IN THE SUPREME COURT OF FLORIDA

DELMER SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC18-42
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR MANATEE COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE ADDRESSING THE RELINQUISHMENT PROCEEDINGS

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The postconviction proceedings will be referred to as "PCR p. __" with the referenced page number of the record inserted in the blank, and the relinquishment proceedings will be referred to as "S. PCR p. __." with the appropriate page number inserted in the blank space.

SUPPLEMENTAL STATEMENT OF THE CASE

Pursuant to this Court's relinquishment order, an evidentiary hearing was held before the Honorable Diana Moreland on June 5 and 13, 2019. The relevant testimony from the hearing is as follows:

Detective Ortiz with Sarasota County Sheriff's Office (SCSO) went to Martha Tejeda's house on September 16, 2009, to talk with her because he spoke Spanish and so did Tejeda. (S. PCR pp. 1593-94). Tejeda gave Detective Ortiz some items that she had removed from Smith's vehicle, including a watch, a camera, and a toy helicopter. (S. PCR p. 1595). While they were waiting for a tow truck to come to the house to get Smith's vehicle, Tejeda handed Detective Ortiz a plastic garbage bag containing items that she had removed from Smith's vehicle before she cleaned it. (S. PCR pp. 1595, 1599). She instructed Detective Ortiz to take the bag. (S. PCR pp. 1595-96). He brought the bag to the Criminal Investigations Service

headquarters, and the bag was later inventoried by someone in the property room. (S. PCR pp. 1596-98).

Lieutenant Michael Dumer was the detective assigned to Smith's Sarasota cases at the time. (S. PCR pp. 1541, 1543). Lieutenant Dumer testified that the medical encyclopedia was inside the trash bag that Tejeda gave to Detective Ortiz; it did not come from the duffel bag that was inside her attic. (S. PCR p. 1560).

Lieutenant Dumer confirmed that he had a search warrant for property reportedly belonging to Smith, which included the black garbage bag Tejeda gave to Detective Ortiz that contained the medical encyclopedia. (S. PCR pp. 1544, 1550). Lieutenant Dumer was asked why he would obtain a search warrant to search a bag when the contents had already been removed. (S. PCR p. 1551). He responded,

> Well, there are a couple of reasons. First, with respect to the bag and receiving the bag into our facility, we're going to inventory those contents and document those items so that they can then at some point be transferred into our property section – or, evidentiary property section. That's our policy. We don't put anything, as best we can, that we have immediate access to into property that we don't know what we're putting in there. We don't want to put in any explosives, hazardous materials, loaded firearms, or any other items that we don't know about. This bag was unsecured. It had items in it. So we inventoried it, which is what you see here on these two continuation sheets. It was then photographed by our crime scene people. And then eventually at some point it would have ended up in property after being

> documented and tagged and put in the appropriate sealed containers or bags.

(S. PCR pp. 1551-52). Lieutenant Dumer stated that nothing was examined until a search warrant was obtained, "but, certainly, it was inventoried and documented and photographed." (S. PCR p. 1552). It was part of their standard operating procedure to inventory property that was going into the property room. (S. PCR p. 1561).

Jessica Jarecki, who was one of the crime scene technicians from the SCSO who inventoried evidence retrieved from Sarasota County involving Smith, testified that the medical encyclopedia at issue was collected by Detective Ortiz. (S. PCR pp. 1510, 1513). She testified that she took a photograph of the medical encyclopedia. (S. PCR pp. 1516, 1518). She did not process the encyclopedia, she just photographed it. (S. PCR p. 1533). Jarecki stated that she never testified during Smith's trial that the medical encyclopedia came from a duffel bag in the attic. (S. PCR pp. 1523, 1532).

Smith's trial attorney, Daniel Hernandez, testified that he did not have any independent recollection of where the medical encyclopedia came from. (S. PCR pp. 1589-90). He stated that he could not offer any strategic reasons for why he did not file a motion to suppress. (S. PCR p. 1590). He stated, "I really do not remember the exact specifics of what this is related to."

(S. PCR p. 1590).

According to Lieutenant Dumer, a search warrant was also obtained for Smith's cell phone on October 20, 2009. (S. PCR p. 1562). Once the warrant was executed, Lieutenant Dumer had a detective from the SCSO perform a data extraction from Smith's cell phone. (S. PCR p. 1562). Detective McHenry used a universal forensic extraction device (UFED) to extract the data. (S. PCR pp. 1562-63). The phone was later turned over to the Manatee County Sheriff's Office because the Sarasota County Sheriff's Office was working with them as part of a multi-agency task force related to Smith. (S. PCR pp. 1563-64).

