evidence and a *Brady*[1] violation, and that he was entitled to an evidentiary hearing on several claims alleging ineffective assistance of trial and postconviction counsel. ***451** Sweet further argues that the court erred in summarily denying a standalone actual innocence claim. Finally, Sweet challenges the denial of his motion to compel, arguing that he sufficiently alleged entitlement to the requested records. We address each of Sweet's arguments in turn, and for the reasons set forth below, we affirm.

SUMMARILY DENIED POSTCONVICTION CLAIMS

[1] Rule 3.851(f)(5)(B) provides that a circuit court may summarily deny a successive postconviction motion if "the motion, files, and records in the case conclusively show that the movant is entitled to no relief." A summary denial of a postconviction claim is subject to de novo review. *Long v. State*, 183 So. 3d 342, 344 (Fla. 2016) (quoting *Hunter v. State*, 29 So. 3d 256, 261 (Fla. 2008)).

I. Sweet's Spoliation of Evidence / *Brady* Violation Claim

Sweet argues that the postconviction court erred by summarily denying his newly discovered evidence claim alleging spoliation of evidence by the State and a *Brady* violation.

[2] **[3]** "*Brady* requires the State to disclose material information within its possession or control that is favorable to the defense." *Riechmann v. State*, 966 So. 2d 298, 307 (Fla. 2007). To establish a *Brady* violation, a defendant must show "(1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced." *Dailey v. State*, 283 So. 3d 782, 789 (Fla. 2019) (quoting *Taylor v. State*, 62 So. 3d 1101, 1114 (Fla. 2011)); *see also Turner v. United States*, —— U.S. ——, 137 S. Ct. 1885, 1888, 198 L.Ed.2d 443 (2017) ("[T]he government violates the Constitution's Due Process Clause 'if it withholds evidence that is favorable to the defense and *material* to the defendant's guilt or punishment.' ") (quoting *Smith v. Cain*, 565 U.S. 73, 75, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012)).

[4] **[5]** In assessing *Brady* materiality and ensuing prejudice, we "review the net effect of the suppressed evidence and determine 'whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *State v. Huggins*, 788 So. 2d 238, 243 (Fla. 2001) (quoting *Maharaj v. State*, 778 So. 2d 944, 953 (Fla. 2000)). Evidence that is "too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards" is not material. *Turner*, 137 S. Ct. at 1894.

[6] Here, Sweet's spoliation and *Brady* claims are based on jail records for Eric Wilridge, a purported witness to the murder. In 2017, when Sweet filed his sixth successive postconviction motion, he attached an affidavit signed by Wilridge. Wilridge swore he witnessed the shooting and could rule Sweet out as the shooter. *Sweet v. State*, 248 So. 3d 1060, 1065 (Fla. 2018). The State produced Wilridge's arrest and booking reports to show that Wilridge was incarcerated when he supposedly witnessed the murder. The postconviction court found that Wilridge was not a credible witness and this Court affirmed. *Id.*

Now, in his instant eighth successive postconviction motion, Sweet alleges that his collateral counsel recently obtained copies of Wilridge's arrest and booking reports from the Jacksonville Sheriff's Office (JSO) and the Duval County Public Records Database (CORE), in hopes of proving that Wilridge was not incarcerated ***452** and therefore could have seen the shooting. According to Sweet, the reports obtained from CORE and JSO differ in certain respects from the supposedly same documents that were previously produced by the State during discovery for Sweet's sixth successive postconviction claim. Sweet argues:

> Since the documents produced by the State, which were admitted into evidence based on the business records exception to the hearsay rule, markedly differ from what is available in CORE and what was produced by [JSO], there was a grave possibility of a *Brady* violation, spoliation of evidence, and withholding evidence favorable to Mr. Sweet.

We hold that the postconviction court did not err in summarily denying this claim. Even assuming Sweet sufficiently alleged evidence that was favorable to the defense and suppressed by the State, he failed to describe evidence that is material to his guilt or punishment. In previous postconviction proceedings, Sweet argued that the trial court erred in admitting Wilridge's arrest report and in finding that Wilridge was not a credible witness. *Sweet*, 248 So. 3d at 1065. In affirming the denial of relief as to these arguments, we noted that "[t]he trial court's determination of Wilridge's credibility did not rest on the admission of the arrest record," *id.* at 1066, but on the fact that Wilridge kept changing his story about what he supposedly saw. *Id.* at 1067-68.[2]

As the determination of Wilridge's credibility was based on inconsistencies in his accounts, not on whether he was incarcerated, any discrepancy in Wilridge's jail records is simply too little and too weak to be material under *Brady* standards. *See Huggins*, 788 So. 2d at 243. Likewise, as the

admission or exclusion of Wilridge's jail records would not even affect the finding as to that one witness's credibility, the purported evidence cannot reasonably be taken to put Sweet's whole case in such a different light as to undermine confidence in the verdict. *See id.* at 243. Accordingly, we hold that Sweet's *Brady* allegations are meritless and therefore affirm the summary denial of his *Brady* claim.

[7] As to Sweet's spoliation of evidence allegations, the effect of the State's failure to satisfy its discovery obligations "is [the same that applies to a *Brady* violation, namely] whether there is a reasonable probability that 'had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Jimenez v. State*, 265 So. 3d 462, 479 (Fla. 2018) (alteration in original) (quoting *Duest v. Dugger*, 555 So. 2d 849, 851 (Fla. 1990)). Because the test for prejudice resulting from discovery violations is the same test as for *Brady* violations, we affirm the summary denial of Sweet's spoliation claim for the same reason we affirm the denial of his *Brady* claim.

II. Sweet's Ineffective Assistance of Counsel Claims

Sweet argues that he was entitled to an evidentiary hearing on his ineffective assistance of postconviction counsel claims. Sweet alleges that his postconviction counsel provided ineffective assistance by failing to file a claim alleging that trial ***453** counsel was ineffective as a result of inexperience and severe alcoholism. Sweet alleges that postconviction counsel failed to discover notes that revealed trial counsel's incompetence. Sweet further alleges that postconviction counsel failed to file a *Giglio*[3] claim Sweet allegedly paid to have investigated, regarding purportedly false trial testimony given by witness Solomon Hansbury.

[8] However, "we have 'repeatedly held that claims of ineffective assistance of postconviction counsel are not cognizable.' " *Banks v. State*, 150 So. 3d 797, 800 (Fla. 2014) (quoting *Howell v. State*, 109 So. 3d 763, 774 (Fla. 2013)); *see also State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 407 (Fla. 1998) ("[D]efendants have no constitutional right to representation in postconviction relief proceedings.") *receded from on other grounds by Darling v. State*, 45 So. 3d 444, 453 (Fla. 2010). Because ineffective assistance of postconviction counsel is not a viable basis for relief under rule 3.851, we affirm the summary denial of Sweet's ineffective assistance of postconviction counsel claims.

[9] Moreover, to the extent Sweet's eighth successive postconviction motion alleges an independent claim of ineffective of *trial* counsel based on trial counsel's alcoholism and inadequate preparation, such a claim is untimely. "Any motion to vacate judgment of conviction and sentence of death shall be filed by the defendant within 1 year after the judgment and sentence become final." Fla. R. Crim P. 3.851(d)(1). Rule 3.851(d)(2) provides certain exceptions to the one-year deadline; for example, an untimely motion will be considered timely if "postconviction counsel, through neglect, failed to file the motion." Fla. R. Crim. P. 3.851(d)(2)(C).

Sweet admits that his ineffective assistance of trial counsel claim was filed many years after his judgment and sentence became final, but he argues that postconviction counsel's failure to file the claim renders it timely. Sweet reads subsection (d)(2)(C) too broadly. Subsection (d)(2)(C) creates an exception to the one-year deadline for circumstances where counsel's neglect results in a postconviction *motion* not being filed within a year of final judgment; the rule does not contemplate failure to raise specific *claims* within a year. *See Howell v. State*, 145 So. 3d 774, 775 (Fla. 2013) ("[U]nder Howell's interpretation, a condemned inmate would never face any time limitation in which to file a motion for postconviction relief, because the inmate could always assert that postconviction counsel neglected to raise a claim.").

Sweet's postconviction counsel did file a motion to vacate Sweet's judgment of conviction and sentence within a year of the date his judgment became final. Counsel's failure to include this ineffective assistance of trial counsel claim in the original postconviction motion does not make the new claim forever timely. Because Sweet failed to allege a valid exception to the one-year deadline for his otherwise untimely claim, we hold that Sweet was not entitled to an evidentiary hearing on his claim of ineffective assistance of trial counsel (to the extent his motion includes such a claim).

III. Sweet's Actual Innocence Claim

[10] The next issue is whether Sweet's assertion of actual innocence states a basis for postconviction relief. We hold that it does not, for Florida does not recognize an independent claim of actual innocence in postconviction proceedings. *Elledge v. State*, 911 So. 2d 57, 78 (Fla. 2005) ("Elledge's contention that he is innocent of the death penalty was decided

adversely to ***454** Elledge on direct appeal and is not cognizable in the postconviction proceeding"). We have also held that Florida's refusal to recognize postconviction actual innocence claims does not violate the Eighth Amendment. *Tompkins v. State*, 994 So. 2d 1072, 1088-89 (Fla. 2008). Because actual innocence is not a cognizable basis for postconviction relief, we affirm the summary denial of this claim.

MOTION TO COMPEL RECORDS

[11] **[12]** In addition to challenging the summary denial of his eighth successive postconviction motion, Sweet argues that the postconviction court abused its discretion by denying a motion asking the court to compel the Office of the State Attorney to produce a former assistant state attorney's "secret garage files." We affirm the denial of Sweet's motion to compel.

> A circuit court may order the production of public records under Florida Rule of Criminal Procedure 3.852(i) only upon finding that:
>
> (A) collateral counsel has made a timely and diligent search of the records repository;
>
> (B) collateral counsel's affidavit identifies with specificity those additional public records that are not at the records repository;
>
> (C) the additional public records sought are either relevant to the subject matter of a proceeding under rule 3.851 or appear reasonably calculated to lead to the discovery of admissible evidence; and
>
> (D) the additional records request is not overly broad or unduly burdensome.

Chavez v. State, 132 So. 3d 826, 829 (Fla. 2014) (quoting Fla. R. Crim. P. 3.852(i)(2)). We review denials of rule 3.852(i) public records requests under the abuse of discretion standard. *Id.*

Sweet alleges that his collateral counsel recently read an article published on Jacksonville.com about former Assistant State Attorney Bernie de la Rionda. The article purportedly made a reference to 30 boxes of case notes stacked in de la Rionda's garage from his 35-year legal career. Sweet's motion to compel asked the postconviction court to order the State Attorney's Office to produce every document, file, and case note stored in de la Rionda's garage.

Notably, de la Rionda did not prosecute Sweet's case. Yet Sweet insists that his request was reasonably calculated to lead to the discovery of admissible evidence because de la Rionda once prosecuted Solomon Hansbury, one of the *witnesses* in Sweet's case. Sweet's eighth successive postconviction motion alleges that Hansbury gave perjured testimony against Sweet in exchange for a reduced sentence, and Sweet's motion to compel argues that de la Rionda may have kept notes discussing Hansbury's decision to give false testimony.

We hold that the postconviction court did not abuse its discretion in denying Sweet's motion to compel. First, Sweet's request for decades of voluminous notes regarding scores of criminal cases was overly broad. A request for a garage full of notes in hopes of finding any mention of a witness fabricating testimony is a textbook example of a fishing expedition. *See Dailey*, 283 So. 3d at 792 (holding that rule 3.852(i) is "not intended to be a procedure authorizing a fishing expedition for records") (quoting *Bowles v. State*, 276 So. 3d 791,795 (Fla. 2019)).

Moreover, Sweet failed to establish that his request was reasonably calculated to lead to the discovery of admissible evidence in support of his postconviction claims. Sweet attached to his eighth successive postconviction motion an affidavit ***455** signed by an investigator named Tom Wildes; in that affidavit, Wildes swore that he had asked Hansbury who gave him information about Sweet's case. Wildes swore that Hansbury told him it was *not de la Rionda* who discussed Sweet's case, as Hansbury would have recognized de la Rionda from his own prosecution. Considering de la Rionda did not prosecute Sweet's case and was not the person who purportedly discussed Sweet's case with the witness in question, it is not reasonably likely that de la Rionda's case notes would lead to the discovery of admissible evidence for Sweet's postconviction claim.

Because Sweet failed to show that his records request was not overly broad and that it was reasonably calculated to lead to the discovery of admissible evidence, we affirm the postconviction court's order denying Sweet's motion to compel.

CONCLUSION

All of Sweet's postconviction claims are legally insufficient or based on allegations that are conclusively refuted by the record. We therefore affirm the postconviction court's order summarily denying relief. We also affirm the order denying Sweet's motion to compel, for Sweet failed to demonstrate his entitlement to the requested records.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.

All Citations

293 So.3d 448, 45 Fla. L. Weekly S76

Footnotes

1 *Brady v. Maryland*, 373 U.S. 83, 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

2 Wilridge swore in his affidavit that he saw a man in a black/gray ski mask shooting into the residence, but Wilridge then wrote letters to the court and to the State Attorney's Office denying the truth of his affidavit and insisting he did not remember anything about the incident. Then, at the evidentiary hearing, Wilridge gave a third story, stating he saw people at the location but could not make out any identifying features or even tell if the people were male or female; he also swore that he did not see a gun and only heard gunshots after leaving.

3 *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

WILLIAM EARL SWEET,
PETITIONER,

VS.

STATE OF FLORIDA,
RESPONDENT

Appendix C: Order denying rehearing SC19-195, 2020 WL 1921623 (Fla. 2020), issued April 21, 2020.

