

IN THE SUPREME COURT OF FLORIDA

OBA CHANDLER,

Appellant,

vs.

Case No. SC 01-1468

THE STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

BAYA HARRISON
738 Silver Lake Road
Post Office Drawer 1219
Monticello, FL 32345-1219
Tel: (850) 997-8469
Fax: (850) 997-8468

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**AS TO THE STATE’S STATEMENT OF THE CASE
AND OF THE FACTS**

Chandler does not dispute the statement of the case and of the facts as set forth on pages 2-22 of the state’s Answer Brief, with the following minor exceptions. On page 20, the state asserts:

He (Chandler) testified that he had not authorized Zinober to admit his guilt of the Blair rape to the jury and that Mr. Zinober had not believed that he had done so, although the newspaper reported it that way.

(Emphasis supplied.)

Actually, the transcript shows that:

He (Chandler) stated that he did not know that Zinober was going to concede his guilt in the Blair case in his opening argument, and he believed that even Zinober didn’t know he was going to do it, that it just “came out.” (EH 162)

See the defendant’s Initial Brief, p. 19.

On page 22 of the Answer Brief, the state contends:

Chandler did not dispute that he had discussed the strategy of their not defending the Blair rape case with Zinober, and that he agreed with the strategy, as Zinober had testified.

However, the transcript states differently:

He (Chandler) acknowledged that they had discussed not defending the Blair case, but he had no idea that Zinober was going to concede his guilt, and he did not authorize that strategy. (EH 177, 237)

See Initial Brief, p. 20.

Again, on page 22 of the Answer Brief, the state claims:

He (Chandler) took the Fifth Amendment because the rape charge was a separate case that he wanted to go to trial on separately.

However, as reported on page 24 of the Initial Brief, the transcript indicated that he did so on the instruction of his counsel:

He took the stand because Zinober had told him, “that puts it in the record.” (EH 180) At that time, he did not know what that meant, “but obviously that’s what it means is when your attorney says do something, he does it during the trial, and in order to save . . . the record, or whatever you want to call it there, and so he said that, you know, I have to, you know, take the Fifth here.” (EH 180)

AS TO THE STATE'S SUMMARY OF THE ARGUMENT

Chandler's venue claim (that trial counsel was ineffective for not moving to avoid an Orange County jury) is not procedurally barred as an appellate issue in this post conviction proceeding. Furthermore, Chandler was denied an evidentiary hearing on the issue by the trial court, thus the state begs the question when it claims (the Answer Brief, p. 23) that there has been no showing of prejudice. That is precisely why an evidentiary hearing should have been granted by the court below -- so that the question of ineffectiveness and prejudice could have been litigated and resolved, one way or the other.

The state, in its Answer Brief at page 23, attempts to justify defense counsel's decision to admit to the jury that Chandler raped Judy Blair by asserting that it was a "tactical" one agreed to by the defendant himself. The record belies the fact that Chandler agreed to this dangerous strategy. Instead, defense counsel made that very damaging admission for him. Furthermore, the state is mistaken when it asserts that the strategy was reasonable. There was strong evidence available to the defense to challenge

Blair's version of the alleged rape. It was ineffective to ignore and not present it. The ineffectiveness was compounded by forcing Chandler into a situation where he had to repeatedly assert his Fifth Amendment privilege against self incrimination when asked questions on cross examination about the Blair case.

Finally, Chandler's third claim, that defense counsel was ineffective for not objecting to the prosecutor's very prejudicial closing argument, is not barred from post conviction consideration just because this Court determined that it was not fundamental error on direct appeal. The state is mixing apples and oranges. There could be no reasonable tactical basis for allowing the prosecutor to demonize Chandler during closing argument. This "strategy" of inaction standing alone might not be sufficient to constitute ineffectiveness under the Strickland standard. However, in the context of the other acts of ineffectiveness, it supports Chandler's contention that the trial court erred in denying his 3.850 motion.