Jerome Diamond, who was formerly a detective with the Manatee County Sheriff's Office, testified that he was part of the multi-jurisdictional task force related to Delmer Smith's cases. (S. PCR pp. 1569-70). Diamond obtained MetroPCS records for Smith's MetroPCS Samsung phone. (S. PCR pp. 1565-66, 1570). He eventually conducted a physical data extraction from the phone "much later on in the case." (S. PCR p. 1571). He testified, "[w]e got the cell phone data from the carrier before we got the information from the phone." (S. PCR p. 1571). The extraction was performed in July of 2012. (S. PCR p. 1572). The Manatee County Sheriff's Office did not even receive the phone until after the records from MetroPCS had already been obtained.

(S. PCR p. 1571).

After the evidentiary hearing, the circuit court issued an amended order on June 24, 2019, denying Smith's motion for postconviction relief. (S. PCR. pp. 1437-1474). On July 10, 2019, this Court issued an order requiring the parties to file supplemental briefs. Smith's brief was filed July 24, 2019. The instant brief is being filed in response to Smith's filing as well as this Court's order.

SUMMARY OF THE ARGUMENT

The trial court properly denied postconviction relief on all of Smith's claims at issue in his postconviction appeal. Once this Court relinquished jurisdiction, the additional evidence adduced from the recent evidentiary hearing only provided more support for the denial of postconviction relief. Smith has no legitimate ineffective assistance of counsel claims, and the lower court's denial of relief should be affirmed.

ARGUMENT

ISSUE I[1]

THIS ISSUE WAS NOT PART OF THE RELINQUISHMENT PROCEEDINGS, AND THEREFORE, THE ARGUMENT CONTAINED WITHIN THE SUPPLEMENTAL BRIEFING SHOULD NOT BE CONSIDERED.

[1] While Smith refers to this issue as "Issue I," it actually corresponds to Issue II of his Initial Brief.

In this issue, Smith argues that law enforcement did not have a legitimate reason to conduct an inventory search of his **duffel bag**, as he claims that it was done solely to discover evidence of crime(s). Notably, this claim was not at issue during the relinquishment evidentiary hearing, so no new evidence was presented regarding this issue as it relates to the duffel bag. Given that Smith is challenging the inventory search of the duffel bag despite not having raised this issue during the relinquishment proceedings, it is unpreserved and should not have been raised within his supplemental briefing.

Smith specifically claims in his supplemental brief that there was no basis to conclude that the contents of the duffel bag posed "danger" to the police to justify an inventory search. Supplemental Brief at 8. Had the State known that Smith was going to be presenting this argument, the State could have sought to admit evidence showing that there was a gun in the duffel bag.[2] The focus of the relinquishment proceedings, however, was narrowly tailored to the issues of the garbage bag (not the duffel bag) and Smith's cell phone. Moreover, this Court's order entered July 10, 2019, directed the parties to

[2] The trial transcripts reflect that the recorded jail conversations were redacted to remove references to the gun. (DAR V13/2168). Smith even admitted during a hearing that the transcripts were about him instructing Tejeda to remove a gun from the bag. (DAR V20/3202).

file supplemental briefs "addressing the relinquishment proceedings only." Because this issue within the supplemental brief is unpreserved and does not address the relinquishment proceedings, this Court should not review this claim.

In the event that this Court wishes to review this claim, the trial court properly denied this claim, finding that if Smith's proposed motion to suppress would have been filed by his trial counsel, the court would have denied it as meritless. (S. PCR p. 1452). Notably, the evidence from the relinquishment proceedings established that the medical encyclopedia was not in the duffel bag at issue here. Therefore, the only remaining evidence that Smith contends should have been suppressed from the duffel bag was contained within a locked strongbox, which Smith concedes law enforcement had a warrant to search. Supplemental Brief at 8. His entire argument is centered around the theory that the initial inventory search of the duffel bag was unlawful, and thus, he implies that the search warrant for the strongbox was invalid.

While Smith's argument is based entirely on his theory that the inventory of his bag invalidated the search warrant for the strongbox contained therein, he presented no evidence during the relinquishment proceeding challenging the lawfulness of the search warrant obtained for the strongbox. Nor did he present

any evidence to support his proposition that the inventory of the bag was unreasonable or a pretext to conceal investigatory motive. Smith has failed to prove this claim, and he is not entitled to relief.