Filing # 106485024 E-Filed 04/21/2020 09:06:55 AM

Supreme Court of Florida

TUESDAY, APRIL 21, 2020

CASE NO.: SC19-195
Lower Tribunal No(s).:
161991CF002899AXXXMA

WILLIAM EARL SWEET vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

kc
Served:

MARGARET S. RUSSELL
JULIE A. MORLEY
LISA HOPKINS
HON. ANGELA M. COX, JUDGE
HON. MARK H. MAHON, CHIEF JUDGE
HON. RONNIE FUSSELL, CLERK
SHEILA ANN LOIZOS

WILLIAM EARL SWEET,
PETITIONER,

VS.

STATE OF FLORIDA,
RESPONDENT

Appendix D. The opinion of the Supreme Court of Florida affirming the judgment and sentence, reported at *Sweet v. State*, 624 So. 2d 1138 (Fla. 1993).

624 So.2d 1138
Supreme Court of Florida.

William Earl SWEET, Appellant,

v.

STATE of Florida, Appellee.

No. 78629.
|
Aug. 5, 1993.
|
Rehearing Denied Oct. 14, 1993.

Synopsis
Following jury trial, defendant was convicted in the Circuit Court, Duval County, Frederick B. Tygart, J., for first-degree murder, attempted first-degree murder and burglary. The Supreme Court held that: (1) defendant's request to represent himself was rendered moot by acceptance of new counsel; (2) evidence of prior robbery was admissible; (3) finding that murder was cold, calculated, and premeditated was justified; (4) finding that defendant committed murder to avoid arrest was justified; (5) trial court's failure to correctly instruct jury as to use of prior felony in sentencing was harmless error; and (6) trial court erred in imposing consecutive sentences for burglary and attempted murder convictions.

Affirmed with modification.

Kogan, J., concurred as to conviction and concurred in result only as to sentence.

West Headnotes (10)

[1] **Criminal Law** Discharge for self-representation

Trial court could not have reasonably allowed defendant to represent himself, though defendant wanted to go to trial immediately and to fire his attorney who had asked for continuance, where defendant was unprepared to represent himself and did not understand State's case or nature of preparing for defense. West's F.S.A. RCrP Rule 3.111(d).

[2] **Criminal Law** Mootness

Trial court's failure to conduct full inquiry into defendant's ability to represent himself, after defendant requested discharge of counsel so defendant could proceed to immediate trial, was rendered moot when defendant's concern for immediate trial diminished, and defendant accepted and expressed satisfaction with new counsel.

2 Cases that cite this headnote

[3] **Criminal Law** Homicide, mayhem, and assault with intent to kill

Criminal Law Same or identical victims

Evidence that defendant participated in robbery of victim three weeks prior to defendant's attempted murder of victim was relevant to show defendant's motive for attempted murder.

[4] **Sentencing and Punishment** Planning, premeditation, and calculation

To prove murder was cold, calculated, and premeditated, for use as sentence aggravator, state must show heightened level of premeditation establishing that defendant had careful plan or prearranged design to kill. West's F.S.A. § 921.141(5)(i).

9 Cases that cite this headnote

[5] **Sentencing and Punishment** Planning, premeditation, and calculation

Trial court's finding that defendant killed victim in cold, calculated, and premeditated manner was warranted, though defendant claimed he was merely trying to harass potential witness in pending robbery investigation, where defendant had motive of eliminating potential witness, defendant went to apartment of potential witness late at night with a gun, tried to break in and immediately began shooting once door was open. West's F.S.A. § 921.141(5)(i).

3 Cases that cite this headnote

[6] **Sentencing and Punishment** Planning, premeditation, and calculation

Fact that murder victim was not actual subject of defendant's plan to kill, did not preclude finding of cold, calculated premeditation; level of preparation, not success or failure of defendant's plan is key. West's F.S.A. § 921.141(5)(i).

7 Cases that cite this headnote

[7] **Sentencing and Punishment** Escape or other obstruction of justice

Finding that defendant committed murder to avoid arrest was warranted where defendant had motive to eliminate potential witness to previously committed robbery, and defendant had seen potential witness talking to police on day of murder. West's F.S.A. § 921.141(5)(e).

[8] **Sentencing and Punishment** Nature, degree, or seriousness of other offense

Defendant's prior conviction for possession of firearm by convicted felon could qualify as prior violent felony for purpose of aggravating defendant's sentence, though this was not per se crime of violence, where circumstances of that particular crime were shown to have been violent. West's F.S.A. § 921.141(5)(b).

2 Cases that cite this headnote

[9] **Criminal Law** Grade or degree of offense; included offenses; punishment

Trial court's failure to instruct jury that they had to consider individual circumstances surrounding crime of possession of firearm by convicted felon before using that crime to aggravate sentence was harmless error where several other convictions justified use of prior violent felony aggravator. West's F.S.A. § 921.141(5)(b).

2 Cases that cite this headnote

[10] **Sentencing and Punishment** Offenses Committed in One Transaction, Episode, or Course of Conduct

Trial court erred in imposing four consecutive minimum mandatory sentences for one burglary and three attempted murder convictions where offenses arose out of same criminal episode.

2 Cases that cite this headnote

Attorneys and Law Firms

***1139** Nancy A. Daniels, Public Defender, and David A. Davis, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and Mark C. Menser, Asst. Atty. Gen., Tallahassee, for appellee.

Opinion

PER CURIAM.

William Sweet appeals his convictions for first-degree murder, three counts of attempted first-degree murder, and burglary, and his sentence of death. We have jurisdiction under article V, section 3(b)(1) of the Florida Constitution.

On June 6, 1990, Marcine Cofer was attacked in her apartment and beaten and robbed by three men. She could identify two of the men by their street names. On June 26, 1990, she was taken by Detective Robinson to the police station to look at pictures to attempt to identify the third assailant. When Robinson dropped Cofer off at her apartment, William Sweet was standing nearby and saw her leave the detective. Unknown to Cofer, Sweet had previously implicated himself in the robbery by telling a friend that he had committed the robbery or that he had ordered it done. Cofer asked her next-door neighbor, Mattie Bryant, to allow the neighbor's daughters, Felicia, thirteen, and Sharon, twelve, to stay with Cofer in her apartment that night. Mattie agreed, and the children went over to Cofer's apartment around 8 p.m.

At approximately 1 a.m. that evening, Sharon was watching television in the living room of Cofer's apartment when she heard a loud kick on the apartment door. She reported this to Cofer, who was sleeping in the bedroom, but because the person had apparently left, Cofer told Sharon not to worry

about it and went back to sleep. Shortly thereafter, Sharon saw someone pulling on the living room screen. She awakened Cofer. The two then went to the door of the apartment, looked out the peephole, and saw Sweet standing outside. Sweet called Cofer by name and ordered her to open the door.

At Cofer's direction, Felicia pounded on the bathroom wall to get Mattie's attention in the apartment next door, and a few minutes later Mattie came over. The four then lined up at the door, with Cofer standing in the back of the group. When they opened the door to leave, Sweet got his foot in the door and forced his way into the apartment. Sweet's face was partially covered by a pair of pants. He first shot Cofer and then shot the other three people, killing Felicia. Six shots were fired. Cofer, Mattie, and Sharon were shot in the thigh, ankle and thigh, and buttock, respectively, and Felicia was shot in the hand and in the abdomen.

Sweet was convicted of first-degree murder, three counts of attempted first-degree murder, and burglary. The jury recommended a sentence of death by a vote of ten to two, and the trial court followed this recommendation.

Sweet's first argument on appeal is that the trial court erred by failing to adequately inquire into whether Sweet wanted to represent himself. Sweet was arrested on June 28, 1990. During a pretrial hearing, Sweet objected to his counsel's request for a continuance and stated that he wanted to go to trial immediately.[1] The conversation proceeded as follows:

***1140** THE DEFENDANT: I don't want to file for continuance. You told me on the 24th that this was going to be my trial. I want to make sure—I want to go to trial this week with Mr. Gazaleh. I'm not—he filed motions to continue. I'm not willing to. I want to go ahead and go to trial.

THE COURT: You have the right to represent yourself. You don't have to have a lawyer. If you want to represent yourself and you say you're ready to try the case this week we could do it.

THE DEFENDANT: Can't he go with me?

THE COURT: He's not ready.

THE DEFENDANT: If I get convicted—I don't have anybody if I get convicted? The law says you can't go to trial unless your lawyer is—

THE COURT: You're talking about your life here, Mr. Sweet.

THE DEFENDANT: I know that. I want to go to trial. I want to pick the jury.

THE COURT: Well, your lawyer is not ready.

THE DEFENDANT: Yes, sir. I want to pick the jury today and go to trial sometime this week.

THE COURT: And face the electric chair?

THE DEFENDANT: Yes, sir.

THE COURT: The law is very clear. If he is not ready to go to trial I can't make him. If you want to fire him and represent yourself that's your privilege. But I think it's probably a short walk to the electric chair to do that and that you're going to have lawyers working against you.

THE DEFENDANT: If that's the case I want to go ahead and pick the jury today and go ahead and elect Mr. Gazaleh.

THE COURT: Then you can do that.

THE DEFENDANT: Let's pick the jury then, Your Honor.

THE COURT: You want Mr. Gazaleh or do you—

THE DEFENDANT: If he don't want to represent me today and go to trial then I'll take my chances and just go ahead and go to trial.

THE COURT: Why do you want to go to trial today as opposed to a few weeks from now?

THE DEFENDANT: I want to make sure—they've left me sitting down where I ain't got no business down here. They've got me sitting down here—

....

THE COURT: Do you have any witnesses subpoenaed to testify for you, Mr. Sweet?

THE DEFENDANT: I have no witnesses.

THE COURT: Do you know who the State is going to call as witnesses against you?

THE DEFENDANT: The State ain't got no witnesses. They haven't took no depositions who they going to put on. They haven't, who they going to put.

THE COURT: They don't have to take depositions.

THE DEFENDANT: I have got the right to meet my accused. Who are they going to put on the stand?

THE COURT: They have got a whole bunch of police officers and detectives.

THE DEFENDANT: Police officers ain't the ones that initiated and orchestrated this crime. They ain't got no key witnesses. They ain't got—

THE COURT: They don't have to have depositions to go to trial. Depositions are for the defense, not for the State.

THE DEFENDANT: Then go to trial.

THE COURT: Well, Mr. Sweet, I don't think you're capable of representing yourself because you don't understand anything that happens at a trial, do you? Have you been through a jury trial before?

....

THE DEFENDANT: I went all the way through trial but it was mistrial. The jury ***1141** had deliberated. They didn't come up with a verdict.

THE COURT: Mr. Sweet, under the circumstances I'm afraid that if I don't grant Mr. Gazaleh's motion for continuance and proceed to trial I'm going to waste everybody's time because the Supreme Court is going to send it right back here to be tried again and you're not going to get this thing disposed. It's going to take longer.

....

THE COURT: Hear me out. I listened to you, you listen to me. The Supreme Court automatically will review your case if you get the electric chair. When they do and I see what happened they're going to send it right back here about six months from now and say Judge Haddock, put a lawyer back on the case and try him again. The way you did it wasn't right. So what have we gained.

THE DEFENDANT: Same way—the State ain't ready to go to trial neither.

THE COURT: They can get ready.

THE DEFENDANT: Get ready. Let's go.

THE COURT: I'll note the defendant's objection and overrule it and grant Mr. Gazaleh's motion for continuance.

....

THE COURT: Go ahead and set your depositions and then maybe somebody—

THE DEFENDANT: Excuse me. Can you fire him and can we go to trial then? I cannot wait, set here for the first of the year.

THE COURT: I don't want to try your case twice, Mr. Sweet. I only want to try it once.

THE DEFENDANT: I'm ready to go to trial. If we talking about the first of the year that ain't that much time to get no case going. Go ahead and fire him and then we go to trial.

THE COURT: We'll set the case for January the 14th for jury trial.

[1] It is clear from the above conversation that Sweet's overriding concern was proceeding to trial immediately. It is also clear Sweet mistakenly believed that if he was tried immediately the State would be unprepared and he would be acquitted. Sweet had a fundamental misunderstanding of the State's case against him and of the nature of the preparation of a defense. He obviously did not understand that the fact there were no depositions taken of State witnesses did not inure to his benefit, but to the benefit of the State. While the court's inquiry fell short of the requirements of *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and Florida Rule of Criminal Procedure 3.111(d), the court could not have reasonably permitted Sweet to represent himself and go to trial immediately when it was evident that he was unprepared to do so.

[2] Further, Sweet later voluntarily withdrew his pro se demand for speedy trial filed January 30, 1991, indicating his concern for an immediate trial had diminished. Sweet ultimately proceeded to trial in May of 1991 with a different attorney, and at his sentencing Sweet spontaneously pronounced his satisfaction with counsel's performance. Therefore, while it appears that Sweet unequivocally requested discharge of counsel, and the court failed to conduct

an adequate inquiry into Sweet's ability to represent himself, under the circumstances of this case the failure was rendered moot by Sweet's subsequent acceptance of and satisfaction with new counsel and by the dissipation of his reason for wanting counsel removed.[2] *See Scull v. State,* 533 So.2d 1137, 1139–41 (Fla.1988) ***1142** (failure to adequately inquire into request to discharge attorney rendered moot by defendant's subsequent expressions of satisfaction with attorney's performance), *cert. denied,* 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989).

[3] Sweet next argues that the trial court erred in admitting evidence that Cofer had been robbed three weeks before the murder and that Sweet participated in the robbery. We agree with the State that this evidence was adequately tied to Sweet and was relevant to show his motive for the shooting. We find substantial competent evidence to support Sweet's convictions, and they are accordingly affirmed.