AS TO THE STATE'S ARGUMENT

As to Claim I:

DID THE TRIAL COURT ERR BY DENYING CHANDLER AN EVIDENTIARY HEARING REGARDING HIS CLAIM THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO SEEK A VENUE CHANGE FROM ORANGE COUNTY?

The state acknowledges (Answer Brief, p. 26) that the trial court denied Chandler an evidentiary hearing regarding his post conviction venue claim. However, the state quickly asserts that the claim was procedurally barred because it could have been raised on direct appeal -- and Florida Rule of Criminal Procedure 3.850 cannot be employed to circumvent the direct appeal process. *Id.* at 29, 30. There is no attempt at circumvention here. Chandler does not deny that the trial court granted (and that the state did not oppose) defense counsel's initial motion to change venue from Pinellas County due to the inordinate amount of pretrial publicity about the case.

Chandler's claim regarding venue is that defense counsel's obligation to assure the client a fair trial with impartial jurors went beyond those Florida

counties that border the shores of Tampa Bay. On the contrary, defense counsel (it is alleged in the 3.850 motion) was also obligated to avoid seating jurors in Orange County as well. This is so because a tremendous amount of media attention focused on the fact that the Rogers family vacationed in the Disney World area before coming to Pinellas County – thus potential venire from Orange County could be expected to have been as exposed to as much or more publicity about the case as those residing in the Tampa Bay area. Unfortunately, defense counsel ceased his efforts at a venue change (from Pinellas County) once the initial venue change motion was granted, and accepted the fact that, according to the trial court, the case would be tried with Orange County jurors absent a showing, during voir dire, that the individual Orange County venire persons were so biased that they could not be fair and impartial. Chandler adds in his post conviction motion that he suffered prejudice as a result because Orange County was as bad a venue or worse than Pinellas County to try this case -- again due, not just to the volume of pretrial publicity generated in Orange County, but to the nature of it, which was decidedly anti-Chandler. Stated slightly differently, Chandler wanted to attempt to convince the trial judge during the post conviction 3.850 evidentiary hearing that the pretrial publicity in Orange County was so massive and so uniformly against the defendant, that juror prejudice against

him could be legally presumed. See Manning v. State, 378 So. 2d 274 (Fla. 1979). He was denied that opportunity because he was denied an evidentiary hearing. The law is clear that an evidentiary hearing should be granted, especially in a capital case, unless the pleadings and files conclusively demonstrate that the movant is not entitled to any relief. Fla. R. Crim. P. 3.850(d); Peete v. State, 748 So. 2d 253 (Fla. 1999).

This claim not only should not have been raised on direct appeal, it could not have been. Ineffective assistance of counsel claims can hardly ever be raised on direct appeal; instead they are normally reserved for post conviction proceedings.

The state argues (the Answer Brief, pp. 31-34) that the record of the voir dire demonstrates conclusively that the jurors were not biased against the defendant. That is debatable due to the particular way the jury was selected as described on pages 51 and 52 of the Initial Brief. In essence, the jurors were picked from a relatively small band of volunteers from Orange County who were chosen in part because of their willingness to endure the discomforts of traveling from Orange County to Pinellas County for the duration of the trial. Under these circumstances, there is reason to question the jurors' candor when stating that they could be impartial.

As to Claim II:

WHETHER COUNSEL WAS INEFFECTIVE FOR ADMITTING THAT THE STATE COULD PROVE CHANDLER'S GUILT IN THE BLAIR CASE AND IN ADVISING HIM TO INVOKE HIS FIFTH AMENDMENT PRIVILEGE REGARDING SAME.