The inventory search of Smith's duffel bag was lawful pursuant to SCSO policy. (S. PCR pp. 1551-52). Smith's duffel bag was opened and inventoried, because it was unsecured, and the SCSO's policies require property that can be opened to be inventoried prior to going into its property section. (S. PCR pp. 1151-52, 1561). A warrant was obtained for the strongbox because the box was locked, and, pursuant to SCSO policy, any locked containers are not opened or searched without a warrant.

Even if the initial inventory of the duffel bag was somehow improper, the items in the locked strongbox would not have been excluded based on the independent source doctrine, given that the bag would have been in the custody of law enforcement regardless of whether the inventory search was conducted, and a warrant was obtained to open the box and search its contents. *See Parker v. State*, 611 So. 2d 1224, 1227 (Fla. 1992) ("The fruit of the poisonous tree doctrine is inapplicable when the State learns of evidence from an independent source or when evidence inevitably would have been discovered."). Smith's counsel was not ineffective for failing to file a motion to

suppress items contained within a locked strongbox, which law enforcement had a valid warrant to search. Smith also failed to establish prejudice given all of the other evidence linking him to the murder, which included stolen items that were not contained within the lockbox. The lower court's denial of relief requires affirmance.

AMENDED ISSUE I[3]

SMITH'S NEW INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING THE GARBAGE BAG THAT CONTAINED THE MEDICAL ENCYCLOPEDIA IS UNTIMELY AND MERITLESS.

In his amended claim, Smith alleges that his trial counsel was ineffective for failing to file a motion to suppress the medical encyclopedia, as he argues that it was found during a warrantless search of a garbage bag belonging to him. Smith's amended claim is untimely and meritless.

Pursuant to 3.851(f)(4), of the Florida Rules of Criminal Procedure, a motion may not be amended unless good cause is shown, and the motion must be filed at least forty-five days *before* the evidentiary hearing. Smith's postconviction evidentiary hearing was October 2-3, 2017. Therefore, his postconviction motion needed to be amended by August 18, 2017. However, it was not filed until June 3, 2019. Accordingly, the amended motion was untimely, and it should have been denied as

[3] Again, this issue relates to Issue II of Smith's Initial Brief.

untimely. *See, e.g. Smith v. State*, 213 So. 3d 722 (Fla. 2017) (finding that the trial court did not abuse its discretion in denying the defendant's motion to amend that was filed after the evidentiary hearing).

Smith also failed to establish good cause to warrant the amendment. This Court has found the denial of a motion to amend appropriate "when the facts in the amended motion were readily available to postconviction counsel at the time that [the defendant] filed his initial 3.851 motion" because those "claims should have been raised in that motion." *Tanzi v. State*, 94 So. 3d 482, 495 (Fla. 2012) (quoting *Lugo v. State*, 2 So. 3d 1, 19 (Fla. 2008)).

In this case, the information that the new claim was based on has been available to Smith since the inception of his case. The information was also most definitely available to Smith's postconviction counsel back in 2015 and 2016 when he acquired records from the repository. In fact, Smith's postconviction counsel demonstrated that he knew about the contents of this claim when he filed his original rule 3.851 motion, as he referenced the inventory receipt attached to the search warrant for the garbage bag in his postconviction motion as well as in his appellate brief. (PCR pp. 202-203, Initial Brief (of the postconviction appeal) at 64). There is no good cause for why

Smith's motion was amended when he could have raised this claim when he filed his postconviction motion January 23, 2017. Smith never alleged good cause to justify his dilatory amendment, and this claim should be deemed procedurally barred because it was untimely raised.

Next, even if Smith's motion is not considered untimely, he still is not entitled to relief because this claim is meritless. Smith failed to show how his counsel was deficient for not filing a motion to suppress. As the trial court properly found, "even if Mr. Smith's trial counsel had filed the proposed motion to suppress evidence found in the black garbage bag turned over by Mrs. Tejeda, such a motion would not have been granted." (S. PCR p. 1453). Smith's motion to suppress would have been denied as meritless based on various legal theories, including the fact that Tejeda gave the bags over to law enforcement, the medical encyclopedia was discovered as part of a proper inventory search, a warrant was subsequently acquired to search the medical encyclopedia, and when the medical encyclopedia was actually searched and processed for fingerprints, a warrant had already been issued.