Turning to the penalty phase of trial, in imposing the death sentence the trial court found the following aggravating circumstances: (1) Sweet had previously been convicted of several violent felonies, including armed robbery, possession of a firearm by a convicted felon, riot, resisting arrest with violence, and the contemporaneous attempted murders and burglary; (2) the murder was committed to avoid arrest; (3) the murder was committed during a burglary; and (4) the murder was cold, calculated, and premeditated.[3] The court found no statutory mitigating circumstances, but found as nonstatutory mitigation that Sweet lacked true parental guidance as a teenager. This mitigation was given slight weight.

[4] **[5]** Sweet first argues that the trial court erred in finding that the murder was cold, calculated, and premeditated. In order to prove the existence of this aggravator, the State must show a heightened level of premeditation establishing that the defendant had a careful plan or prearranged design to kill. *Rogers v. State,* 511 So.2d 526, 533 (Fla.1987), *cert. denied,* 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Here, the State proved such a prearranged plan to kill Marcine Cofer. Sweet's motive was to eliminate a potential witness in a pending robbery investigation. After seeing Cofer talking to the police, Sweet went to her apartment, late at night, with a gun. He spent some time pounding on the door and attempting to break in. Then, when the door was opened, he pushed his way in and immediately began shooting. He attempted to cover his face with a pants leg, and he said nothing upon entering the apartment. This scenario is consistent with a plan to kill and not, as Sweet argues, a plan to merely scare or harass Cofer so she would not implicate him in the robbery.

[6] Although Felicia Bryant was not the actual subject of the planning, this fact does not preclude a finding of cold, calculated premeditation. As we stated in *Provenzano v. State,* 497 So.2d 1177, 1183 (Fla.1986), *cert. denied,* 481 U.S. 1024, 107 S.Ct. 1912, 95 L.Ed.2d 518 (1987), "[h]eightened premeditation necessary for this circumstance does not have to be directed toward the specific victim." It is the manner of the killing, not the target, which is the focus of this aggravator. *Id.*

Finally, the key to this factor is the level of preparation, not the success or failure of the plan, and we therefore reject Sweet's argument that because there were survivors of the shooting this aggravator is not applicable. Sweet was probably surprised by the presence of Cofer's neighbors, and planning is not the equivalent of shooting skill.

[7] Sweet next argues that the trial court erred in finding that he committed the murder to avoid arrest. In making this determination, the trial court found that Sweet's motive in going to Cofer's apartment was to eliminate her as a witness to the prior robbery. The court pointed out that Sweet had seen Cofer talking to the police earlier on the day of the murder, that there was substantial evidence he had been involved in the prior robbery of Cofer, and that he made statements after his arrest which indicated his intent. While it turned out that an innocent bystander, Felicia, was killed instead of the target, Cofer, the dominant motive for the killing remains the same, and we agree with the trial court that this aggravator was established beyond a reasonable doubt.

[8] **[9]** Sweet's next argument is that the trial court erred in finding that his prior conviction for possession of a firearm by a ***1143** convicted felon qualified as a prior violent felony. While this offense is not per se a crime of violence, the circumstances of this particular crime were shown to have been violent, as Sweet used the firearm to hit someone in the face and ribs. However, the trial court did err in failing to instruct the jury that they had to consider the individual circumstances of the crime in order to determine if it was violent before weighing it as a prior violent felony. *Johnson v. State,* 465 So.2d 499, 505 (Fla.), *cert. denied,* 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985). In light of the fact that there were several other convictions supporting the prior violent felony aggravator, the error was harmless.

[10] Finally, Sweet argues that the trial court erred in imposing four consecutive fifteen-year minimum mandatory sentences for the burglary and attempted murder convictions. We agree that the imposition of consecutive minimum mandatory sentences when the offenses arose out of the same criminal episode was error under *Daniels v. State,* 595 So.2d 952 (Fla.1992).

Accordingly, we affirm Sweet's convictions and his sentence of death. We also affirm Sweet's other sentences, except that the minimum mandatory aspects thereof shall be deemed to run concurrently with each other.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES and HARDING, JJ., concur.

KOGAN, J., concurs as to the conviction and concurs in result only as to the sentence.

All Citations

624 So.2d 1138, 18 Fla. L. Weekly S447

Footnotes

1 This hearing took place on November 5, 1990, when Sweet was represented by Mr. Gazaleh. Gazaleh was appointed to represent Sweet on September 19, 1990, after Sweet's public defender reported a conflict of interest. Gazaleh was subsequently replaced by Mr. Adams when Gazaleh, too, had a conflict of interest. Adams ultimately represented Sweet at trial with the assistance of Mr. Moore.

2 Sweet also alludes to another problem he had with a different attorney, Mr. Adams, asking for a continuance. After reviewing the transcript of the January 14, 1991, hearing, we conclude that Sweet did not ask to represent himself at that time, but rather tried to fire Adams because he was not satisfied with his performance. The trial court made adequate inquiry into the reason for Sweet's dissatisfaction and properly found that dismissal of counsel was not justified. *See Bowden v. State,* 588 So.2d 225, 229–30 (Fla.1991), *cert. denied,* 503 U.S. 975, 112 S.Ct. 1596, 118 L.Ed.2d 311 (1992); *Peede v. State,* 474 So.2d 808, 815–16 (Fla.1985), *cert. denied,* 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1986). Even if the trial court had erred in its handling of this proceeding, the same analysis would apply as discussed above and any error would have been rendered moot.

3 § 921.141(5)(b), (e), (d), (i), Fla.Stat. (1989).

WILLIAM EARL SWEET,
PETITIONER,

VS.

STATE OF FLORIDA,
RESPONDENT

Appendix E. The opinion of the Supreme Court of Florida affirming the denial of postconviction relief, reported at *Sweet v. State*, 810 So. 3d 854 (Fla. 2002).

810 So.2d 854
Supreme Court of Florida.

William Earl SWEET, Appellant,
v.
STATE of Florida, Appellee.

No. SC00-1509.
|
Jan. 31, 2002.

Synopsis

Petitioner was convicted in the Circuit Court, Duval County, Frederick B. Tygart, J., of first-degree murder, attempted first-degree murder, and burglary and was sentenced to death. The Supreme Court, 624 So.2d 1138, affirmed with modification. Petitioner then sought post-conviction relief. The Circuit Court, Duval County, Frederick Tygart, J., denied relief. Petitioner appealed. The Supreme Court held that: (1) attorney did not render ineffective assistance in guilt or penalty phases, and (2) cumulative effect of evidence presented in post-conviction proceeding, including prosecution witness' recantation of testimony, did not entitle the defendant to relief.

Affirmed.

Anstead, J., concurred in the result only.

West Headnotes (17)

[1] **Criminal Law** Effective Assistance

Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review. U.S.C.A. Const.Amend. 6.

[2] **Criminal Law** Preparation for Trial

Attorney's failure to investigate victim's boyfriend as suspect was not deficient in prosecution for first-degree murder and attempted first-degree murder by shooting victim and neighbors after forced entry into apartment; the boyfriend was a co-habitant of a victim, and neither the victim nor her neighbor could identify the perpetrator through the peephole. U.S.C.A. Const.Amend. 6.

[3] **Criminal Law** Presentation of Witnesses

Attorney made a strategic decision not to call as a witness a person who had knocked on victim's door on night of the murder and attempted murders, but who had made an out-of-court identification of the defendant as the person who had pulled a gun on him and forced him to knock; the attorney thus did not render ineffective assistance in capital murder prosecution. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[4] **Criminal Law** Investigating, Locating, and Interviewing Witnesses or Others

Attorney did not render ineffective assistance in a capital murder prosecution by failing to ensure the appearance of a subpoenaed witness to testify that the defendant did not appear to be one of three men outside a victim's apartment on the night of the shootings; the attorney secured a recess to find the witness, and the witness gave inconsistent testimony, refused to divulge name of one person, and admitted bad eyesight and lack of a good look. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[5] **Sentencing and Punishment** Arguments and Conduct of Counsel

Attorney's alleged lack of preparation in presenting testimony of defendant's sister did not prejudice the defendant in the penalty phase of a capital murder prosecution; any additional testimony in mitigation was essentially cumulative regarding defendant's background and childhood. U.S.C.A. Const.Amend. 6.

[6] **Sentencing and Punishment** Arguments and Conduct of Counsel

Attorney's failure to present testimony of defendant's mother did not prejudice the defendant in the penalty phase of a capital

murder prosecution; although the mother could have presented some new facts concerning the defendant's childhood, the majority of her testimony would have been cumulative to testimony by the defendant's sister, presenting the mother as a witness would have opened the door to cross-examination about the defendant's juvenile record, and her testimony would not have established any statutory mitigation or refuted any statutory aggravation. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[7] **Sentencing and Punishment** Arguments and Conduct of Counsel

Attorney's failure to present testimony of defendant's foster mother did not prejudice the defendant in the penalty phase of a capital murder prosecution; her testimony would have been cumulative to testimony by the defendant's sister, presenting the foster mother as a witness could have led to the admission of evidence of the defendant's juvenile record, and her testimony would not have established any statutory mitigation or refuted any statutory aggravation. U.S.C.A. Const.Amend. 6.

[8] **Sentencing and Punishment** Arguments and Conduct of Counsel

Attorney's failure to request the appointment of a mental health expert to evaluate him did not prejudice the defendant in the penalty phase of a capital murder prosecution; although a psychologist who testified after trial believed that the defendant could not have committed the crime in a cold and calculated manner, was unable to conform his conduct to the requirements of the law, and was under the influence of an emotional disturbance, evidence at trial overwhelmingly showed a motive and intent to eliminate a witness to a prior robbery. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[9] **Criminal Law** Perjured Testimony

Cumulative effect of evidence presented in post-conviction proceeding, including prosecution witness' recantation of testimony that the defendant confessed to the murder while they were in jail together, did not entitle the defendant to relief in a capital murder prosecution. West's F.S.A. RCrP Rule 3.850.

2 Cases that cite this headnote

[10] **Criminal Law** Contradictory Statements by Witness

Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial.

[11] **Criminal Law** Contradictory Statements by Witness

In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial.

[12] **Criminal Law** Contradictory Statements by Witness

Recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true.

[13] **Criminal Law** Contradictory Statements by Witness

Criminal Law Probable Effect of New Evidence, in General

Recantation by a witness called on behalf of the prosecution entitles a defendant to a new trial only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted.

[14] **Criminal Law** Competence to Stand Trial; Sanity Hearing

Attorney's failure to provide mental health experts with information concerning the defendant's background and competency to stand trial was not shown to prejudice the defendant in a capital murder prosecution; evidence supported the trial court's conclusion that the state called an expert and established that his opinion would not have been different even when specifically considering the facts not specifically noted in his report. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[15] **Criminal Law** Necessity for Hearing

A defendant is not entitled to an evidentiary hearing if the post-conviction motion is legally insufficient on its face. West's F.S.A. RCrP Rule 3.850.

4 Cases that cite this headnote

[16] **Criminal Law** Arguments and Conduct in General

Reciting claims from post-conviction motion in a sentence or two, without elaboration or explanation, failed to preserve claims of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

14 Cases that cite this headnote

[17] **Criminal Law** Matters Which Either Were or Could Have Been Adjudicated Previously, in General

Post-conviction claim that the trial court erred in finding no statutory and only one nonstatutory mitigating circumstance was procedurally barred since the defendant could have raised it on direct appeal.

5 Cases that cite this headnote

Attorneys and Law Firms

***856** Michael P. Reiter, Capital Collateral Counsel-Northern Region, John M. Jackson, Assistant CCRC, and Kimberly L. Sharkey, Assistant CCRC-Northern Region, Tallahassee, FL, for Appellant.

Robert A. Butterworth, Attorney General, and Barbara J. Yates, Assistant Attorney General, Tallahassee, FL, for Appellee.

Opinion

PER CURIAM.

William Earl Sweet appeals the trial court's denial of postconviction relief after an evidentiary hearing. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons stated below, we affirm the trial court's order denying Sweet postconviction relief.

Sweet, who was twenty-three years old at the time of the offenses, was convicted of first-degree murder, three counts of attempted first-degree murder, and burglary. *See Sweet v. State,* 624 So.2d 1138, 1139 (Fla.1993). The facts of the crime are detailed in this Court's opinion on direct appeal.

> On June 6, 1990, Marcine Cofer was attacked in her apartment and beaten and robbed by three men. She could identify two of the men by their street names. On June 26, 1990, she was taken by Detective Robinson to the police station to look at pictures to attempt to identify the third assailant. When Robinson dropped Cofer off at her apartment, William Sweet was standing nearby and saw her leave the detective. Unknown to Cofer, Sweet had previously implicated himself in the robbery by telling a friend that he had committed the robbery or that he had ordered it done. Cofer asked her next-door neighbor, Mattie Bryant, to allow the neighbor's daughters, Felicia, thirteen, and Sharon, twelve, to stay with Cofer in her apartment that night. Mattie agreed, and the children went over to Cofer's apartment around 8 p.m.
>
> At approximately 1 a.m. that evening, Sharon was watching television in the living room of Cofer's apartment when she heard a loud kick on the apartment door. She reported this to Cofer, who was sleeping in the bedroom, but because the person had apparently left, Cofer told Sharon not to worry about it and went back to sleep. Shortly thereafter, Sharon saw someone pulling on the living room screen.

> She awakened Cofer. The two then went to the door of the apartment, looked out the peephole, and saw Sweet standing outside. Sweet called Cofer by name and ordered her to open the door.
>
> At Cofer's direction, Felicia pounded on the bathroom wall to get Mattie's ***857** attention in the apartment next door, and a few minutes later Mattie came over. The four then lined up at the door, with Cofer standing in the back of the group. When they opened the door to leave, Sweet got his foot in the door and forced his way into the apartment. Sweet's face was partially covered by a pair of pants. He first shot Cofer and then shot the other three people, killing Felicia. Six shots were fired. Cofer, Mattie, and Sharon were shot in the thigh, ankle and thigh, and buttocks, respectively, and Felicia was shot in the hand and in the abdomen.

