

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1436

JOSE JIMENEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-
DADE COUNTY,
CRIMINAL DIVISION

ANSWER BRIEF OF APPELLEE

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INTRODUCTION

This brief is written in 12 point Courier New Font. The parties will be referred to as they stood in the Court below. The symbols "R." and "T." will refer to the record and transcripts from the direct appeal in this matter, respectively. The symbol "PC-R." will refer to the record of the Rule 3.851 proceeding.

STATEMENT OF THE CASE AND FACTS

On October 21, 1992, Defendant was charged by indictment in the Eleventh Judicial Circuit Court, Case No. 92-34156, with the first degree murder of Phyllis Minas and the armed burglary with an assault on Ms. Minas. (R. 1-3) The crimes were alleged to have been committed on October 2, 1992. The murder was charged alternatively as felony or premeditated murder.

Trial commenced on October 3, 1994. (R. 516) The jury found Defendant guilty of first degree murder and armed burglary with an assault. (R. 449-50) The trial court adjudicated Defendant in accordance with the verdict. (R. 451-52)

On November 10, 1994, a sentencing hearing was held before the same jury. (R. 512) The jury unanimously recommended that Defendant be sentenced to death. (R. 487) On December 14, 1994, the trial court followed the jury's recommendation and sentenced Defendant to death for the murder. (R. 529-44) The trial court also imposed a consecutive life sentence for the burglary. (R. 544)

Defendant appealed his conviction and sentence to this Court. The following issues were raised, verbatim:

I.
DEFENDANT ENTITLED TO NEW TRIAL WHERE HE
REQUESTED DISCHARGE OF HIS COURT-APPOINTED
COUNSEL PRIOR TO TRIAL AND COURT CONDUCTED
INSUFFICIENT HEARING THEREON

II.

DEFENDANT WAS DENIED A FAIR TRIAL DUE TO HIS ABSENCE FROM, AND LACK OF PARTICIPATION IN, SIDEBAR CONFERENCES DURING THE VOIR DIRE PROCEEDINGS WHERE CAUSE CHALLENGES OF PROSPECTIVE JURORS WERE MADE BY THE ATTORNEYS AND RULED UPON BY THE TRIAL COURT

III.

DEFENDANT WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S IMPERMISSIBLE RESTRICTION OF HIS RIGHT TO CROSS-EXAMINATION

IV.

DEFENDANT IS ENTITLED TO A NEW TRIAL BASED ON THE TRIAL COURT'S FAILURE TO OBTAIN A PERSONAL WAIVER BY DEFENDANT AS TO LESSER INCLUDED OFFENSE INSTRUCTION

V.

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTIONS OF FIRST DEGREE MURDER AND BURGLARY

VI.

DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE PROSECUTOR'S IMPROPER PENALTY PHASE ARGUMENTS

VII.

THE TRIAL COURT'S SENTENCE OF DEATH SHOULD BE VACATED SINCE DEATH WAS A DISPROPORTIONATE SENTENCE IN THIS CASE

VIII.

THE TRIAL COURT'S SENTENCING ORDER HAS ERRORS THAT, BOTH INDIVIDUALLY AND CUMULATIVELY, REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE AND A REMAND FOR RESENTENCING BY THE TRIAL COURT

IX.

CAPITAL PUNISHMENT AS PRESENTLY ADMINISTERED VIOLATES THE STATE AND FEDERAL CONSTITUTIONS

On October 30, 1997, the Court affirmed Defendant's

convictions and sentences. On December 29, 1997, rehearing was denied. *Jimenez v. State*, 703 So. 2d 437 (Fla. 1997). In affirming Defendant's convictions and sentences, the Court outlined the facts of the case as follows:

On October 2, 1992, Jimenez beat and stabbed to death sixty-three-year-old Phyllis Minas in her home. During the attack her neighbors heard her cry, "Oh God! Oh my God!" and tried to enter her apartment through the unlocked front door. Jimenez slammed the door shut, locked the locks on the door, and fled the apartment by exiting onto the bedroom balcony, crossing over to a neighbor's balcony and then dropping to the ground. Rescue workers arrived several minutes after Jimenez inflicted the wounds, and Minas was still alive. After changing his clothes and cleaning himself up, Jimenez spoke to neighbors in the hallway and asked one of them if he could use her telephone to call a cab.

Jimenez's fingerprint matched the one lifted from the interior surface of the front door to Minas's apartment, and the police arrested him three days later at his parents' home in Miami Beach.

* * *

Jimenez's fingerprints were found on the inside of the front door. This is consistent with the neighbors' testimony that the door was pushed shut when they tried to get in to help Minas. Further, while the neighbors were blocking the front door, Jimenez was seen jumping from the rear balcony next to Minas's, and the sliding glass doors leading to her balcony were open. Finally, Jimenez told Rochelle Baron that the police wanted to talk to him about a stabbing when the police never mentioned a stabbing. They told Jimenez they wanted to talk to him about some burglaries.