Evidence from the relinquishment proceedings established that the warrant was issued October 27, 2009. (S. PCR p. 1349). Jessica Jarecki, one of the crime scene technicians from the

SCSO who inventoried evidence that Tejeda gave to Detective Ortiz, which included the medical encyclopedia, testified that she only took a photograph of the encyclopedia; she did not process it. (S. PCR pp. 1516, 1518, 1533). The medical encyclopedia was not processed for fingerprints until November of 2009. (S. PCR p. 1283). Thus, the actual search of the encyclopedia was conducted ***after*** the warrant was obtained. Given that the search was conducted pursuant to a lawful warrant, Smith's trial counsel would have no basis to file a motion to suppress the medical encyclopedia. Accordingly, counsel cannot be deemed ineffective for failing to file a meritless motion. *See Ferrell v. State*, 29 So. 3d 959, 976 (Fla. 2010) ("Trial counsel cannot be deemed ineffective for failing to raise a meritless argument.").

While Smith argues that law enforcement improperly searched the garbage bag before the warrant was obtained, he is incorrect. The medical encyclopedia was discovered as a result of law enforcement inventorying items that were in a garbage bag that had been provided to them by Tejeda. An inventory search is a recognized exception to the warrant requirement of the Fourth Amendment. *Colorado v. Bertine*, 479 U.S. 367, 371 (1987). As this Court has recognized, an inventory search must be conducted

in accordance with standard police procedures. *State v. Wells*, 539 So. 2d 464, 468-69 (Fla. 1989). That was done here.

The SCSO conducted an inventory search of the contents of the garbage bag provided by Tejeda. It is part of the SCSO's procedures to conduct an inventory of all items going into its property section unless the items are locked or secured in some way. Lieutenant Dumer testified that with regard to the garbage bag that was received, "we're going to inventory those contents and document those items so that they can then at some point be transferred into our property section – or, evidentiary property section. **That's our policy."** (S. PCR pp. 1551-52). He explained, that they do not put any bag or container that they have immediate access to in the property section without first inventorying the contents. (S. PCR pp. 1551-52). While Smith seems to suggest that the "policy" was not followed in this case, the policy at issue is whether bags are inventoried by the SCSO. His reference to how the crime scene technician photographs evidence does not show that the policy to inventory property was not followed in this case.

The garbage bag from Tejeda was not locked or secured, and according to the inventory procedures for SCSO, it had to be inventoried. Therefore, the inventory of the items in the garbage bag, and specifically the medical encyclopedia, was

properly performed pursuant to the SCSO's policies. Competent, substantial evidence supports the trial court's finding that the inventory was conducted pursuant to SCSO policy and was permissible.

Smith's supplemental brief focuses almost entirely on whether Tejeda could consent to the search of the garbage bag; however, consent to search is irrelevant here given that law enforcement had a search warrant and the contents of the bag were inventoried pursuant to SCSO policy. To the extent that Smith is arguing that the garbage bag was not lawfully in police custody, he is incorrect. Tejeda gave the bag over to law enforcement; she wanted Detective Ortiz to take it. Detective Ortiz did not need a warrant in order to accept the garbage bag that was given to him.

The contents of the garbage bag had been removed from Smith's vehicle by Tejeda, and Tejeda put the items in the garbage bag and subsequently gave the bag to Detective Ortiz. The trial court specifically found that "Smith had shared access to his vehicle not only with Ms. Tejeda, but also with "David," from whom Ms. Tejeda obtained the keys to Mr. Smith's vehicle, as well as, the keys to the storage unit where Ms. Tejeda retrieved Mr. Smith's duffel bag, arguably reducing any subjective expectation of privacy Mr. Smith may have had in his

vehicle and the property contained therein." (S. PCR p. 1453). The court noted that during recorded jail calls, Tejeda discussed removing items from Smith's vehicle, and he did not object or otherwise attempt to limit her access to his vehicle or the property. (S. PCR p. 1453). The court correctly concluded that "Smith had no legitimate expectation of privacy in the items in the black garbage bag because he abdicated control of his vehicle, and its contents, to Ms. Tejeda; Ms. Tejeda voluntarily presented the contents of the black garbage bag that she removed from Mr. Smith's vehicle to law enforcement; and following a permissible inventory search, law enforcement obtained a valid search warrant for the items obtained from Ms. Tejeda." (S. PCR p. 1453). Smith failed to establish that his counsel was ineffective for not filing his proposed motion to suppress, which was meritless.

Smith also entirely failed to establish any resulting prejudice from his counsel's alleged deficiency. His speculative, conclusory, and meager statement that the outcome could have been different was insufficient to warrant relief. *See Jones v. State*, 998 So. 2d 573, 584 (Fla. 2008) ("A mere conclusory allegation that the outcome would have been different is insufficient to state a claim of prejudice under *Strickland*; the defendant must demonstrate how, if counsel had acted

otherwise, a reasonable probability exists that the outcome would have been different-that is, a probability sufficient to undermine confidence in the outcome."). The lower court's denial of relief requires affirmance.