The state (on page 39 of the Answer Brief) mischaracterizes Chandler's argument (made at page 53 of the Initial Brief) when it asserts that Chandler contends that once the Blair evidence was admitted, Chandler should not have asserted his Fifth Amendment privileges on cross-examination as to any questions concerning the Williams rule evidence. Chandler does not make that claim. Instead, on page 53 of the Initial Brief, Chandler argues that it was wrong for defense counsel to concede that Blair was raped because there was strong evidence to the contrary. More importantly, the rape case had not even been tried yet. Thus, we contend that it was entirely inappropriate for defense counsel to concede Chandler's guilt for the rape at the homicide trial and thereby allow the jury to be tainted with a suspicion of his guilt regarding the Rogers case. This is exactly what the state played upon in tying the two cases together and arguing that Chandler's concession of guilt in the Blair case necessarily meant he was guilty in the homicide case. See appellant's Initial Brief, p. 61-63.

As to Chandler's concession that Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000), was not exactly on point, it is not "because defense counsel

Fred Zinober did not actually concede guilt regarding the Rogers homicides” (Answer Brief, p. 39). It is nonetheless very relevant. For defense counsel to concede Chandler’s guilt in an ancillary, as yet untried case certainly meets the criteria of being nothing less than “. . . a situation more damaging to an accused than to have his own attorney tell the jury that there is no reasonable doubt that his client was the person who committed the conduct that constituted the crime charged in the indictment.” Nixon, 758 So. 2d at 623.

The State (Answer Brief, pp. 40-41) cites Atwater v. State, 788 So. 2d 223 (Fla. 2001) to portray Zinober’s concession as a tactical decision, as follows:

In light of the evidence against Atwater, defense counsel properly attempted to maintain credibility with the jury by being candid as to the weight of the evidence. Faced with the prospect of a guilty verdict for first-degree murder and in light of the State’s evidence, defense counsel’s concession, which was made only in rebuttal to the State’s closing argument, was reasonable and does not amount to a constitutional violation. The concession was made to a lesser crime than charged, during rebuttal closing argument, and after a meaningful adversarial testing of the State’s case.

(Emphasis added.)

The situation in Atwater is nothing like the situation here. The uncontested, direct evidence presented by the alleged victim in the Blair case overshadowed the state's weak, circumstantial evidence in the Rogers case. To concede guilt in Blair was, effectively, to concede guilt in the Rogers case, and it is not as if a "concession was made to a lesser crime than charged . . ." Id. at 223, -- but was instead to a different offense that the state claimed was a carbon copy of the primary offense for which Chandler was on trial. The effect was to taint Chandler's character by creating unnecessarily the logical premise that since he was guilty of one brutal crime (the Blair rape), then he was most likely guilty of the Rogers murders.

The state next argues (the Answer Brief, p. 41) that Mr. Zinober was further justified in conceding guilt in the Blair case because of the "persona" of the alleged victim. That was a lapse in logic for, despite his perception of vast differences in their personae, Blair readily admitted going out in the boat with Chandler, not once, but twice. It was her choice. Because she chose to go out in the boat with him, there is certainly an inference that the sex was consensual. Anyone can dress "up" or dress "down" to look "wholesome" or not; one can't judge a book by its cover. Actions speak much louder than appearances.

The State notes (the Answer Brief, p. 43) that Zinober did not actually concede that Chandler committed the rape, only that the state could prove that he did. This a distinction without a difference. It is not likely that the jury would have carefully dissected Zinober's syntax, but instead would have logically assumed that if he conceded that the state could prove that his client raped Blair, he was also conceding that his client actually did it.

Zinober had a duty to aggressively confront Blair, persona aside, regarding her free choice to go out in the boat with Chandler twice. In support of his argument, he could have used her admission that, at the time, Chandler looked different and was attractive. (EH 89, 90) It must be remembered that there was no physical evidence to corroborate Blair's claim that Chandler employed the use of force. (EH 22, 24)

Zinober's handling of the Blair Williams Rule evidence was crucial since, ". . . there was no evidence directly linking him to the homicide," (EH 51, 52) and the state was relying on the Blair evidence to make its case in the murder trial. The state, on page 43 of its Answer Brief, attempts to prop up Zinober's argument for conceding Chandler's guilt stating that, ". . . if the jury believed he was going to receive a life sentence for the rape, that because of the lack of evidence, they might not vote to convict on the murders." This was dangerous speculation and ignored the reality of the

damage that would most certainly be done to Chandler as a result of the concession.