Id. at 438, 441. Defendant then sought certiorari review in the United States Supreme Court, which was denied on May 18, 1998. *Jimenez v. Florida*, 523 U.S. 1123 (1998).

On January 31, 2000, Defendant filed his initial motion for post conviction relief, alleging six claims:

CLAIM NO. 1

THE DEFENDANT, JOSE JIMENEZ, WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF THE TRIAL, IN VIOLATION OF HIS SIXTH, EIGHT AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION BY THE FAILURE OF HIS TRIAL COUNSEL TO CALL WITNESSES ON HIS BEHALF.

CLAIM NO. 2

THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, BY COUNSEL'S FAILING TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE; INCLUDING INVESTIGATING WHETHER THERE WAS AVAILABLE EVIDENCE TO ARGUE THE APPLICABILITY OF MENTAL HEALTH MITIGATING EVIDENCE, FAMILY RELATED, AND OTHER TYPES OF MITIGATING EVIDENCE.

CLAIM NO. 3

TRIAL COUNSEL WAS INEFFECTIVE IN THAT THEY FAILED TO OBJECT TRIAL AND PRESERVE ISSUES ON APPEAL. THIS CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

CLAIM NO. 4

DEFENDANT'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, AND THE OUTCOME THEREOF WAS MATERIALLY UNRELIABLE BECAUSE THERE WAS NOT AN ADEQUATE AMOUNT OF ADVERSARIAL TESTING DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF

COUNSEL.

CLAIM NO. 5

DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE WHERE DEFENDANT AND HIS LAWYER MR. KASSIER HAD A CONFLICT OF INTEREST AND COUNSEL'S PERFORMANCE AT THE PENALTY PHASE WAS CONSTITUTIONALLY DEFICIENT.

CLAIM NO. 6

DEATH BY ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT AN[sic] VIOLATIVE OF THE DEFENDANT'S RIGHTS UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

(PC-R. 29-37) On March 10, 2000, Defendant filed his Amended 3.850 Motion, claiming that he was entitled to relief under *Delgado v. State*, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000), *revised*, 25 Fla. L. Weekly S631 (Fla. Aug. 24, 2000), *clarified*, 25 Fla. L. Weekly S1144 (Fla. Dec. 14, 2000).

On June 8, 2000, the lower court denied Defendant's motions for post conviction relief. (PC-R. 91-112) The lower court found that the alleged ineffectiveness regarding the witness was refuted by the record. (PC-R. 96-100) It also held that the alleged penalty phase ineffectiveness was insufficiently plead and refuted by the record. (PC-R. 100-105) As to claims 3 and 4, the lower court found that they were insufficiently pled. (PC-R. 105-06) The lower court stated that claim 5 had been raised on direct appeal and was procedurally barred. (PC-R.

106-07) The electrocution claim was found to be moot. (PC-R. 108) With regard to the *Delgado* claim, the lower court held, *inter alia*, that *Delgado* was inapplicable to this matter as it was not retroactive and no consent defense, or evidence of consensual entry, was presented at trial. (T. 108-10)

This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly determined that Defendant was not entitled to relief based on the change in law in *Delgado*. No consent defense was raised at trial. Further, *Delgado* does not apply retroactively because it is not constitutional in nature and is not of fundamental significance.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CLAIM THAT HE IS ENTITLED TO A NEW TRIAL BASED ON *DELGADO*, WHERE NO CONSENT DEFENSE WAS RAISED AT TRIAL AND THIS MATTER WAS FINAL BEFORE *DELGADO* WAS ISSUE.

Defendant contends that he is entitled to a new trial because of this Court's decision in *Delgado v. State*, 25 Fla. L. Weekly S1144 (Fla. Dec. 14, 2000). However, *Delgado* is inapplicable to this case as no consent defense was raised at trial and *Delgado* does not apply retroactively.

Defendant asserts that the State did not prove that his entry into Ms. Minas' apartment was unauthorized. However, in *Delgado*, this Court reaffirmed the principle that consent was an affirmative defense to a charge of burglary. *Id.* at S1145. This Court held, "the burden is on the defendant to establish that there was consent." *Id.* As such, the issue is not whether the State proved the entry was unauthorized but whether Defendant presented a consent defense at trial. As Defendant did not do so, the lower court properly denied this claim.

