IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA
THIRTEENTH JUDICIAL CIRCUIT

RODNEY KARL STANBERRY,

Petitioner,

v. CC-92-2313 - 2315

STATE OF ALABAMA,

Respondent.

ORDER

The Court, having tried the Petitioner, and now having presided over the hearing on the petition for relief under Rule 32, finds that the petition should be denied. The Court takes judicial notice of the entire record, together with the evidence received in the Rule 32 proceedings, in making its findings.

On April 7, 1995, following a trial by jury, the petitioner was found guilty of attempted murder, first degree robbery, and first degree burglary. On May 11, 1995, he was sentenced to 20 years in prison on all charges, to run concurrently. Petitioner's Motion for New Trial raising numerous claims was denied. Petitioner appealed the conviction raising two issues. He claimed that the trial court erred in refusing to admit the confession of a third party, Terrell Moore, who, over the State's objection, had invoked the privilege against self incrimination at trial, and whose testimony would have, allegedly, exonerated Petitioner. He also claimed that the trial court erred in instructing the jury on conspiracy when conspiracy was not charged. The Court of Criminal Appeals affirmed the conviction on the merits. The Court ruled that the third party statement did not meet any requirements for admissibility.

The facts tended to show, and the State's theory of the case was, that Petitioner, armed with a gun, entered the home of the victim, Valerie

Finley, early on the morning of March 2, 1992, with Rene "Ponytail" Whitecloud Barbosa, stole guns and other items, and fled after Barbosa shot the Valerie Finley in the head, leaving her for dead. The victim did not die, however. She recovered and was able to identify the perpetrators and testify at the trial. She gave strong and extensive testimony. She was able to identify the Petitioner because he was one of her husband's closest friends. She had also met the shooter "Ponytail" prior to the day of the shooting and was able to identify him also. The evidence also tended to show that the motive was to steal the guns and to kill the victim at her husband's behest. At the time of trial, Valerie was in a wheel chair, paralyzed from the injury, and having lost the use of her left arm and both legs, but she was fully *compos mentis* and able to recall the events of that fateful day. Since that time, Valerie has died of causes unrelated to the shooting.

The defense's theory was that Rodney was at work (even though the evidence placed him 6 minutes from the victim's home at the time of the shooting and even though his Bronco with its unmistakable "One Night Stand" markings was seen at the victim's house at the time of the shooting). His second line of defense was that others had perpetrated the crime. He also claimed that he was the one trying to catch the bad guys. First, Petitioner stated that Rene "Ponytail" Whitecloud Barbosa and Angel "Wish" "Ihoe" Melendez were the perpetrators. "Wish", it turns out, died before the trial. Then, Petitioner identified "Wish" and Terrell Moore as the culprits. Numerous delays in getting the case tried also were to the Petitioner's advantage because if the victim died there would be no "unavailable witness" testimony to implicate him.[1]

* * *

Petitioner filed an application for relief from the conviction under Rule 32 and claimed that his counsel was ineffective for: (1) failing to subpoena witness Kenny Barbosa (aka Rene "Ponytail" Whitecloud Barbosa) (who Petitioner was informed and believed was the perpetrator, *or* who would have testified that Terrell Moore committed the offenses, as Moore

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[1] The Defendant waived the case to the grand jury at the preliminary hearing.

later stated); and (2) failing to call private investigator, Ryan Russell, to testify to the hearsay statement of Terrell Moore confessing to the offense.

Petitioner has also claimed a violation of due process, in that the State failed to produce an alleged "exculpatory" statement of Rene "Ponytail" Barbosa to him before trial. He contended that he first became aware of the statement which was produced while he was preparing for the Rule 32 hearing. Petitioner introduced evidence of a statement allegedly given by Barbosa to an investigator in New York concerning the shooting in Mobile, wherein Barbosa allegedly corroborated the defense's theory of the events. The statement was never authenticated as the statement of Barbosa.

The defense's theory as to who the "true" perpetrators were had not been consistent throughout. At first, Petitioner stated that Rene "Ponytail" Whitecloud Barbosa and Angel "Wish" "Ihoe" Melendez were the culprits. "Wish", it turns out, died before the trial. Then, Petitioner identified "Wish" and Terrell Moore as the culprits. Barbosa's alleged statement supported this latter theory.

