

IN THE SUPREME COURT OF FLORIDA

MARSHALL LEE GORE
Petitioner

vs

MICHAEL W. MOORE, Secretary,
Florida Department of Corrections
Respondent

Case Number: SC02-684
Lower Tribunal: 88-607 CF

PETITIONER’S AMENDED REPLY TO STATE’S RESPONSE

CLAIM ONE

The State’s Response to Petitioner’s request for a Writ in Claim One is in essence that Appellate counsel elected to pursue issues he believed to be more compelling and more likely to obtain a reversal of the conviction, and/or he elected to pursue the issues he felt more likely to be successful in challenging the appropriateness of the death penalty.

The State then proceeds to argue that, although the Florida Supreme Court, on direct appeal, concurred and agreed with Gore that he did not have a “careful plan or prearranged design to kill”, (Gore v. State, 761 So.2d at 890) there was sufficient evidence to demonstrate that he killed the victim.

The State then argues that Appellate counsel was effective because, although

he chose not to challenge premeditation, he did challenge whether the kidnapping case had been proven beyond a reasonable doubt, and he challenged the appropriateness of the CCP aggravator.

The problem is, Appellate counsel did not challenge whether premeditated murder was proven beyond a reasonable doubt, and if Gore was only indicted for premeditated murder, not felony murder, the fact that Appellate Counsel challenged the kidnapping case does not establish Appellate counsel's effectiveness with regards to the death sentence imposed. This is especially true where there was not a jury instruction on felony murder, nor was Gore charged with any felony based murder.

In this case, the indictment charged Gore with premeditated murder, robbery, and kidnaping. The indictment did not charge felony murder in any form or fashion. (R-2758-2759)

The indictment charged as follows in Count One: "The Grand Jurors of the County of Columbia, State of Florida, charge that Marshall Lee Gore AKA/Tony on the 31st day of January A.D. 1988, in the County and State aforesaid, unlawfully and from a premeditated design and intent to effect death, did then and there unlawfully kill and murder Susan Marie Roark in some manner and by some means to the Grand Jury unknown, thereby inflicting in an upon Susan Marie Roark mortal

wounds and injuries or mortal sickness, of and from which said mortal wounds and injuries or mortal sickness, Susan Marie Roark died, contrary to Florida Statute 782.04.”

Further, no jury instruction was given on felony murder. (R2503 thru 2525)

The 1989 version of F.S. 782.04(1)(a)(1), which was applicable to Gore’s case, defined murder as that “perpetrated from a premeditated design to effect the death of the person killed...”, and 782.04(1)(a)(2) defined murder as that “committed by a person engaged in the perpetration of, or in the attempt to perpetrate...(d) robbery, or (f) kidnapping.”

There was no charge in the indictment, nor was there a jury instruction given to the jury that Gore could be convicted of first degree murder based on the robbery or kidnapping under F.S. 782.04(1)(a)(2). (R2503 thru 2525)

The 1989 version of F.S. 782.04(1)(b) provided that “In all cases under this section, the procedure set forth in 921.141 shall be followed in order to determine sentence of death or life imprisonment.”

The 1989 version of F.S. 782.04(1)(b)(2) provided that when a murder was perpetrated by an act imminently dangerous to another, and evincing a depraved mind, although not with premeditated design, this constituted murder in the second degree, punishable by a term of years. Further, 782.04(1)(b)(3) provided that when

a person was killed in the perpetration of, or in the attempt to perpetrate, other than (d) robbery, or (f) kidnapping, the perpetrator was guilty of second degree murder, punishable by a term of years not to exceed life.

All of this means that, before we can ever get to the determination of a life or death sentence under 921.141 in this case, the jury must first have determined that Gore was guilty of premeditated murder, and premeditated murder only.

The jury instruction read to the jury was as follows, commencing at R2505:

“Before you can find the defendant guilty of first degree premeditated murder, the State must prove the following three elements beyond a reasonable doubt.

Number one, that Susan Marie Roark is dead. Number two, the death was caused by the criminal act or agency of Marshall Lee Gore, and element number three, that there was a premeditated killing of Susan Marie Roark.

Killing with premeditation is killing after consciously deciding to do so. The decision must be present in mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated attempt to kill and the killing.

The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

The question of premeditation is a question of facts to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

Before you can find the defendant guilty of the lesser included offense of

second degree murder, the State must prove the following three elements beyond a reasonable doubt.

Number one, that Susan Marie Roark is dead, and number two, the death was caused by the criminal act or agency of Marshall Lee Gore, and number three, there was an unlawful killing of Susan Marie Roark by an act imminently dangerous to another and danger evincing a depraved mind regardless of human life.”

Thereafter, the Court continued in defining an act imminently dangerous to another (F.S. 782.04(1)(b)(2)), and followed that with an instruction on Third Degree Murder. (R-2507)

The jury was charged on the verdict form as follows: “Choice A, the defendant is guilty of murder in the first degree as charged in the indictment. Choice B, the defendant is guilty of the lesser included offense of murder in the second degree. Choice C, the defendant is guilty of the lesser included offense of murder in the third degree, and Choice D, the defendant is guilty of the lesser included offense of manslaughter. Choice E, the defendant is not guilty.” (R-2524-2525)

As a matter of law, the State is required to prove each and every element of the charged offense beyond a reasonable doubt. In Re Winship, 397 U.S. 358 (1970)

If they jury based the verdict on the robbery, or on the kidnaping, or on a depraved mind, Gore could only have been sentenced to a term of years, not death.