At trial, the State presented this case based on a nonconsensual entry; not a consensual entry and withdrawn consent. In opening statement at trial, the State asserted that Ms. Minas was in bed when Defendant entered her apartment

without her permission and that she was killed when she confronted him inside the home. (T. 484, 487) Defendant asserted a misidentification defense. (T. 488-93) Crime Scene Technician Ronald Pearce testified that the only light on in the apartment when he entered it was the kitchen light. (T. 537) He found no signs of forced entry. (T. 552)

Virginia Taranco, Ms. Minas' neighbor, testified that at the time she heard the banging in Ms. Minas' apartment and Ms. Minas calling "Oh my God. Oh my God," the lights in the apartment were off. (T. 620-22, 634) When Ms. Taranco saw Ms. Minas lying in her apartment after the attack, she was wearing a nightgown. (T. 641) Ms. Taranco stated that the people in the apartment building use to get together at the pool. (T. 645)

Lecrecia Ponce, another of Ms. Minas' neighbors, confirmed that the lights were off in Ms. Minas' apartment at the time noises were heard coming from the apartment. (T. 650, 657) Ms. Ponce stated that she had once allowed Defendant to use her telephone. (T. 660) She did not consider it unusual to allow a neighbor to use one's telephone. (T. 660) She stated that almost everyone in the apartment building knew each other. (T. 660)

Officer Walter Sidd, the officer who opened the door to Ms. Minas' apartment, stated that she was wearing a nightgown when

found. (T. 682-85) Defendant did not testify at trial. (T. 870) No evidence was presented that Ms. Minas ever allowed him into her apartment on any occasion.

During its initial closing argument, the State stressed that there was no evidence that Defendant had ever consensually entered Ms. Minas' apartment. (T. 880-91) Defendant argued a misidentification defense in his closing argument and explained the presence of Defendant's fingerprint on the inside of Ms. Minas' apartment door by asserting that he was in the apartment with permission days or weeks before the crime. (T. 891-910)

Despite this evidence and the lack of argument that the entry into Ms. Minas' home was consensual at trial, Defendant asserts that this Court should still find *Delgado* applicable because there was no evidence of a forced entry and because Ms. Minas and Defendant resided in the same apartment complex. However, evidence of a forced entry is not required and there was no showing that Ms. Minas actually knew Defendant.

With regard to the forced entry, this Court acknowledged in *State v. Hicks*, 421 So. 2d 510, 512 (Fla. 1982), that the legislature had eliminated the breaking requirement from the burglary statute in 1975. This Court further held that the elimination of the breaking element did not raise lack of consent to the level of an element of burglary. *Id.* As such,

the fact that no evidence of forced entry was presented did not show that Defendant did not commit a burglary.

With regard to the alleged prior relationship between Ms. Minas and Defendant, the evidence only showed that they resided in the same apartment complex. No evidence was presented that they ever knew one another. In fact, Ms. Ponce, on whose testimony Defendant relied, testified that almost everyone in the complex knew almost everyone else. (T. 660) She was never even asked if Ms. Minas knew Defendant. Further, even if Ms. Minas was aware that Defendant resided in the same apartment complex, there was no evidence that she knew him well enough to permit him to enter her home, especially at night when she was in her nightgown and the lights were off. Thus, Defendant did not establish a consent defense simply because he and Ms. Minas resided in the same apartment complex.

Defendant also assails the lower court's finding that the lights were off in Ms. Minas' apartment at the time of the attack. However, both Ms. Taranco and Ms. Ponce testified that at the time they heard the attack occurring in Ms. Minas' apartment, the lights were off. (T. 620-22, 634, 650, 657) As such, the trial court's finding of fact that the lights were off was amply supported by the record and should be affirmed. See *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999)(factual findings

made by a lower court in ruling on a motion for post conviction relief are entitled to a presumption of correctness). As the evidence showed that the entry into Ms. Minas' apartment was not consensual and Defendant did not raise a defense of consent at trial, the lower court properly determined that *Delgado* did not apply and properly denied the motion for post conviction relief.

Even if consent had been an issue in this case, the lower court would still have properly denied the motion as *Delgado* does not apply retroactively to cases that were final before it. *Delgado*, 25 Fla. L. Weekly at S1147. As this Court found, *Delgado* fails the second and third prongs of the standard for retroactivity established in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *Delgado*, 25 Fla. L. Weekly at S1147 n.7. This is so because the change in law in *Delgado* is not constitutional in nature and is not of fundamental significance. *Witt v. State*, 387 So. 2d at 931. Here, Defendant's conviction became final when the United States Supreme Court denied certiorari review on May 18, 1998, almost two years before the initial *Delgado* opinion was released. As such, *Delgado* does not apply retroactively to this case, and the lower court properly denied relief.

CONCLUSION

For the foregoing reasons, the trial court's order denying Defendant post conviction relief from his convictions should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **Louis Casuso**, 111 N.E. 1st Street, Suite 603, Miami, Florida 33132, this 28th day of December, 2000.

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