Id. The jury recommended a sentence of death by a vote of ten to two, and the trial court followed this recommendation. *See id.* The trial court found four aggravators[1] and no statutory mitigators, but found as a nonstatutory mitigating circumstance that Sweet "lacked true parental guidance as a teenager." *Id.* at 1142.[2]

On direct appeal, this Court affirmed Sweet's convictions and sentence of death. *See id.* at 1143.[3] Sweet timely filed a motion for postconviction relief on August 1,1995, and filed an amended motion on June 30, 1997, raising twenty-eight claims.[4] ***858** A *Huff*[5] hearing was held on February 20, 1998. The trial court granted an evidentiary hearing, which was held from January 25 through January 28, 1999, on the following four claims: (1) trial counsel, Charlie Adams, failed to investigate and present evidence of other suspects; (2) Adams failed to present, as potentially mitigating evidence, Sweet's background history; (3) Adams failed to present background information to the mental health experts; and (4) the mental health experts conducted an inadequate evaluation. The trial court summarily denied Sweet's remaining claims. After the evidentiary hearing, the trial court denied relief on the four remaining claims. Sweet now appeals the trial court's denial of postconviction relief, raising six issues for this Court's review.[6]

1. INEFFECTIVE ASSISTANCE OF COUNSEL DURING GUILT PHASE

[1] In order to establish an ineffective assistance of counsel claim, a defendant must prove two elements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made ***859** errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Rutherford v. State,* 727 So.2d 216, 219-20 (Fla.1998). To establish deficiency, "the defendant must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052. To establish prejudice "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052. Ineffective assistance claims present a mixed question of law and fact which is subject to plenary review. *See Stephens v. State,* 748 So.2d 1028, 1032 (Fla.1999). "This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings." *State v. Riechmann,* 777 So.2d 342, 350 (Fla.2000). Moreover, because the "*Strickland* standard requires establishment of both prongs, where a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." *Waterhouse v. State,* 792 So.2d 1176, 1182 (Fla.2001).

[2] In Sweet's first claim, he asserts that the trial court erred in denying his ineffective assistance claim during the guilt phase with regard to Adams' failure to investigate and present evidence of other suspects and individuals who would have refuted the State witnesses' identification of Sweet as the shooter. Sweet contends that his theory of defense was that he was innocent and that the State's witnesses misidentified him as the shooter. Sweet claims that three witnesses-Dale George, Jesse Gaskins, and Anthony McNish-were available to either identify other individuals as the shooter or to establish that Sweet was not the shooter, and that trial counsel rendered

ineffective assistance by failing to utilize these witnesses at trial.

As to Dale George, Sweet contends that Adams rendered ineffective assistance in failing to investigate George as a suspect. George was Marcine Cofer's boyfriend, and he lived with Cofer at the time of the shooting. Sweet maintains that Adams rendered ineffective assistance in failing to investigate George as a possible suspect for several reasons. First, Adams had police reports containing several domestic violence petitions that Cofer filed against George, alleging that George had threatened to kill her and that Cofer feared for her life. Second, the evidence at trial showed that in the afternoon preceding the night of the shooting, George took the clip out of Cofer's gun. Third, evidence was presented at trial that George was involved in drug-dealing activity with Cofer, and Sweet alleges that this could have provided an alternative motive for the shooting. Fourth, the State's theory of prosecution in this case originated with George, and Sweet contends that this should have raised a red flag that a potential suspect was trying to shift the blame to another.

Although Adams' theory of defense in this case was that someone else killed the victim, Adams never put on evidence of ***860** other suspects at trial. At the evidentiary hearing, Adams admitted that evidence of other potential suspects would have been helpful. However, Adams stated that he never considered George a suspect because there was no credible reason why Cofer and her neighbor, Sharon Bryant, could not identify George if he was the shooter. Bill Salmon, who was accepted at the evidentiary hearing as an expert on capital cases, stated that the failure to investigate George as a suspect presented a "close question" as to whether Adams acted deficiently. Salmon ultimately concluded, however, that Adams should have presented George to the jury as an alternative suspect. At a minimum, Salmon concluded, Adams should have investigated and considered George before making the determination of whether George should take the stand.

In rejecting Sweet's contention that Adams rendered ineffective assistance in failing to investigate George as a potential suspect, the trial court explained:

> In the defendant's second claim under this ground, he alleges that counsel failed to investigate other possible suspects *who would have had a motive to kill* Marcine Cofer.... The only other person that the defendant suggests had a motive to kill Cofer was Dale George. Dale George was not only Cofer's boyfriend, he lived with Cofer, and he was known to Sharon Bryant. There was no evidence presented as to why George would have had any problem getting into the home that he lived in, as did the murderer, nor why either Cofer or Bryant would not have identified George as the person they saw through the peep hole in the front door and who had shot them.

We agree with the trial court's conclusion that Adams' performance was not deficient in failing to pursue George as a possible suspect. There was no evidence in this case that George was involved in the shooting, and Sweet presented no evidence at the evidentiary hearing that George was a possible suspect. Further, there was no evidence that the police ever considered George to be a suspect so as to lead us to a conclusion that Adams was deficient in not pursuing George as an alternative suspect. *See* *Haliburton v. Singletary*, 691 So.2d 466, 470-71 (Fla.1997) (holding that counsel's decision not to use a possible witness was not "so patently unreasonable that no competent attorney would have chosen" to forego the witness's testimony).

[3] Sweet next contends that Adams rendered ineffective assistance in failing to call Jessie Gaskins as a witnesses. At a pretrial deposition, Gaskins stated that someone pulled a gun on him and made him knock on Cofer's door on the night of the murder. Gaskins described the person as wearing a ski mask and did not mention whether or not the person was wearing jewelry. Sweet contends that this testimony is inconsistent with the identification of Sweet by Cofer and Bryant.

At trial, Bryant described the shooter as wearing rings on his fingers and a beaded necklace with a crucifix on the end. Moreover, Bryant stated that the shooter was wearing a blue jean pant leg over his face. Bryant also identified Sweet in a photographic spread at the police station and at trial. Although she stated that she saw Sweet directly through the door peephole, she also testified that she did not actually see the face of the shooter. Furthermore, Cofer described the shooter at trial as having something covering his face, like "a piece of clothing." She testified that this clothing was not covering the shooter's entire face, and that she recognized Sweet's eyes, nose, and a "partial of his face" through the clothing. Cofer identified Sweet as the shooter when the police ***861** came to investigate the murder scene, and while she was in the hospital, she picked Sweet out of a photographic spread.

At the evidentiary hearing, Adams testified that he did not use Gaskins as a witness because Gaskins had made an out-

of-court statement identifying Sweet as the shooter after he saw Sweet on television. Moreover, Adams explained that Gaskins gave the police a signed statement saying that the man Gaskins saw on television looked like the man who made him knock on Cofer's door. Therefore, Adams did not want to risk the possibility of a third eyewitness identification of Sweet as the shooter.

When asked about Adams' performance with regard to Gaskins, Salmon stated: "Gaskins would at least have given the jury something to think about ... food for thought" with regard to Sweet's identification. Salmon stated that this "food for thought" also would have carried over to the penalty phase in allowing the jury to consider a penalty less than death. With regard to Gaskins' identification of Sweet as the shooter, Salmon stated that he believed that the identification would not have been admissible because of either relevancy or materiality. Moreover, Salmon felt that Gaskins' identification was "equivocal," and that he would not have been troubled by putting Gaskins on the stand even with Gaskins' out-of-court statement. However, upon cross-examination, Salmon admitted that the State could have brought out Gaskins' statement if Gaskins testified, and that it may have been a strategic decision not to put him on the stand.

We conclude that Adams was not deficient in deciding not to call Gaskins. The record demonstrates that Adams made a strategic decision not to call Gaskins as a witness based upon the possibility that Gaskins' out-of-court identification could have come in at trial. *See Maharaj v. State,* 778 So.2d 944, 959 (Fla.2000) (holding that counsel's strategic reason not to call alibi witness could not constitute deficient performance); *Rose v. State,* 675 So.2d 567, 570 (Fla.1996) (same).

[4] Finally, Sweet contends that Adams rendered ineffective assistance in failing to ensure that Anthony McNish appear at trial. Adams had subpoenaed McNish to appear at trial, but he did not show up. At trial, Adams told the court that McNish would have testified that he was on his way home at the time of the shooting and that he passed Cofer's house. McNish would have testified that he saw three black males come up to the apartment in the alley, but also would have testified that it was dark. McNish had known Sweet for five or six years, and would have testified that none of the three men walked like Sweet or were built like Sweet. Adams also told the trial court that McNish was supposed to come to court the day before, and, when he did not show up, Adams contacted McNish. McNish stated that he was confused as to the date, but assured Adams that he would appear the following day. That next day, when McNish failed to appear, Adams requested a thirty-minute continuance to find McNish, and the trial court granted him fifteen minutes. Forty-five minutes later, Adams told the trial court that he went to both McNish's residence and McNish's grandmother's residence, and that McNish could not be found. The trial court stated: "It seems like you've certainly made extraordinary efforts to locate Mr. McNish and have him here."

McNish testified at the evidentiary hearing. McNish stated that the three men at Cofer's door walked differently than Sweet, and that the three men each had a different skin complexion and physical build than Sweet. McNish admitted that he received the subpoena Adams sent, but ***862** that he never read it. Moreover, McNish stated that he read the date of the subpoena, but did not read the part of the subpoena instructing him to call Adams. McNish claimed that he did not go to court on the date instructed because he had to watch his daughter. McNish stated that he ultimately did call Adams, and told Adams that he had no transportation. Adams disputed that McNish ever told him that he needed transportation.

The State established on cross-examination that McNish had been convicted of seven felonies, including crimes involving dishonesty. Further, although he stated at a pretrial deposition that he could not see any of the three mens' faces at Cofer's door, that it was dark, and that he had bad eyesight, he explained at the evidentiary hearing that, after thinking about it, he had a good idea of what the three men looked like. However, he repeated at the evidentiary hearing that he had bad eyesight and never got a good look at the three men. Moreover, McNish never saw any of the men wearing a mask, and he did not actually see the men knock on the door. Finally, McNish stated at the evidentiary hearing that he could identify one of the men that was at Cofer's door now, but he refused to reveal the name of the person. He did state that the man is not Sweet.

The trial court found that Sweet failed to demonstrate either deficient performance or prejudice, explaining:

> The evidence at the hearing established that counsel had listed and intended to use McNish as a witness, that McNish appeared at a deposition by the State pursuant to subpoena, that McNish had assured counsel that he would appear at trial, that he had been subpoenaed by counsel to appear at trial (but had not read that subpoena), and that counsel secured a recess in the trial to go to McNish's house and to McNish's grandmother's house in order to locate McNish, but was unsuccessful in his efforts. This Court

specifically finds that counsel was not ineffective in his efforts to secure McNish's appearance at trial. Moreover, given McNish's inconsistent testimony at the evidentiary hearing and complete evasiveness regarding a critical piece of newly divulged evidence-some *eight* years after the fact, the jury would find McNish's testimony to be as incredible as this Court found it to be, and therefore, the defendant has also failed to show any actual prejudice as well.

We agree with the trial court that Sweet demonstrated neither deficient performance nor prejudice with regard to McNish.

In short, none of these claims refute the overwhelming evidence of guilt presented by the State. Further, "[e]ven assuming any deficiency in trial counsel's guilt-phase performance, there is no reasonable probability, sufficient to undermine our confidence in the outcome, that the result of the proceeding would have been different." *Rutherford,* 727 So.2d at 220.

2. INEFFECTIVE ASSISTANCE DURING PENALTY PHASE

In Sweet's second claim, he asserts that trial counsel rendered ineffective assistance in failing to present readily available mitigating evidence during the penalty phase. Sweet actually raises several separate but related claims. First, Sweet contends that trial counsel was ineffective in presenting the testimony of his sister, Deonne Sweet, during the penalty phase. Second, Sweet argues that Adams was ineffective in failing to present Sweet's mother, Bertha Sweet, and Sweet's foster mother, Emily Shealey, during the penalty phase. Finally, Sweet maintains that Adams was ineffective in failing to present available mental mitigation during the penalty ***863** phase. We address each claim individually, but also evaluate the cumulative effect of the additional mitigation in order to determine whether Sweet has demonstrated prejudice.

[5] At the penalty phase, Adams relied solely on Deonne Sweet to provide mitigation testimony. Adams explained at the evidentiary hearing that he had several meetings with Deonne where he discussed the types of things he would ask during the penalty phase. He asked Deonne if she had the names of any family members he could speak to, and he stated that she did not give him any information.[7]

Deonne testified to the following at trial. She and Sweet grew up without a father. Growing up with her mother was "normal." However, she also testified that their mother was an alcoholic "on and off." Deonne stated that she did not know if their mother's alcoholism affected Sweet, but that it did not affect her. Deonne explained that she raised Sweet for a period of time, and that Sweet was a good uncle to Deonne's daughter. Deonne testified that Sweet never caused any problems for her when she was raising him. Finally, Deonne stated that she and Sweet were in a foster home because of their mother's neglect and alcoholism, and that Sweet was in a foster home for approximately two years.

At the evidentiary hearing, Deonne elaborated on her prior trial testimony. The new portions of her testimony included the fact that Sweet never knew his father, and that his father never acknowledged Sweet as his son. Sweet sometimes witnessed their mother fighting with her boyfriends and their mother would sometimes hide from them. Sweet had behavioral problems in school and could not sit down and pay attention. Furthermore, Sweet had a stuttering problem for which he went to speech therapy. Sweet was sent to a juvenile facility in Marianna. Sweet was never physically abused.