Since the case did nevertheless proceed under 921.141, and since the Trial Court found certain aggravators, including the CCP Aggravator, which the Supreme Court rejected, this means that the Judge must have found the premeditation; otherwise, Gore may have improperly been found guilty by the jury of a murder based on either robbery, kidnapping, or a depraved mind.

In fact, the Trial Judge found four aggravators (1) prior conviction of a felony, (2) committed during a kidnapping, (3) committed for pecuniary gain, (4) CCP.

If the Trial Judge found that the murder was done during the perpetration of a kidnapping or robbery, Gore was convicted of first degree murder in a manner not charged.

If the Supreme Court rejected the CCP aggravator, which it did, and if the Trial Judge could not legally find premeditation, who did find premeditation? It is a legal impossibility for Gore to have been convicted of premeditated murder as charged, especially since the Florida Supreme Court has made a finding that there was not a premeditated murder. Gore, at 890.

Under either circumstance, it is clear from the record that the Judge actually made the findings of premeditation which resulted in the death sentence. If this is true, then, pursuant to Ring v. Arizona, 122 S.Ct. 2428 (2002) and Apprendi v.

New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000) Gore’s sentence of death is unconstitutional under the Sixth and Fourteenth Amendments.

As stated in Ring, at 2443, “the right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant’ sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.”

Ring continues at 2432, “Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their punishment.

Further, and as stated in Apprendi, at 492, “even if the State characterizes the additional findings made by the judge as ‘sentencing factors’, such is unconstitutional.”

In this case, as stated in the Petition for Writ of Habeas, the State’s expert, Doctor Floro, testified that an overdose of drugs or natural causes could not be ruled out as the cause of death. (R-1157 thru 1958) and R-1164 thru 1166) Further, the expert testified that he could not determine the exact cause of death (R-1155 thru 1164) but his opinion was that it was a homicide.(R-1170) None of the scientific evidence at the scene was connected to Gore, and the hair found in the victim’s hand was not connected to Gore. (R-1073, 1082 thru 1084, and 1092)

Further, no latent prints found at the crime scene matched Gore. (R-1046)

If Appellant Counsel had raised the sufficiency of the premeditation evidence on direct appeal and pointed out to the Court how the Defendant was charged, and how the jury was instructed, Gore's conviction of premeditated murder would have been reversed. Gore has obviously been prejudiced.

Appellate counsel was ineffective for his failure not to raise the issue of the sufficiency of the premeditation evidence on appeal.

CLAIM TWO

Appellate counsel was ineffective when he failed to raise as an assignment of error, the issue of circumstantial evidence.

In order to convict Gore on the facts presented at trial, the jury would necessarily have had to pyramid inference upon inference. The facts of the case are set forth in the direct appeal decision, Gore v. State, 599 So.2d 978 (Fla. 1992). Gore and the victim departed a party in Tennessee. The victim was going to take Gore home, then she was going to spend the night with a friend. She had a purse with her. The next day Gore showed up in Tampa, Florida with jewelry and the vehicle of the victim. Later, the skeletal remains of the victim were found near Lake City, Florida. The body could have been there two weeks to six months. (R-1112) None of the scientific evidence, hairs, fibers, latent prints, etc. found at the scene

were connected to Gore. Witnesses claimed to have seen the victim in Tennessee after her initial disappearance. (R-1297 thru 1301) and (R-2328 thru 2337)

The jury must have pyramided either the robbery and kidnapping allegations with the fact that Gore showed up in Tampa with the victim's car and purse into first degree murder, when in fact Gore could not be connected to the crime scene, and witnesses claimed to have seen the victim in Tennessee during the same time prior to her body being found.

Appellate Counsel was ineffective for his failure to raise the sufficiency of the evidence and the pyramiding of circumstantial evidence as issues on appeal.

CLAIM FOUR

Appellate counsel was ineffective for his failure to raise the issue concerning the defendant being shackled in the presence of the jury.

What the State misses in its response to this claim is the fact that the Trial Court never made any finding that the restraints were reasonable under the circumstances, or were necessary for security or safety purposes.

From the record, it does not appear that Gore's exposure to the jury was brief, and the same was to deprive him of a fair trial, in violation of the Fair and Impartial Trial Clause of the 6th Amendment, and in violation of the Due Process Clause of the 5th, and 14th Amendments. For appellate counsel to fail to raise this

fundamental issue in the direct appeal, constitutes ineffective appellate counsel.

WHEREFORE, Plaintiff Marshall Lee Gore prays that his convictions and sentence be vacated, and that a Writ of Habeas Corpus issue directing the Defendant, and the Florida Department of Corrections to immediately release and discharge him. Alternatively, the Plaintiff demands a new trial.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been served on Carolyn M. Snurkowski, Assistant Attorney General, The Captial, Tallahassee, Florida 32399-1050, and upon George R. Dekle, Assistant State Attorney, PO Drawer 1546, Live Oak, Florida, 32060, and sent to Marshall Lee Gore, Plaintiff, #401256, Box 221 UCI, P-2125, Raiford, Florida 32083-0221, all by United States Mail, on this the _____ day of _____, 2002.

CERTIFICATE OF COMPLIANCE

I DO HEREBY CERTIFY that the lettering in this Reply to Response is in distinct type, double-spaced, with margins no less than one inch. I do further certify that the fonts are Times New Roman 14-point, and complies with Fla.R.App.P.9.100(1).

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