However, Petitioner did not plead this due process ground as a basis for the relief he seeks nor apprise the State of this claim in advance of the hearing. Without waiver of the bar that this ground was not pled, it is without merit.

First, the statement did not exculpate the Petitioner. It did not contain any information unknown to Petitioner's trial counsel. Petitioner's trial counsel admitted that he was aware of all of the facts recited in the statement allegedly made by Barbosa and of the existence and whereabouts of Barbosa, should he have desired to call him to testify and should calling him have been of any advantage to the defense. [2]

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[2] At the hearing, trial counsel stated that it would have been of benefit to call Barbosa even if he were to invoke the Fifth Amendment. But yet, Petitioner complains of his trial counsel's performance in calling Terrell Moore and allowing him to invoke the Fifth Amendment, which he contends was prejudicial to him.

" 'There is no Brady violation where the information in question could have been obtained by the defense through its own efforts'. ... ' "Evidence is not 'suppressed' if the defendant either knew ... Or should have known of the essential facts permitting him to take advantage of any exculpatory evidence."' ..." Freeman v. State, 1998 WL 228196 (Ala. Crim. App. 1998).

Second, although the prosecutor did not recall the existence of this statement, this court finds that the Petitioner's attorney did in fact receive the letter he now claims was not given to him. Not only did trial counsel have open file discovery, but the affidavit of Buzz Jordan, the prosecutor, submitted after the Rule 32 hearing, indicates that the statement was sent to Petitioner's counsel on October 15, 1993, a year and a half before trial, together with other documents and a transmittal letter that was hand delivered to the defense attorney's office. The due process claim (construed as a claim of newly discovered material facts) is therefore without merit.

With respect to the claim of ineffective assistance of counsel for not calling Barbosa, this court finds that at the time of trial, Barbosa was in custody in New York for murder. Petitioner has not shown that he would have ever persuaded Barbosa to waive the privilege against self-incrimination; what Barbosa would say if he were to testify; how Barbosa's testimony, would have aided him; how he could overcome the witness' taint of conviction for a violent crime; or how the invocation of the fifth amendment by this witness would have aided him.

The appearance and presence of Barbosa at this trial would have backfired on the defense. The victim clearly identified Barbosa as the shooter. His presence would have enabled the victim to confirm his identity, as well as the circumstances of his presence in Mobile during early March 1992, his acquaintance with Petitioner, his acquaintance with her husband, the fact that he had had a ponytail and was known by that nickname. The prosecutor, Buzz Jordan, was able to locate Barbosa in New York from information given him by either the Petitioner or his trial attorney. He thought perhaps that the Petitioner might bring Barbosa down to Mobile to testify, so he intended to get his rap sheet while in New York. Jordan visited Barbosa at Ryker's Island Prison in New York prior to the trial and was able to confirm that Barbosa was in Mobile at the time

of the shooting, was known as "Ponytail", did in fact have a ponytail at that time, and was a friend of the Petitioner, Rodney Stanberry and an acquaintance of Valerie's husband. At the meeting in New York, Barbosa told the prosecutor to investigate the husband. Barbosa's presence would have strengthened the State's case. If Barbosa had invoked the privilege against self incrimination, this would have confirmed the State's theory of the case that Barbosa and Stanberry were the perpetrators and weakened the credibility of the theory that Terrell Moor and Angel "Wish" "Ihoe" Melendez committed the offense.

The Court finds that although trial counsel could have summoned Barbosa for the trial, it is evident that his trial strategy was to use Terrell Moore, whose immunized statement implicating others he had already procured, and hoped to introduce. With respect to the alleged statement of Barbosa which also corroborated Moore's version of the events, that statement was given in August of 1992, shortly after the offense, and long before the prosecutor's visit to Ryker's Island Prison in New York where Barbosa told the prosecutor that he should take a look at the husband. Calling Barbosa after that would have been risky for Stanberry, whether Barbosa were to take the fifth amendment or testify. His remarks implicating the victim's husband would have been devastating to the Petitioner's case. As noted above, his presence would have invariably strengthened the State's case while offering no guarantee to the Petitioner and only risk.