Sweet contends that defense counsels' lack of preparation in presenting Deonne's testimony constituted deficient performance. However, we need not decide this issue, as we conclude that, based solely on Deonne's testimony at the evidentiary hearing, Sweet has failed to establish prejudice. *See Waterhouse,* 792 So.2d at 1182 (where defendant fails to make showing as to one prong of *Strickland,* it is unnecessary to analyze the other prong). We conclude that although Deonne elaborated on her trial testimony during the evidentiary hearing, this additional testimony was essentially cumulative.

As to Sweet's claim that his counsel was ineffective in failing to have his mother and foster parent testify, the trial court found that Adams did speak to various potential witnesses concerning mitigation, including Sweet's mother, his girlfriend, his girlfriend's mother, and his foster parents. Furthermore, we note with regard to this mitigation, that this is not a case where Adams failed to investigate any available mitigating witnesses. *See, e.g., Rose,* 675 So.2d at 572; *Heiney v. State,* 620 So.2d 171, 173 (Fla.1993).

[6] We do not, however, reach the issue of whether Adams was deficient in failing to have additional penalty phase ***864** witnesses testify, because, having reviewed the testimony of the witnesses at the evidentiary hearing, we agree with the trial court that Sweet did not establish prejudice

under this claim. Although Bertha Sweet's testimony at the evidentiary hearing did present some new facts concerning Sweet's childhood, the majority of the testimony was cumulative to Deonne's trial testimony. Not only was the testimony cumulative to Deonne's testimony that was actually presented at trial, but presenting Bertha as a witness would have opened the door to cross-examination about Sweet's juvenile record.

For example, Bertha stated that Sweet got into trouble a number of times as a juvenile and was sent away to the Dozier School for Boys in Marianna. Sweet was suspended from school for misconduct and he would get into fights at school. Bertha testified that Sweet was arrested for battery in 1981 for hitting another child and that he was taken into custody for being ungovernable. Moreover, Sweet began stealing things at a very young age and this continued into his teenage years. Bertha also testified that Sweet was once arrested for stealing a bicycle. Thus, to the extent that the jury may have benefitted from this additional testimony, the jury also would have heard potentially damaging information regarding Sweet's juvenile record and prior violent behavior. Moreover, none of Bertha's testimony established any statutory mitigation or refuted any statutory aggravation.

[7] We also reject Sweet's ineffective assistance claim with regard to the failure to call Sweet's foster mother, Emily Shealey, as a witness during the penalty phase. Adams spoke with Shealey before trial. At the evidentiary hearing, he stated that he did not present her as a witness because of "something she said," although he could not remember what specific thing she said that caused him concern. At the evidentiary hearing, Shealey testified that when Sweet arrived at her house, Sweet told her that his mother was not taking care of him and was drinking a lot. Shealey also stated that Sweet did not do well in school at first, but Shealey "straightened him out" and placed him on Ritalin. Moreover, Sweet behaved well in Shealey's home, and got along with Shealey's son. However, she also acknowledged that Sweet stole from a store at least three times and misbehaved a lot in class. Salmon conceded at the evidentiary hearing that by placing Shealey (as well as Bertha Sweet) on the stand, the State would have been able to elicit Sweet's juvenile criminal history through cross-examination.

Similar to Bertha Sweet's testimony, we conclude that Shealey's testimony was cumulative to that of Deonne's. In fact, Shealey's testimony probably would have been damaging, in that Sweet's juvenile criminal history would likely have been disclosed to the jury. Moreover, none of Shealey's testimony established any statutory mitigation or refuted any statutory aggravation in this case.

[8] Sweet's final contention of penalty phase ineffectiveness is that Adams rendered ineffective assistance in failing to request the appointment of a mental health expert to evaluate Sweet. At the evidentiary hearing, Sweet presented the testimony of Drs. Ernest Miller and Jethro Toomer. Dr. Miller, a retired professor of psychiatry, was appointed by the trial court to evaluate Sweet for competency. Dr. Miller rendered a report in which he found Sweet competent to stand trial. However, Adams never submitted the competency report into evidence or pursued with Dr. Miller the potential for further examination of Sweet in order to establish mental mitigation.

***865** As we stated in *Rutherford,* 727 So.2d at 223:

> In evaluating the *Strickland* prongs of deficiency and prejudice, it is important to focus on the nature of the mental mitigation Rutherford now claims should have been presented. This focus is of assistance when determining whether trial counsel's choice was a reasonable and informed strategic decision, as well as whether the failure to present such testimony (assuming that the failure amounted to a deficiency in performance) deprived the defendant of a reliable penalty phase proceeding.

Dr. Toomer, a clinical and forensic psychologist, evaluated Sweet for the purposes of the evidentiary hearing. Dr. Miller's testimony contradicted Dr. Toomer's testimony. Dr. Toomer testified that he did not administer the Minnesota Multiphastic Personality Inventory ("MMPI") because "there is nothing suggesting the existence of any severe form of mental illness or major mental illness" with regard to Sweet. Dr. Toomer testified about Sweet's family background and also stated that Sweet had an IQ of 88, which fell in the low-average range. Dr. Toomer stated that he did not test Sweet for organic impairment, but that Sweet did fall within the range of psychological problems. Dr. Toomer explained that, based on Sweet's background, there were a number of "red flags" concerning overall functioning. Dr. Toomer stated that Sweet was suffering from a personality disorder, in that he was dependent upon others, but did not suffer from an antisocial personality disorder. Dr. Toomer explained that he found no sign of organic brain damage and that Sweet did not fall into the mentally deficient category.

Further, Dr. Toomer testified that Sweet could not have committed the crime in a cold and calculated manner because, based upon Sweet's background, he did not act

in a logical, premeditated manner. Moreover, Dr. Toomer stated that Sweet was unable to conform his conduct to the requirements of the law, based upon his impulsivity, and therefore, Sweet should have been able to establish a statutory mental mitigator. On cross-examination, Dr. Toomer conceded that Sweet had been able to conform his conduct to the requirements of law while in jail, but explained that this was due to the fact that he was in a structured environment. Moreover, Dr. Toomer stated on cross-examination that Sweet knew the difference between right and wrong at the time he committed the murder. Dr. Toomer also explained that Sweet was under the influence of an emotional disturbance at the time of the murder based upon his borderline personality disorder, and thus Sweet would have been able to establish another statutory mitigator.

In contrast to Dr. Toomer, Dr. Miller testified that Sweet suffered from an antisocial personality disorder. However, Dr. Miller explained that people who suffer from antisocial personality disorders may be capable of engaging in planning. Moreover, Dr. Miller stated that Sweet would sometimes have the capacity to satisfy the CCP aggravator, and that at other times Sweet would act out impulsively. Dr. Miller stated that Sweet was capable of engaging in long-range planning and forming the design to kill someone after deliberation. Yet Dr. Miller also testified that the defense might have been able to argue against CCP because of Sweet's impulsive behavior. Moreover, Dr. Miller stated that Sweet could appreciate the criminality of his conduct. Dr. Miller testified that he saw no evidence of brain damage or mental illness. Dr. Miller concluded that it was difficult to find anything directly and openly mitigating in this case and that the facts of this case suggest premeditation and planning.

***866** In rejecting the testimony that Sweet could not have formed the premeditation sufficient to establish the CCP aggravator and that Sweet was under an extreme emotional disturbance at the time of the murder, the trial court evaluated not only the testimony of the expert witnesses, but the other evidence at trial regarding the heightened premeditation that surrounded the planning and execution of this murder:

> However, this Court finds that the evidence in this case contradicts Dr. Toomer's opinions. The evidence at trial overwhelmingly showed the defendant's motive and intent to eliminate the victim/witness to his prior robbery of that victim, and the defendant's own inculpatory statements to Manuela Roberts and Solomon Hansbury provide the icing on the cake.

We conclude that it is not reasonably probable, given the nature of all the additional mitigation, that this "altered picture would have led to the imposition of a life sentence, outweighing the multiple substantial aggravators at issue in this case." *Rutherford,* 727 So.2d at 226. We have carefully reviewed the evidentiary hearing testimony of Dr. Miller and Dr. Toomer and agree with the trial court that, given the nature of the mental health mitigation presented by these experts at the evidentiary hearing, Sweet has failed to demonstrate that he was deprived of a reliable penalty phase hearing. Moreover, we cannot conclude that the presentation of the testimony would have led to the imposition of a sentence other than death, given the four strong aggravators and the nature and extent of the additional mitigation evidence presented at the evidentiary hearing. We find this case similar to *Rutherford:*

> Even if the additional mitigation evidence Rutherford presented at the 3.850 hearing had been heard and considered by the jury and original judge, it is not reasonably probable, given the nature of the mitigation offered, that this altered picture would have led to the imposition of a life sentence, outweighing the multiple substantial aggravators at issue in this case (HAC, CCP, and robbery/ pecuniary gain). Rutherford was not deprived of a reliable penalty proceeding.

727 So.2d at 225-26; *see also Haliburton v. Singletary,* 691 So.2d 466, 471 (Fla.1997) ("In light of the substantial, compelling aggravation found by the trial court [i.e., under sentence of imprisonment, prior violent felonies, committed during a burglary, and CCP] there is no reasonable probability that had the mental health expert testified, the outcome would have been different.").

As to the additional mitigation evidence presented through Deonne Sweet, Bertha Sweet and Emily Shealey, we conclude that the testimony is both cumulative and potentially harmful, as the testimony might have opened the door for the State to present negative information concerning Sweet's background. *See Rutherford,* 727 So.2d at 224-25 (explaining that essentially cumulative testimony presented during 3.850 evidentiary hearing was insufficient to establish prejudice in failing to present additional mitigation); *see also Ventura v. State,* 794 So.2d 553, 570 (Fla.2001) (holding that defendant could not establish prejudice where the mitigation presented at evidentiary hearing was cumulative of evidence presented at trial); *Breedlove v. State,* 692 So.2d 874, 878 (Fla.1997) (affirming denial of 3.850 relief where "the three aggravating factors we have previously affirmed [prior violent felony, during course of burglary, and HAC] overwhelm whatever

mitigation the [3.850] testimony of [the defendant's] friends and family members could provide"). Accordingly, we reject Sweet's claim of ineffective assistance of counsel during the penalty phase.

***867** 3. CUMULATIVE ERROR UNDER *STATE v. GUNSBY,* 670 So.2d 920 (Fla.1996)

[9] In Sweet's third claim on appeal, he asserts that this Court must consider the evidence concerning Sweet's innocence disclosed during the evidentiary hearing in conjunction with Sweet's allegations of ineffective assistance. Specifically, Sweet asserts that because Solomon Hansbury, a witness at trial who claimed that Sweet confessed to the murder while they were in jail together, recanted his testimony at the evidentiary hearing, the trial court erred in failing to consider the cumulative effect of all the evidence not presented at Sweet's trial. In making this claim, Sweet relies upon this Court's decision in *State v. Gunsby,* 670 So.2d 920 (Fla.1996). In *Gunsby* the Court explained:

> [W]hen we consider the cumulative effect of the testimony presented at the rule 3.850 hearing and the admitted *Brady* violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome.

Id. at 924.

[10] **[11]** **[12]** **[13]** However, before we engage in a cumulative error analysis under *Gunsby,* we must first consider Hansbury's testimony. The trial court expressly rejected Hansbury's testimony at the evidentiary hearing, in which he recanted his earlier statement, as "incredible." As this Court explained in *Armstrong v. State,* 642 So.2d 730, 735 (Fla.1994), in rejecting a new trial based upon recanted testimony:

> Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial. "Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury." Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted.

(Citations omitted.)

Certainly, the testimony of Hansbury standing alone would not rise to the level of requiring the granting of a new trial, and Sweet does not contend that he was entitled to a new trial based solely on Hansbury's recantation. Considering all of the testimony presented at the evidentiary hearing in this case, we reject Sweet's claim under *Gunsby.* As noted above, Sweet has failed to establish an ineffective assistance of counsel claim with regard to the guilt-phase proceedings. Therefore, we deny relief on this claim.

4. INEFFECTIVE ASSISTANCE IN FAILING TO PROVIDE COMPETENCY EXPERTS WITH SWEET'S BACKGROUND INFORMATION

[14] In Sweet's fourth claim, he contends that Adams rendered ineffective assistance in failing to provide Dr. Miller and Maritza Cabrera with information concerning Sweet's background. The trial court rejected this claim, concluding:

> This Court appointed two independent mental health professionals to examine the defendant, Dr. Ernest C. Miller, M.D., and Maritza Cabrera, M.A., CRC.... The [professionals'] report shows that the examiners were, in fact, aware of much of the information that ***868** the defendant contends his counsel did not provide them with. The information in the report is stated in concise summarizations, as opposed to being recited in the detail that the defendant has stated it in his motion. The defendant did not call Dr. Miller as a witness at the hearing to establish his alleged lack of adequate information; *rather, the State called Dr. Miller and established that his opinion would not have been different even when specifically considering the facts not specifically noted in his report.* Therefore, this Court finds that the evidence failed to establish any prejudice to the defendant's mental health examination.

(Emphasis supplied.) The trial court's factual conclusions are supported by competent substantial evidence and we likewise conclude that Sweet has failed to demonstrate any prejudice. *See Patton v. State,* 784 So.2d 380, 393 (Fla.2000) (holding that defendant failed to demonstrate actual prejudice where competency expert testified that his opinion would not have changed even after considering additional information).

In a related claim, Sweet asserts that the mental health professionals who examined him failed to render adequate mental health assistance. Sweet contends that the professionals relied almost exclusively on what Adams provided, which was inadequate, and did not conduct an independent investigation into Sweet's family history. Sweet contends that the professionals might have reached a different conclusion as to Sweet's competency if they had engaged in a more thorough investigation of Sweet's background. However, because there is no evidence to support the conclusion that either of the experts' opinions would have changed regarding competency, we reject this claim.