The state next argues (the Answer Brief, p. 43) that Zinober could not have reasonably been expected to understand that the trial court would allow the prosecutor to question the defendant in such a manner as to force him invoke his Fifth Amendment privilege as many times (twenty-one) as he did. (EH 57, 58) The state also backs Zinober's reasoning that, ". . . if his choice was between Chandler answering the questions and taking the Fifth, he would still rather Chandler take the Fifth." (Answer Brief, p. 43) This misses the point. If Zinober believed the state could prove the Blair case and that Chandler would have been perceived as a liar if he answered the state's questions (about the Blair case), he should not have put Chandler on the witness stand to begin with.

The state contends that Chandler was informed as to all of Zinober's major trial tactics and agreed with them. Even if this were true, it does not exonerate defense counsel to the extent that the decisions he made were poor and harmful ones. Chandler had every right to rely upon his lawyer's advice. Had Zinober advised Chandler not to testify and that he was going to attack Blair's credibility, Chandler most certainly would have agreed to that strategy as well. It is the attorney's job to inform his client of the best course of

action to take -- and then take it. The fact that a client agrees with his counsel's strategy does not exonerate the attorney's bad decisions.

The state makes an issue of Chandler's testimony that he wanted to testify in order to deny the Blair allegations. (Answer Brief, pp. 47-48) Again, it was counsel's duty to guide his client in the best course of action. Zinober acknowledged that he was predisposed to having his clients testify in their trials. (EH 132-134) Once he decided that Chandler was to take the stand and assert his Fifth Amendment privilege regarding the Blair case, however, he did nothing to prepare him for what was to come. (EH 132-135)

As to Claim III:

WHETHER COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO STATEMENTS MADE DURING THE STATE'S CLOSING ARGUMENTS.

The state, paraphrasing defense counsel's evidentiary hearing testimony, attempts to justify his failure to object to the prosecutor's improper, overreaching closing argument by attributing it to trial strategy. (The Answer Brief, pp. 63-64) The state credits Mr. Zinober's argument that he read the body language of the jurors; he did not want to arouse ill will on the part of the jury by continually objecting to the prosecutor's improper

remarks; he believed that the State was only hurting itself; and that he had a better chance of a not guilty verdict if he did not object. Id. at p. 63. Justifying inaction of defense counsel by attributing it to trial tactics must have its limits, otherwise counsel's solemn obligation to vigorously defend the client would have no real meaning and never be the subject of an ineffective claim.

On page 65 of the Answer Brief, the state accuses Chandler of taking the prosecutor's statements out of context in the Initial Brief and inserts a long quote from his closing argument. The state explains:

Thus the State was correcting what it believed to be a direct misstatement of the law by defense counsel concerning the Judge's instructions on reasonable doubt and the jurors' responsibility to deal with conflicts in the testimony . . .

(The Answer Brief, p. 65.) Supposed conflicts in the testimony cannot form a valid basis for the prosecutor's many virulent, personal and unnecessary attacks on the defendant, his theory of the case and his counsel. The objectionable arguments of the prosecutor quoted in the Initial Brief are set forth in sufficient detail to make it clear that they were not taken out of context. See the Initial Brief, pp. 67-70. The state ignores also the case law cited by Chandler in his brief which supports his argument.

The state dismisses the offending comments as merely “poorly chosen and more strident than necessary” and “poorly expressed.” (The Answer Brief, pp. 65, 66.) The state is wrong because the improper comments were weighty and prejudicial -- and necessarily carried substantial influence and authority because of who made them. The court in Pacifico v. State, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994) makes it clear that:

[b]ecause a jury can be expected to attach considerable significance to a prosecutor’s expressions of personal beliefs, it is inappropriate for a prosecutor to express his or her personal belief about any matter in issue.