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With respect to the claim that counsel should have called Ryan Russell to introduce evidence of the content of the statement of Terrell Moore, Petitioner's counsel did attempt to introduce the statement and this Court and the Court of Criminal Appeals ruled that it was inadmissible hearsay. This Court believes that ruling to still be correct. Therefore, the failure to call Russell to testify concerning the statement was not error sufficient to meet the standards for a claim of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

The Court notes, moreover, that the statement of Moore does not

exculpate the Petitioner. Moore was a convicted felon. Moore was located by the defense's investigator. He gave the investigator the statement a year after the crime. Moore gave inconsistent statements during the course of the investigation. Moore's statement was not made under oath. His statement was not consistent with the victim's statement and with statements of the Defendant's other alibi witnesses.[3] His statement that he and "Wish" were involved in the attempted murder was not corroborated by any other witness. Moore was not available at trial for cross examination because he invoked his fifth amendment privilege against self incrimination when called by the Defense to testify, ostensibly to his involvement in this attempted murder. The victim identified Rodney, whom she liked, and had no prior motive to point the finger at him. The victim expressly excluded Moore as one of the perpetrators. The prosecutor would not offer immunity to Moore for his trial testimony because he did not believe in the truthfulness of his testimony.

Petitioner contends that the law has changed after the trial and that Moore's statement would have been admissible. He asks this court to reverse itself as to the admissibility of that statement without so pleading. This claim could be construed as a due process claim. Petitioner cites Ex parte Griffin, 2000 WL 1171906 (Ala. August 18, 2000) .

Without waiver of the bar that the claim has not been pled, this Court finds that the rule of Ex parte Griffin, 2000 WL 1171906 (Ala. August 18, 2000) is of no avail to Petitioner, and the contention is without merit. The rule of Ex parte Griffin is not absolute. Rather, it is a balancing test. Under the Ex parte Griffin test, the statement of Terrell Moore would have never been admitted by this Court. The statement was

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[3] E.g. He stated masks were worn by perpetrators, but the victim stated no masks were worn; he stated they asked for a package left for them by the husband, but the victim had been told by her husband that folks would be coming by to pick up a tree stand, even though hunting season was over, and according to the victim, no one ever asked her for the stand; two of defendant's witnesses said the loot or guns were in an army bag, while Moore says he carried the loot in one of Finley's pillowcases.

unreliable and unsupported hearsay which did not exclude the Defendant's guilt and which would not have been admissible if Moore himself had been on trial. See Ex parte Griffin, 2000 WL 1171906 (Ala. August 18, 2000).

Both the Supreme Court of Alabama in Ex parte Griffin and the Court of Criminal Appeals in it ruling of Petitioner's direct appeal considered the decision of the U.S. Supreme Court in Chambers v. Mississippi, 410 U.S. 284 (1973), in deciding whether due process principles require that a third party statement be admitted to support the defense's case.

In Chambers v. Mississippi, the U.S. Supreme Court ruled that Chambers was denied due process when he was not permitted to cross examine a third party who had at one time admitted to committing the offense under oath, but later repudiated his statement at a preliminary hearing; and when he was not permitted to introduce the hearsay testimony of three friends to whom the third party had made spontaneous inculpatory statements shortly after the killing, that he had been the one that killed the victim. Significant to the Supreme Court's decision was that the third party sworn statement had been introduced after the proper predicate had been laid; that the third party was available to testify at trial; that he had made the first of four prior inculpatory statements under oath; that the three other confessions were made to close acquaintances and were made within days of the killing; that there were numerous instances of corroboration of the third party's inculpatory statement (two additional witnesses, one who saw the third party shoot the victim and one who, moments after the shooting saw the third party with a gun; as well as a gun dealer who sold the third party a gun a year prior to the shooting, then sold him another one after the shooting, thus confirming the third party's confession that he had shot the victim then gotten rid of the gun and later purchased another one to replace it); and finally that the State's evidence excluded the theory that more than one person participated in the killing. The U.S. Supreme Court found that the hearsay statements sought to be introduced by Chambers contained considerable assurances of reliability. None of these circumstances of reliability attend the third party statement sought to be introduced by the Petitioner in the instant case. The U.S. Supreme Court held that the right to cross examine is not absolute, and that in appropriate cases it may be limited to accommodate other legitimate interests in the criminal trial

process. It also ruled that the hearsay rules cannot be mechanistically applied.