5. MISCELLANEOUS CLAIMS

In his fifth claim, Sweet makes several different subclaims. First, Sweet asserts that the trial court erred in granting an evidentiary hearing on only one aspect of his claim regarding ineffective assistance of counsel during the guilt phase. Second, Sweet claims that the trial court should have considered the additional examples of Adams' ineffectiveness and the State's alleged misconduct in conjunction with his claim that Adams failed to properly investigate other suspects. Finally, Sweet contends that the trial court should have considered the improper actions of the trial judge in conjunction with Sweet's ineffective assistance claim regarding Adams' failure to investigate other suspects. Each of these claims shall be addressed in turn.

Sweet's first subclaim is that the trial court erred in granting an evidentiary hearing on only one aspect of Sweet's ineffectiveness claim. Sweet asserts that he raised three separate bases for Adams' ineffectiveness during the guilt phase in his postconviction motion. These bases were: (1) Adams failed to conduct an adequate pretrial investigation and preparation of the case; (2) Adams failed to investigate and present evidence of other suspects; and (3) Adams failed to properly impeach the State's witnesses, Marcine Cofer and Solomon Hansbury. The trial court granted an evidentiary hearing for only Adams' alleged failure to investigate and present evidence of other suspects. However, during the evidentiary hearing, defense counsel did present evidence in an attempt to establish ineffectiveness under the first and third subclaims.

[15] As this Court explained in *Gaskin v. State,* 737 So.2d 509, 516 (Fla.1999):

> Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is ***869** not entitled to relief. The movant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if he alleges specific "facts which are not conclusively rebutted by the record and demonstrate a deficiency in performance that prejudiced the defendant." Upon review of a trial court's summary denial of postconviction relief without an evidentiary hearing, we must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record.

(Citations and footnote omitted.) Furthermore, a defendant is not entitled to an evidentiary hearing if the postconviction motion is legally insufficient on its face. *See Freeman v. State,* 761 So.2d 1055, 1061 (Fla.2000); *Peede v. State,* 748 So.2d 253, 257 (Fla.1999).

In this case, the trial court rejected Sweet's claim that Adams was ineffective for failing to conduct an adequate pretrial investigation and preparation of the case, explaining:

> The defendant's first claim under this ground is that counsel allegedly failed to conduct an adequate pre-trial investigation and preparation of the defendant's case. As the defendant acknowledges, the defendant was initially represented by the Public Defender's Office, and his trial counsel was not appointed until five months after the defendant's arrest, only one month prior to when the speedy trial period would have expired. Counsel sought and was granted two continuances of several months in duration for investigative purposes, and two continuances of a few weeks in duration for health reasons. When counsel attempted to obtain yet another, this Court denied that request. The defendant makes the conclusory allegations that his attorney's preparation was inadequate due to counsel's health problems, and due to a break down in communications between he and his attorney. The defendant cites to a statement he made in court as support for his allegation that there was a break down in communications. In point of fact, the defendant's statement clearly shows that the defendant was pushing counsel bring the case to trial, and was unhappy that counsel was not doing so, which is diametrically opposed to counsel being able to take the time to adequately prepare for trial. Further, this Court denied counsel's additional requests for more continuances. This Court finds that this claim is, at best, facially insufficient. The defendant also makes the conclusory allegations that counsel "failed to conduct

an adequate voir dire; to object to the introduction of inflammatory and improper evidence; and failed to present adequate argument to the jury." The defendant merely cites to the record on appeal in support of these allegations. This Court finds these allegations to be facially insufficient.

Moreover, with regard to Sweet's assertion that Adams rendered ineffective assistance in failing to impeach the State's witnesses, the trial court made the following conclusion:

The defendant's third claim under this ground is that counsel allegedly failed to properly cross-examine Marcine Cofer and Solomon Hansbury at trial (Hansbury testified at trial regarding the defendant's confession to him). The defendant contends that counsel should have attempted to impeach Cofer's identification of him through evidence of her drug usage. The defendant acknowledges that counsel was restrained in his efforts to do this through a pre-trial order of this Court. The trial transcripts rebut this claim, in that the jury did hear evidence that Cofer sold drugs, used drugs, and that she had drugs in her system on the night of the murder. ***870** Moreover, the defendant fails to alleged why the jury would disbelieve Cofer's positive identification of the defendant in the face of such corroborating evidence as the positive identification of the defendant by Sharon Bryant, the defendant's possession of the jewelry he had stolen from Cofer during the prior robbery, and the testimony of the defendant's confession to both Solomon Hansbury and Manuela Roberts. As for Solomon Hansbury, the trial transcripts show that counsel did extensively cross-examine Hansbury and the defendant fails to allege what additional cross-examination counsel should have performed. As part of this claim, the defendant presented the recanted testimony of Hansbury at the evidentiary hearing. However, Hansbury admitted that he is now serving a life sentence without the possibility of parole, that snitches are not highly regarded in prison, and that the inmates consider it an admirable thing to testify on behalf of another inmate. Hansbury's trial testimony was consistent with the other evidence in this case. This Court finds Hansbury's current testimony that he lied at trial to be incredible. This Court finds that there is no reasonable probability that any of the claims raised under this ground would probably have resulted in a different outcome at trial. *Williamson v. Dugger,* 651 So.2d 84 (Fla.1994); *Kennedy v. State,* 547 So.2d 912 (Fla.1989).

We agree with the trial court and conclude that these claims are either legally insufficient or conclusively refuted by the record. Also, to the extent that Sweet did introduce evidence at the evidentiary hearing regarding Hansbury, the trial court's factual findings are supported by the record.

[16] Sweet's second subclaim is that the trial court should have considered the additional examples of Adams' ineffectiveness and the State's alleged misconduct in conjunction with his claim that Adams failed to properly investigate other suspects, and that the trial court erred in denying a hearing on these claims. However, because on appeal Sweet simply recites these claims from his postconviction motion in a sentence or two, without elaboration or explanation, we conclude that these instances of alleged ineffectiveness are not preserved for appellate review. *See Shere v. State,* 742 So.2d 215, 217 n. 6 (Fla.1999); *Duest v. Dugger,* 555 So.2d 849, 851-52 (Fla.1990).

[17] In Sweet's third subclaim, he asserts that the trial court made various errors throughout his trial, and that he was entitled to an evidentiary hearing on this claim. First, Sweet contends that despite the presentation of evidence supporting several mitigators, the trial court found no statutory and only one nonstatutory mitigating circumstance (lack of parental guidance). Specifically, Sweet contends that he presented the following nonstatutory mitigation in this case: (1) organic brain damage; (2) broken home; (3) difficult and impoverished background; (4) potential for rehabilitation; (5) positive traits; (6) drug abuse problems; (7) alcohol abuse; (8) potential to contribute to society; (9) acceptable behavior at trial; (10) emotional disturbance or instability; (11) personality change from drugs; and (12) mother was an alcoholic. Moreover, Sweet contends that Adams rendered ineffective assistance in failing to effectively use this evidence to argue for a life sentence.

However, we agree with the trial court's conclusion with regard to this claim:

This Court finds this claim to be procedurally barred, in that it could and should have been raised in his direct appeal. Additionally, this Court finds that the evidence presented at the hearing failed to establish his proposed mitigators ***871** of "organic brain damage," "potential for rehabilitation," "positive traits," "drug abuse problem," "alcohol problem," "could contribute to society," "emotional disturbance or instability," and "personality change from drugs." The remainder of the proposed mitigators were presented at trial through the testimony of the defendant's sister. As the defendant's quotation from this Court's sentencing order demonstrates, this Court did take into account those factors which resulted

> in the defendant having a disadvantaged childhood. As the quotation also notes, however, those disadvantages were largely offset by numerous positive influences which would have allowed the defendant to overcome his disadvantages, just as his sister Deonne did. Moreover, had the jury been presented with additional evidence in regard to the defendant's proposed mitigators, the State would have been able to bring out a wealth of evidence of the defendant's anti-social personality. Accordingly, this Court finds that there is no reasonable probability that the jury would have reached a different sentencing decision had they been presented with additional evidence by *both* parties.

(Citations omitted.)

Second, Sweet contends that he was denied a right to a fair sentencing hearing because the jury was instructed on unconstitutionally vague aggravators. However, this argument appears to be a repeat of his ineffectiveness claim discussed above, and for the reasons already discussed, was properly denied.

Accordingly, we affirm the denial of postconviction relief.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, PARIENTE, LEWIS, and QUINCE, JJ., concur.

ANSTEAD, J., concurs in result only.

All Citations

810 So.2d 854, 27 Fla. L. Weekly S113

Footnotes

1 These aggravators included: (1) Sweet had previously been convicted of several violent felonies, including armed robbery, possession of a firearm by a convicted felon, riot, resisting arrest with violence, and the contemporaneous attempted murders and burglary; (2) the murder was committed to avoid arrest; (3) the murder was committed during a burglary; and (4) the murder was cold, calculated, and premeditated. *See id.*

2 The trial court gave this nonstatutory mitigator "slight weight." *Id.*

3 The United States Supreme Court denied certiorari. *See Sweet v. Florida,* 510 U.S. 1170, 114 S.Ct. 1206, 127 L.Ed.2d 553 (1994).

4 These claims included: (1) Sweet was denied access to public records; (2) the one-year time limitation for filing a rule 3.851 motion for postconviction relief violates Sweet's due process and equal protection rights; (3) the "felony murder" statutory aggravating circumstance constitutes an unconstitutional "automatic statutory aggravating circumstance"; (4) the "avoid arrest" statutory aggravator was inapplicable in this case and the jury was erroneously instructed regarding this aggravator because the trial court improperly failed to further instruct the jury that the aggravator can only be found where it is the "dominant or only" motive for the defendant's commission of the murder; (5) the trial court's jury instruction on the "cold, calculated, and premeditated" aggravator was erroneous because it failed to instruct the jury that this aggravator required "heightened premeditation" and the evidence failed to establish the necessary heightened premeditation necessary to support this aggravator; (6) the Jacksonville Sheriff's Office destroyed all of the evidence in this case, depriving Sweet of his right to conduct an independent analysis of this evidence using his own experts; (7) ineffective assistance during the guilt phase by: (a) failing to conduct an adequate pretrial investigation and preparation of Sweet's case; (b) failing to investigate other possible sources who would have had a motive to kill Marcine Cofer; and (c) failing to properly cross-examine Marcine Cofer and Solomon Hansbury; (8) ineffective assistance by failing to investigate and prepare available mitigation evidence regarding Sweet's background; (9) Sweet was denied his right to a fair trial as a result of his jury being subjected to improper influences; (10) the jury was given inadequate instructions on the "prior violent felony," "great risk," "avoiding arrest," and "cold, calculated, and premeditated" aggravators; (11) Rule Regulating the Florida Bar 4-3.5(d)(4), which prohibits attorneys from interviewing jurors, caused his postconviction counsel to render ineffective assistance of counsel; (12) Sweet is innocent of first-degree murder and innocent of the death penalty; (13) the record fails to show his presence or his counsel's presence at five sidebar conferences and counsel rendered ineffective assistance by failing to object; (14) improper prosecutorial comments during the penalty phase in arguing that the jury should not be sympathetic towards Sweet and ineffective assistance in failing to object to this comment and in failing to request a "mercy instruction"; (15) alleged omissions in the record on appeal deprived him of meaningful appellate and postconviction review and trial counsel rendered ineffective assistance in failing to ensure a complete record; (16) the trial

court's failure to ensure that Sweet had a complete record on appeal deprived him of a proper direct appeal; (17) Sweet received a fundamentally unfair trial due to the sheer number and types of errors committed; (18) the penalty phase jury instructions improperly shifted the burden to Sweet to show that death was not the appropriate sentence for the jury to recommend; (19) the State's misleading evidence and improper argument deprived Sweet of a fair trial; (20) Sweet's contemporaneous felonies were improperly used to support the prior violent felony aggravator; (21) the State failed to prove that Sweet "knowingly" created a great risk of causing the death of other persons given that his mental state at the time of the murder prevented him from knowing this fact; (22) the trial court improperly used a prior possession of a firearm by a convicted felon conviction as a statutory aggravator because the conviction was unconstitutionally obtained; (23) Florida's death penalty statute is unconstitutional on its face and as applied; (24) the trial court erred in failing to consider nonstatutory mitigating circumstances; (25) the State's introduction of and argument regarding nonstatutory aggravators deprived Sweet of a fair sentencing recommendation; (26) the State's closing argument and the jury instructions during the penalty phase improperly diminished the jury's sense of responsibility in the sentencing process; (27) trial counsel failed to provide the two court-appointed mental health examiners with sufficient background information to allow them to adequately evaluate Sweet's competency to stand trial; and (28) the mental health officials that examined Sweet failed to render adequate mental health assistance.

5 *Huff v. State,* 622 So.2d 982 (Fla.1993).

6 These issues are: (1) whether counsel was ineffective during the guilt phase for failing to investigate and present evidence of other suspects; (2) whether counsel was ineffective during the penalty phase; (3) whether the trial court erred in failing to consider the cumulative effect of the newly discovered evidence concerning Sweet's innocence with the evidence that was not presented due to trial counsel's ineffectiveness; (4) whether counsel was ineffective regarding Sweet's competency evaluation by a mental health expert; (5) whether the trial court erred in summarily denying a hearing on Sweet's claims related to trial counsel's ineffectiveness and the State's misconduct that must be considered for their cumulative effect on the outcome of the guilt and penalty phases; and (6) whether the record on appeal is so incomplete that Sweet cannot meaningfully raise claims in this appeal. We conclude that Sweet's sixth claim, that the transcript in this case is missing pages 1594-95 and page 1601, and as a result, he is "being denied his right to appeal because this Court's review cannot be constitutionally complete," is without merit because the State correctly explains that the record of the evidentiary hearing in this case is complete.