See also, Huff v. State, 544 So. 2d 1143 (Fla. 4th DCA 1989)

Regarding the prosecutor’s improper remarks on Chandler’s asserting his Fifth Amendment privilege against self incrimination, the state avoids the issue. (The Answer Brief, pp. 76-79) The trial court ruled that Chandler was entitled to invoke his Fifth Amendment privilege as to the Blair evidence; thus the prosecutor was forbidden from insinuating to the jury that doing so was an indicator of his guilt regarding the Rogers case. See Griffin v. California, 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), and State v. Marshall, 476 So. 2d 150, 153 (Fla. 1985).

As to the second category of improper remarks presented in the Initial Brief, the personal attacks on defense counsel and his theory of the defense,

the state argues that the remarks were warranted. Thus the state contends that they were each merely “. . . a comment on the fact that certain defense testimony was not explained in the defense closing as having any relevance to the defendant’s guilt or innocence”. (Answer Brief, p. 74) However, this does not address the personally demeaning nature of the prosecutor’s statements, intended to undermine defense counsel’s credibility with the jury.

The state argues that the offensive remarks referred to defense counsel’s “approach” to the case as opposed, presumably, to him personally.

(Answer Brief, p. 72) The law holds them to be one and the same. Thus, in Adams v. State, 192 So. 2d 762, 764 (Fla. 1966), the court found reversible error when the prosecutor described defense counsel’s closing argument as “twisted”, and “perverted and distorted,” and suggested that defense counsel violated his oath as a lawyer. See also, Knight v. State, 672 So. 2d 590, 591 (Fla. 4th DCA 1996); Jenkins v. State, 563 So. 2d 791 (Fla. 1st DCA 1990); Redish v. State, 525 So. 2d 928, 931 (Fla. 1st DCA 1988), Ryan v. State, 457 So. 2d 1084, 1089 (Fla. 4th DCA 1984) and Jackson v. State, 421 So. 2d 15 (Fla. 3rd DCA 1982). The state again contends that the comments made by the prosecutor referred to in the Initial Brief about Mr. Zinober and his theory of the case were taken out of context. In what context can the phrases, “cowardly”, “despicable”, “totally irrational”, “completely dishonest to

you,” (referring to defense counsel’s conduct) be sanitized so that they are not improper and prejudicial?

The third category of improper remarks charged in the Initial Brief relates to the prosecutor expressing “a personal belief in the guilt of the accused,” which is not permitted under Riley v. State, 560 So. 2d 279, 280-281 (Fla. 3d DCA 1990). The state did not address this issue, and Chandler stands on his argument as set forth in the Initial Brief.

The fourth category of objectionable remarks by the prosecutor were the personal attacks on Chandler himself. The state contends that the prosecutor’s remarks were warranted because, “It is not error to accurately describe what the evidence shows about the crimes and the defendant who was proven to have committed them.” (Answer Brief, p. 72) Perhaps these comments would have been warranted at sentencing after the defendant was “proven to have committed them,” but surely not during the guilt/innocence phase of the trial.

CONCLUSION

For the reasons set forth in the initial brief of appellant and this reply brief, the Court is requested to reverse the Order of the lower tribunal that denied the defendant's Florida Rule of Criminal Procedure 3.850 motion, order the lower tribunal to grant the motion and vacate Chandler's judgment of guilt and sentences of death, and grant him such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

Baya Harrison, Esq.
736 Silver Lake Rd.
Post Office Box 1219
Monticello, FL 32345
Tel: (850) 997-8469
FX: (850) 997-8468
Bayalaw@aol.com

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing reply brief of appellant has been furnished to counsel for appellee, Candance Sabella, Esq., Deputy Assistant Attorney General, the Florida Department of Legal Affairs, Suite 700, 2002 Lois Avenue, Tampa, Florida 33607-2366, and Douglas Crow, Esq., Office of the State Attorney, 14250 49th Street North, Clearwater, Florida 34662, this 1st day of July, 2002, by United States mail delivery.

CERTIFICATE OF COMPLIANCE

I certify that this reply brief was prepared using a Times New Roman 14 point font not proportionally spaced.

Baya Harrison