The Alabama Supreme Court in Ex parte Griffin, 2000 WL 1171906 (Ala. August 18, 2000), followed the decision in Chambers, 410 U.S. 284 (1973). In that case, Griffin sought to introduce the plea of guilty of a third party (which was later set aside) to the murder with which he was charged. The Court ruled that the trial court should apply a balancing test in determining whether the evidence of a third party's culpability is admissible, and "weigh the defendant's 'strong interest in presenting exculpatory evidence' against the state's interest 'in promoting reliable trials, particularly in preventing the injection of collateral issues into the trial through unsupported speculation about the guilt of another party.'" (citations omitted). Ex parte Griffin, 2000 WL 1171906 (Ala. August 18, 2000). To satisfy the balancing test, the Court held that there must be a substantial nexus between the third party and the crime, i.e. that the evidence sought to be introduced is probative and not merely speculative. In order to introduce such evidence, (1) it must be shown to relate to the res gestae of the offense, (2) it must exclude the accused as a perpetrator of the offense and (3) it would have to be admissible if the third party was on trial. And if the evidence is hearsay, the Court ruled that the hearsay rule should not be mechanistically applied and the evidence allowed if it meets the first two parts of test of probativeness. This Court notes that in the instant case the statement of Moore does not exclude Stanberry as a perpetrator and also, his statement was given under a limited grant of immunity for that statement alone. As noted above, the statement lacked the indicia of reliability of both Chambers or Griffin's statements under the circumstances that it was made.

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In the case of Strickland v. Washington, we are advised that the Court should not seek to attempt to find the answer as to why trial strategy in a particular case went in the direction that it did. In addition, we have learned that in order to rise to the level of ineffective assistance of counsel, the Defendant must prove that the trial strategy was so flawed as to render the attorney's assistance beneath the standard of due process. And that if the attorney had proceeded in another manner, the

outcome of the trial would have been different. However, it should be common knowledge that the man who walks barefooted on a cleared path should not fear the thorns or other impediments that used to be there. However, unlike that man on the cleared path, the attorney representing the Defendant at trial did not have a smooth surface to follow, but had to proceed in a manner that appeared best for his client at the time and under the circumstances prevailing. Hindsight is as advertised, always 20/20.

To say, at this late stage, that calling this or that witness would have, or could have, made a difference, begs the question. During the proceedigns on the Rule 32 in question and in the petition itself, it is suggested that not calling Barbosa to testify was error and that if he had been called, the outcome of the trial would have been different. This is, at best, guess work. To suggest that the testimony of Barbosa would have proven the Defendant was not guilty as charged is not worthy of the credence apparently placed on the anticipated testimony of Barbosa. It may have been extremely prejudicial to call Barbosa. The testimony of Barbosa could have easily implicated the Petitioner.

To say that counsel erred because he did not to call Ryan Russell to testify about the statement of Terrell Moore is incorrect as a matter of law. First of all, Moore was called at the Defendant's trial and invoked his fifth amendment privilege. He also was called at the Rule 32 hearing and again invoked his fifth amendment privilege. Trial counsel tried to introduce his statement at Petitioner's trial and the Court denied its admission. The ruling was affirmed on appeal. Moore , a convicted felon, had given inconsistent statements, none under oath. He was unearthed by an investigator to whom he made a confession. He shared information with the investigator that was inconsistent with what he stated to police. (As did the victim's husband, who also shared information with the investigator that he chose not share with law enforcement). Moore's statement did not exonerate the Petitioner. His statement was inconsistent with that of other alibi witnesses.

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Petitioner's counsel did not dispute the State's defense of preclusion which was raised with respect to the claims of insufficient

evidence (or actual innocense) and prosecutorial misconduct. This Court concurs.

Numerous other allegations of ineffective assistance were abandoned by the Petitioner and his counsel at the hearing and not proven.

Accordingly, the petition is denied.

DONE on this 21 day of May 2001.

FERRILL D. MCRAE
CIRCUIT JUDGE