7 This testimony is somewhat contradicted by Deonne's testimony at the evidentiary hearing. She stated that Adams spoke to her on the phone several times, and that she went to his office once. She stated that Adams spoke to her more like a friend, telling her about his girlfriends and other unrelated matters. She also claimed that Adams never told her that he tried to get in touch with Sweet's mother during the trial. Nevertheless, the trial court must evaluate the credibility of any witnesses, and we are obligated to give deference to the trial court's factual findings. *See Porter v. State,* 788 So.2d 917, 923 (Fla.2001).

WILLIAM EARL SWEET,
PETITIONER,

VS.

STATE OF FLORIDA,
RESPONDENT

Appendix F. The opinion of the Supreme Court of Florida affirming the denial of postconviction relief, reported at *Sweet v. State*, 248 So. 3d 1060 (Fla. 2018).

248 So.3d 1060
Supreme Court of Florida.

William Earl SWEET, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–1987
|
[May 24, 2018]

Synopsis

Background: Following affirmance of his convictions for first degree murder, three counts of attempted first degree murder, and burglary and sentence of death on direct appeal, 624 So.2d 1138, and affirmance of denials or dismissals of his petitions for postconviction relief and for writs of habeas corpus, 810 So.2d 854, 822 So.2d 1269, 467 F.3d 1311, 234 So.3d 646, defendant filed sixth successive motion for postconviction relief. The Circuit Court, Duval County, Angela Cox, J., No. 161991cf002899axxxma, denied motion. Defendant appealed.

Holdings: The Supreme Court held that:

[1] arrest record showing that prisoner, whose affidavit stated that capital defendant was not perpetrator of crimes, was arrested five days before crimes at issue occurred, was admissible;

[2] evidence supported finding that shooting victim's recantation testimony was not credible; and

[3] evidence supported finding that testimony by prisoner was not credible.

Affirmed.

West Headnotes (9)

[1] Criminal Law Admissibility

Arrest record showing that prisoner, whose affidavit stated that capital defendant was not perpetrator of crimes, was arrested five days before crimes at issue occurred, was admissible in postconviction relief proceedings following convictions for first degree murder, attempted first degree murder, and burglary; trial court's determination of prisoner's credibility did not rest on admission of arrest record, as he did not come forward for more than 24 years after offenses, he was seventh-time convicted felon serving life sentence, he had previously specified that he did not remember anything from night pertaining to crimes, and his account of what he observed was inconsistent.

1 Cases that cite this headnote

[2] Criminal Law Post-conviction relief

When reviewing a trial court's determination relating to the credibility of a recantation, the Supreme Court is highly deferential to the trial court and will affirm the lower court's determination so long as it is supported by competent, substantial evidence.

[3] Criminal Law Post-conviction relief

When compared with the Supreme Court conducting a review, postconviction courts hold a superior vantage point with respect to questions of fact, evidentiary weight, and observations of the demeanor and credibility of witnesses; unlike the Supreme Court, the trial judge is there and sees and hears the witnesses presenting the conflicting testimony, while the cold record on appeal does not give appellate judges that type of perspective.

[4] Criminal Law Perjured testimony and recantation

Evidence supported finding that shooting victim's recantation testimony, during which she allegedly came forward and suggested that she might have misidentified defendant to police and at trial, was not credible during postconviction proceedings following convictions for first degree murder, attempted first degree murder, and burglary; testimony

regarding blurred present memory as to shooter came 26 years after trial, testimony at evidentiary hearing could not be considered true recantation, as victim testified on cross-examination by State that trial testimony was truthful, victim testified that she was contacted by defendant's sister about recanting trial testimony, and victim testified that she smoked approximately fifteen marijuana blunts a day and had consumed five blunts prior to testifying at hearing.

[5] **Criminal Law** Recantation

If a postconviction court is not satisfied that the recanted testimony is true, it has a duty to deny the defendant a new trial.

1 Cases that cite this headnote

[6] **Criminal Law** Perjured testimony and recantation

Evidence supported finding that testimony by prisoner, who stated that capital defendant was not perpetrator of crimes, was not credible in postconviction proceedings following convictions for first degree murder, attempted first degree murder, and burglary; prisoner did not come forward for more than 24 years after offenses, prisoner was seventh-time convicted felon serving life sentence, after claiming his guilty conscience in knowing that an innocent man was going to be executed made him come forward, he had abrupt change of heart and claimed that his affidavit was invalid and inaccurate, and, at evidentiary hearing, prisoner's inconsistency about what he observed continued.

[7] **Criminal Law** Post-conviction relief

When the trial court rules on a newly discovered evidence claim after an evidentiary hearing, the Supreme Court reviews the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence.

1 Cases that cite this headnote

[8] **Criminal Law** Review De Novo

As with rulings on other postconviction claims, the Supreme Court reviews the trial court's application of the law to the facts on a claim of newly discovered evidence after an evidentiary hearing de novo.

1 Cases that cite this headnote

[9] **Criminal Law** Newly discovered evidence

Trial court correctly applied standard for newly discovered evidence during postconviction proceedings following convictions for first degree murder, attempted first degree murder, and burglary; court considered cumulative effect of all evidence that could have been presented at new trial, and, after noting its finding that testimony by recanting witnesses was not credible, court concluded that defendant's newly discovered evidence would not have produced reasonable probability of different outcome at new trial.

1 Cases that cite this headnote

***1061** An Appeal from the Circuit Court in and for Duval County, Angela Cox, Judge—Case No. 161991CF002899AXXXMA

Attorneys and Law Firms

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Opinion

PER CURIAM.

William Earl Sweet appeals the postconviction court's order denying his sixth successive motion for postconviction relief based on a claim of newly discovered evidence after an

evidentiary hearing.[1] For the reasons that follow, we affirm the postconviction court's order denying Sweet relief.

FACTUAL BACKGROUND

In 1991, a jury convicted Sweet of one count of first-degree murder, three counts of attempted first-degree murder, and one count of burglary. *Sweet v. State* (*Sweet I*), 624 So.2d 1138, 1139 (Fla. 1993). On direct appeal, this Court explained the details underlying Sweet's convictions:

> On June 6, 1990, Marcine Cofer was attacked in her apartment and beaten ***1062** and robbed by three men. She could identify two of the men by their street names. On June 26, 1990, she was taken by Detective Robinson to the police station to look at pictures to attempt to identify the third assailant. When Robinson dropped Cofer off at her apartment, William Sweet was standing nearby and saw her leave the detective. Unknown to Cofer, Sweet had previously implicated himself in the robbery by telling a friend that he had committed the robbery or that he had ordered it done. Cofer asked her next-door neighbor, Mattie Bryant, to allow the neighbor's daughters, Felicia, thirteen, and Sharon, twelve, to stay with Cofer in her apartment that night. Mattie agreed, and the children went over to Cofer's apartment around 8 p.m.
>
> At approximately 1 a.m. that evening, Sharon was watching television in the living room of Cofer's apartment when she heard a loud kick on the apartment door. She reported this to Cofer, who was sleeping in the bedroom, but because the person had apparently left, Cofer told Sharon not to worry about it and went back to sleep. Shortly thereafter, Sharon saw someone pulling on the living room screen. She awakened Cofer. The two then went to the door of the apartment, looked out the peephole, and saw Sweet standing outside. Sweet called Cofer by name and ordered her to open the door.
>
> At Cofer's direction, Felicia pounded on the bathroom wall to get Mattie's attention in the apartment next door, and a few minutes later Mattie came over. The four then lined up at the door, with Cofer standing in the back of the group. When they opened the door to leave, Sweet got his foot in the door and forced his way into the apartment. Sweet's face was partially covered by a pair of pants. He first shot Cofer and then shot the other three people, killing Felicia. Six shots were fired. Cofer, Mattie, and Sharon were shot in the thigh, ankle and thigh, and buttock, respectively, and Felicia was shot in the hand and in the abdomen.

Id.

Following the jury's recommendation for death by a vote of ten to two, the trial court sentenced Sweet to death. *Id.* In imposing the death sentence, the trial court found the following aggravating factors:

> (1) Sweet had previously been convicted of several violent felonies, including armed robbery, possession of a firearm by a convicted felon, riot, resisting arrest with violence, and the contemporaneous attempted murders and burglary; (2) the murder was committed to avoid arrest; (3) the murder was committed during a burglary; and (4) the murder was cold, calculated, and premeditated.

Id. at 1142. "The court found no statutory mitigating circumstances, but found as nonstatutory mitigation that Sweet lacked true parental guidance as a teenager. This mitigation was given slight weight." *Id.*

On direct appeal, this Court affirmed Sweet's convictions and sentence of death. *Id.* at 1143. Sweet's sentence of death became final in 1994. *Sweet v. Florida*, 510 U.S. 1170, 114 S.Ct. 1206, 127 L.Ed.2d 553 (1994).

Sweet's Initial Postconviction Motion

In 1995, Sweet filed his initial motion for postconviction relief, raising twenty-eight claims. *Sweet v. State* (*Sweet II*), 810 So.2d 854, 857 n.4 (Fla. 2002).[2] The postconviction ***1063** court granted an evidentiary hearing on four of Sweet's claims. *Id.* at 858.

At the evidentiary hearing, Sweet presented the testimony of Anthony McNish, a witness who was subpoenaed to testify at Sweet's trial, but did not appear. *Id.* at 861. McNish's testimony at the evidentiary hearing was summarized by this Court as follows:

> ***1064** McNish stated that the three men at Cofer's door walked differently than Sweet, and that the three men each had a different skin complexion and physical build than Sweet....
>
> The State established on cross-examination that McNish had been convicted of seven felonies, including crimes involving dishonesty. Further, although he stated at a pretrial deposition that he could not see any of the three

> mens' faces at Cofer's door, that it was dark, and that he had bad eyesight, he explained at the evidentiary hearing that, after thinking about it, he had a good idea of what the three men looked like. However, he repeated at the evidentiary hearing that he had bad eyesight and never got a good look at the three men. Moreover, McNish never saw any of the men wearing a mask, and he did not actually see the men knock on the door. Finally, McNish stated at the evidentiary hearing that he could identify one of the men that was at Cofer's door now, but he refused to reveal the name of the person. He did state that the man is not Sweet.

Id. at 861–62. Also at the evidentiary hearing on his initial postconviction motion, Sweet presented the testimony of Solomon Hansbury, a witness at Sweet's trial who testified "that Sweet confessed to the murder while they were in jail together." *Id.* at 867. At the evidentiary hearing, Hansbury recanted his testimony. *Id.*

After the evidentiary hearing, the postconviction court denied relief. *Id.* at 858. As to Sweet's claim regarding trial counsel's failure to secure McNish's appearance at trial, the postconviction court found that Sweet "failed to demonstrate either deficient performance or prejudice." *Id.* at 862. The postconviction court explained that "given McNish's inconsistent testimony at the evidentiary hearing and complete evasiveness regarding a critical piece of newly divulged evidence—some eight years after the fact, the jury would find McNish's testimony to be as incredible as this Court found it to be." *Id.* Additionally, as to Hansbury's recantation, the postconviction court "expressly rejected Hansbury's testimony at the evidentiary hearing ... as 'incredible.' " *Id.* at 867.

Sweet appealed the denial of postconviction relief to this Court. As to McNish, this Court agreed with the postconviction court that "Sweet demonstrated neither deficient performance nor prejudice with regard to McNish," and concluded that none of Sweet's claims of ineffective assistance of counsel at the guilt phase "refute[d] the overwhelming evidence of guilt presented by the State." *Id.* at 862. This Court, likewise, rejected Sweet's cumulative evidence claim concerning Hansbury's recantation after "[c]onsidering all of the testimony presented at the evidentiary hearing." *Id.* at 867. This Court denied Sweet's other claims and unanimously affirmed the postconviction court's denial of relief. *Id.* at 871.[3]

***1065 Sweet's Sixth Successive Motion for Postconviction Relief**

On January 25, 2017, Sweet filed his sixth successive motion for postconviction relief based on newly discovered evidence.[4] The newly discovered evidence was an affidavit executed by Florida state prisoner Eric L. Wilridge, who attested, in part:

> On June 26/27, 1990 around 1:30am I was at the laundromat on 4th Market. I was looking down the alley and saw 3 males standing at Dales (Spot). I got on my bike and rode around the corner towards 3rd and market. I ran into Jesse and he said that he relieved [sic] that somebody is gonna rob Dale (Marcene) cause a guy with a ski mask made him knock on their door. About 10 minutes later I rode past Dales (spot) down 3rd and saw a guy standing in the doorway shooting. I couldn't see who it was because he was wearing a ski mask (black/gray). I know it wasn't (William E. Sweet) because of his build, height, and complexion (shorter and lighter). The next morning, I heard a little girl got killed. I didn't come forward earlier because I didn't want to get involved, but an innocent man is on death row. This is what happened.

Sweet's motion also asserted that Cofer, who testified against Sweet at trial, had since come forward and suggested that she may have misidentified Sweet to the police and at trial.[5] Sweet argued that, because "[i]dentification has always been a key issue in this case," an evidentiary hearing was warranted.

The postconviction court granted Sweet an evidentiary hearing "to develop the factual allegations of [Sweet's] claim" regarding Wilridge and "to present additional evidence to support [Sweet's] claim that Ms. Cofer recanted her testimony for the limited purpose of demonstrating any cumulative effect the recantation may have" on Sweet's claim. After the one-day evidentiary hearing, the postconviction court denied relief.

Sweet now appeals the postconviction court's denial of relief, claiming that the postconviction court (1) erred in admitting an arrest record, which indicated that Wilridge was arrested five days before Sweet's offenses; (2) erred in its credibility determinations regarding the testimony of Cofer and Wilridge; and (3) misapplied the *Jones*[6] standard for newly discovered evidence. For the reasons explained below, we affirm the postconviction court's order denying relief.

I. Admission of the Arrest Record

[1] Sweet claims that the postconviction court erred in admitting an arrest record that was introduced by the State, which showed that Wilridge was arrested five days before the crimes at issue in this case occurred. The State sought to admit the arrest record to show that Wilridge was likely incarcerated at the time of the murder and thus could not have been an eyewitness to the crime. Sweet argues that the arrest record should not have been admitted because it was not timely disclosed to the defense and was not relevant, as it did not conclusively establish that ***1066** Wilridge was in custody at the time the crimes at issue occurred.

We conclude that the postconviction court did not err in admitting the arrest record. Even if we were to conclude that it was error to admit the record, however, any error would be harmless beyond a reasonable doubt. *See Deparvine v. State*, 995 So.2d 351, 372 (Fla. 2008) (holding that erroneously admitted evidence was harmless where there was "no reasonable possibility" that the evidence contributed to the defendant's convictions). The trial court's determination of Wilridge's credibility did not rest on the admission of the arrest record, as we more fully explain below.

Accordingly, Sweet is not entitled to relief on this claim.

II. Credibility Determinations

[2] **[3]** "When reviewing a trial court's determination relating to the credibility of a recantation, this Court is 'highly deferential' to the trial court and will affirm the lower court's determination so long as it is supported by competent, substantial evidence." *Lambrix v. State*, 39 So.3d 260, 272 (Fla. 2010) (quoting *Heath v. State*, 3 So.3d 1017, 1024 (Fla. 2009)). "Postconviction courts hold a superior vantage point with respect to questions of fact, evidentiary weight, and observations of the demeanor and credibility of witnesses." *Ibar v. State*, 190 So.3d 1012, 1018 (Fla. 2016). "Unlike this Court, 'the trial judge is there and ... see[s] and hear[s] the witnesses presenting the conflicting testimony. The cold record on appeal does not give appellate judges that type of perspective.' " *Spann v. State*, 91 So.3d 812, 816 (Fla. 2012) (quoting *State v. Spaziano*, 692 So.2d 174, 178 (Fla. 1997)).

1. Cofer

[4] **[5]** Sweet claims that the postconviction court erred in finding that Cofer's recantation testimony was not credible. With regard to recanting testimony, this Court has explained:

> Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial. "Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury." Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted.

Consalvo v. State, 937 So.2d 555, 561 (Fla. 2006) (citations omitted) (quoting *Armstrong v. State*, 642 So.2d 730, 735 (Fla. 1994)). If a postconviction court "is not satisfied that the recanted testimony is true, *it has a duty to deny the defendant a new trial*." *Heath*, 3 So.3d at 1024; *see also Archer v. State*, 934 So.2d 1187, 1199 (Fla. 2006) (affirming denial of postconviction relief "because a recantation which is not credible would not produce an acquittal or a life sentence on retrial").

In this case, Cofer's testimony regarding her blurred present memory as to the shooter came twenty-six years after Sweet's trial. Additionally, and importantly, Cofer's testimony at the evidentiary hearing cannot be considered a true recantation, as she testified at the evidentiary hearing on cross-examination by the State that her trial testimony was truthful. However, as the postconviction court explained in its order denying relief, Cofer testified at the evidentiary hearing that "she was ***1067** now unsure whether [Sweet] was the person who shot her." The postconviction court further explained:

> Ms. Cofer claimed that she had been unsure about [Sweet's] guilt for some time, but did not feel it was confirmed until her sister told her in 2013 that [Sweet] was innocent. Ms. Cofer also testified that shortly after speaking with her sister, she was contacted by [Sweet's] sister about recanting her trial testimony. Despite now testifying that [Sweet] was not the true perpetrator, she claimed that what she testified to at the time of the trial was true. Ms. Cofer did not provide

any specific details to explain how she went from being able to concretely identify [Sweet] as the perpetrator to now questioning her identification.

While Ms. Cofer's testimony was credible at trial, her testimony at the Evidentiary Hearing was not. Ms. Cofer testified that her memory "goes in and out" and is "blurry." She also testified that she smokes approximately fifteen marijuana blunts a day and that she had consumed five marijuana blunts prior to testifying at the Evidentiary Hearing. Ms. Cofer's demeanor at the Evidentiary Hearing suggested that she was on friendly terms with [Sweet] and had a vested interest in seeing [Sweet's] conviction overturned despite his culpability. Based on Ms. Cofer's testimony it is clear to the Court that with the passage of time and Ms. Cofer's drug use, her memory of the offenses has faded. Her fading memory was then influenced by statements made to her by her sister and [Sweet's] sister that [Sweet] was not the true perpetrator.

We conclude that this finding is supported by competent, substantial evidence.

Accordingly, Sweet is not entitled to relief on this claim.

2. Wilridge

[6] Sweet next argues that the postconviction court erred in finding that Wilridge was not credible. Like the delay in Cofer's recantation, Wilridge did not come forward for more than twenty-four years after the offenses. *See Jones*, 709 So.2d at 521–22 ("Where ... some of the newly discovered evidence includes the testimony of individuals who claim to be witnesses to events that occurred at the time of the crime, the trial court may consider both the length of the delay and the reason the witness failed to come forward sooner."). Additionally, Wilridge is a seven-time convicted felon, who is currently serving a life sentence for which he has been incarcerated since October 26, 1991. *See Clark v. State*, 35 So.3d 880, 893 (Fla. 2010) (affirming the denial of postconviction relief where the newly discovered evidence came from an inmate serving multiple sentences, noting that the inmate "would probably not serve as a credible witness at a new trial").

Further, as the postconviction court explained in its order denying relief:

Mr. Wilridge's explanation for why he waited over twenty-four years to come forward with this possibly exonerative information was that he did not want to become involved with law enforcement. Mr. Wilridge claimed that his guilty conscious [sic], caused by knowing an innocent man was going to be executed, is what made him finally come forward. Then, a few months prior to the Evidentiary Hearing occurring, Mr. Wilridge had an abrupt change of heart. He wrote two letters, one to the Court and one to the State Attorney Office for the Fourth Judicial Circuit, in which he claimed his affidavit about [Sweet's] case was invalid and inaccurate. Further, in the letter to the Court, Mr. Wilridge even went so far as to specify that he did not remember ***1068** anything from that night pertaining to [Sweet's] case.

At the Evidentiary Hearing, Mr. Wilridge's inconsistency in what he observed concerning the offenses continued. In his affidavit, Mr. Wilridge stated that on the night of the offense he initially saw three men standing around Ms. Cofer's apartment, but at the Evidentiary Hearing he testified that while he saw three individuals, they were too far away for him to see any identifying features, including whether they were male or female. Mr. Wilridge also wrote in his affidavit that he saw a man standing in the doorway shooting into Ms. Cofer's apartment, but at the Evidentiary Hearing he testified that he saw a man standing in the doorway with his hand extended and did not see a gun or shots being fired. Mr. Wilridge further testified that it was only after riding away that he heard gunshots, which he claimed was common to hear in the neighborhood.

We conclude that this finding is supported by competent, substantial evidence.

Accordingly, Sweet is not entitled to relief on this claim.

III. Newly Discovered Evidence

[7] **[8]** **[9]** Lastly, Sweet claims that the postconviction court misapplied the *Jones* standard for newly discovered evidence. "When the trial court rules on a newly discovered evidence claim after an evidentiary hearing, we review the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence." *Green v. State*, 975 So.2d 1090, 1100 (Fla. 2008). "As with rulings on other postconviction claims, we review the trial court's application of the law to the facts de novo." *Id.*

With regard to claims of newly discovered evidence, this Court has explained:

> To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements: First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 709 So.2d 512, 521 (Fla. 1998) (*Jones II*). Newly discovered evidence satisfies the second prong of this test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Id.* at 526 (quoting *Jones v. State*, 678 So.2d 309, 315 (Fla. 1996) (*Jones I*)). In determining whether the evidence compels a new trial, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones v. State*, 591 So.2d 911, 916 (Fla. 1991).

Id. at 1099.

After finding that Cofer and Wilridge were not credible, the postconviction court turned to consider the cumulative effect of all evidence that could be presented at a new trial. The court considered the additional evidence presented at the evidentiary hearing on Sweet's initial postconviction motion of McNish's testimony and Hansbury's recantation. After noting its previous findings that neither McNish's testimony nor Hansbury's recantation was credible, the postconviction court concluded that "[i]n light of all the evidence presented at the evidentiary hearing and all other evidence available," Wilridge's newly discovered evidence and Cofer's recantation "would not produce a reasonable probability of a different outcome at a new trial." Thus, it is clear that the postconviction ***1069** court properly applied the *Jones* standard to Sweet's claim.

Accordingly, Sweet is not entitled to relief on this claim.

CONCLUSION

For the reasons stated, we affirm the postconviction court's order denying Sweet's sixth successive motion for postconviction relief.

It is so ordered.

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

All Citations

248 So.3d 1060, 43 Fla. L. Weekly S243

Footnotes

1 We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

2 Sweet's initial postconviction claims included:

> (1) Sweet was denied access to public records; (2) the one-year time limitation for filing a rule 3.851 motion for postconviction relief violate[d] Sweet's due process and equal protection rights; (3) the "felony murder" statutory aggravating circumstance constitute[d] an unconstitutional "automatic statutory aggravating circumstance"; (4) the "avoid arrest" statutory aggravator was inapplicable in this case and the jury was erroneously instructed regarding this aggravator because the trial court improperly failed to further instruct the jury that the aggravator can only be found where it is the "dominant or only" motive for the defendant's commission of the murder; (5) the trial court's jury instruction on the "cold, calculated, and premeditated" aggravator was erroneous because it failed to instruct the jury that this aggravator required "heightened premeditation" and the evidence failed to establish the necessary heightened premeditation necessary to support this aggravator; (6) the Jacksonville Sheriff's Office destroyed all of the evidence in this case, depriving Sweet of his right to conduct an independent analysis of this evidence using his own experts; (7) ineffective assistance during the guilt phase by: (a) failing to conduct an adequate pretrial investigation and preparation of Sweet's case; (b) failing to investigate other possible sources who would have had a motive to kill Marcine Cofer; and (c) failing to properly cross-examine Marcine Cofer and Solomon Hansbury; (8) ineffective assistance by failing to investigate and prepare available mitigation evidence regarding Sweet's background; (9) Sweet was denied his right to a fair trial as a result of his jury being subjected to improper influences; (10) the jury was given inadequate instructions on the "prior violent felony," "great risk," "avoiding arrest," and "cold, calculated, and premeditated" aggravators; (11) Rule Regulating the Florida Bar 4–3.5(d)(4), which prohibits attorneys from interviewing jurors, caused his postconviction

counsel to render ineffective assistance of counsel; (12) Sweet is innocent of first-degree murder and innocent of the death penalty; (13) the record fail[ed] to show his presence or his counsel's presence at five sidebar conferences and counsel rendered ineffective assistance by failing to object; (14) improper prosecutorial comments during the penalty phase in arguing that the jury should not be sympathetic towards Sweet and ineffective assistance in failing to object to this comment and in failing to request a "mercy instruction"; (15) alleged omissions in the record on appeal deprived him of meaningful appellate and postconviction review and trial counsel rendered ineffective assistance in failing to ensure a complete record; (16) the trial court's failure to ensure that Sweet had a complete record on appeal deprived him of a proper direct appeal; (17) Sweet received a fundamentally unfair trial due to the sheer number and types of errors committed; (18) the penalty phase jury instructions improperly shifted the burden to Sweet to show that death was not the appropriate sentence for the jury to recommend; (19) the State's misleading evidence and improper argument deprived Sweet of a fair trial; (20) Sweet's contemporaneous felonies were improperly used to support the prior violent felony aggravator; (21) the State failed to prove that Sweet "knowingly" created a great risk of causing the death of other persons given that his mental state at the time of the murder prevented him from knowing this fact; (22) the trial court improperly used a prior possession of a firearm by a convicted felon conviction as a statutory aggravator because the conviction was unconstitutionally obtained; (23) Florida's death penalty statute is unconstitutional on its face and as applied; (24) the trial court erred in failing to consider nonstatutory mitigating circumstances; (25) the State's introduction of and argument regarding nonstatutory aggravators deprived Sweet of a fair sentencing recommendation; (26) the State's closing argument and the jury instructions during the penalty phase improperly diminished the jury's sense of responsibility in the sentencing process; (27) trial counsel failed to provide the two court-appointed mental health examiners with sufficient background information to allow them to adequately evaluate Sweet's competency to stand trial; and (28) the mental health officials that examined Sweet failed to render adequate mental health assistance. *Id.* at 857 n.4.

3 Sweet's subsequent petition for a writ of habeas corpus filed in this Court was also denied. *Sweet v. Moore*, 822 So.2d 1269 (Fla. 2002).

Sweet filed a successive motion for postconviction relief in 2003, raising a claim under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which the postconviction court denied as untimely and facially insufficient. This Court affirmed without opinion. *See Sweet v. State*, 900 So.2d 555 (Fla. 2004).

Sweet filed a third successive motion for postconviction relief, raising a claim under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The postconviction court denied the claim, and this Court affirmed without opinion. *Sweet v. State*, 934 So.2d 450 (Fla. 2006). Sweet's petition for a writ of habeas corpus in federal court was dismissed as untimely. *See Sweet v. Sec'y, Dep't of Corr.*, 467 F.3d 1311 (11th Cir. 2006). Sweet's fourth and fifth successive motions for postconviction relief were also denied; Sweet did not appeal.

4 While this case was pending, Sweet filed a seventh successive motion seeking relief under *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). Sweet appealed the postconviction court's denial of that motion and, upon review, this Court affirmed. *Sweet v. State*, 234 So.3d 646 (Fla. 2018).

5 In 2014, Sweet filed a successive pro se motion for postconviction relief, in which he alleged that Cofer recanted her trial testimony and an evidentiary hearing was warranted. This motion was stricken because Sweet was represented at the time of the filing and his then-counsel did not adopt the motion.

6 *Jones v. State*, 709 So.2d 512 (Fla. 1998).