ISSUE III

THE EVIDENCE DURING THE RELINQUISHMENT PROCEEDINGS ESTABLISHED THAT LAW ENFORCEMENT DID INDEED HAVE A WARRANT TO SEARCH SMITH'S PHONE; THEREFORE, COUNSEL CANNOT BE INEFFECTIVE FOR FAILING TO FILE A MOTION TO SUPPRESS EVIDENCE OBTAINED FROM SMITH'S CELL PHONE.

This issue is being briefed pursuant to this Court's order dated July 10, 2019, which directs the parties to file supplemental briefs "addressing the relinquishment proceedings only." Given that this issue was one of the main topics of the relinquishment proceedings, briefing is warranted. While Appellant has not briefed this issue, unless he intends to abandon this claim, Appellee believes that briefing is appropriate.

Smith previously alleged in his Initial Brief that Detective Diamond searched Smith's cell phone without a warrant, and as a result of the information he obtained from Smith's cell phone, Detective Diamond obtained the call detail and cell tower information from Smith's cellular provider, MetroPCS. Initial Brief at 73. He, therefore, argued that the MetroPCS records

were “fruit of the poisonous tree” and that suppression should have been sought by his attorney. Initial Brief at 77.

The evidence from the relinquishment proceedings, however, established that the MetroPCS records were lawfully obtained well before Smith’s phone was searched by Detective Diamond. (S. PCR p. 1571). Detective Diamond obtained an order to acquire the MetroPCS records on November 9, 2009. (S. PCR pp. 1321-1342). According to Detective Diamond, he did not search Smith’s phone until July of 2012. (S. PCR p. 1572). He testified, “[w]e got the cell phone data from the carrier before we got the information from the phone.” (S. PCR p. 1571). He did not even have possession of Smith’s phone at the time that he received the MetroPCS records. (S. PCR p. 1571). Accordingly, the MetroPCS records, which yielded the cell-phone evidence linking Smith to the murder, were not subject to suppression as fruit of the poisonous tree, and Smith’s counsel had no basis to file a motion to suppress those records.

Smith’s argument that his counsel should have filed a motion to suppress the data received from Detective Diamond’s search of his cell phone, through the use of a universal forensic extraction device (UFED), also fails because the evidence now shows that the SCSO obtained a warrant to search Smith’s cell phone. (S. PCR pp. 1377-1381). The search warrant

was executed on October 20, 2009. (S. PCR p. 1382). Testimony from the evidentiary hearing established that Lieutenant Dumer had Detective McHenry search Smith's phone, and McHenry used a UFED to retrieve the data from Smith's phone. (S. PCR pp. 1562-63). If Smith's counsel would have filed a motion to suppress the UFED report generated by Detective Diamond in July 2012, the State could have sought to admit the UFED report generated by Detective McHenry in 2009 pursuant to a warrant. Smith's cell phone was not in use and was in police custody the entire time in between the two searches, so the UFED reports would have been identical (but for the dates on the report). Accordingly, Smith's counsel was not ineffective for not filing Smith's proposed motion to suppress. *Engle v. Dugger*, 576 So. 2d 696 (Fla. 1991) (a court will not label counsel ineffective for failing to raise meritless claims).

Competent, substantial evidence supports the trial court's amended order denying postconviction relief. The court properly found that "In light of the prior SCSO search and UFED extraction conducted by Detective McHenry-pursuant to a valid search warrant-Mr. Smith fails to establish that he was prejudiced by his trial counsel's failure to move to suppress the subsequent UFED extraction of the same information and

content from his cell phone, as conducted by Detective Diamond." (S. PCR p. 1459). The lower court's ruling requires affirmance.

In addition, Smith's prejudice argument also fails because the witnesses who testified at trial (who Smith claims were located from the contact list that was extracted from his phone by Detective Diamond) could have been identified through Detective McHenry's data extraction *or* the MetroPCS records. According to Detective Diamond, the MetroPCS records, which were lawfully obtained pursuant to a court order, listed the contact numbers in Smith's phone. (S. PCR p. 1573). For all these reasons, the trial court's denial of this claim requires affirmance.

ISSUE IV

EVEN IF *RILEY V. CALIFORNIA*, 134 S. CT. 2473 (2014), WERE RETROACTIVE TO SMITH ON COLLATERAL REVIEW HE WOULD NOT BE ENTITLED TO RELIEF WHEN LAW ENFORCEMENT HAD A WARRANT TO SEARCH HIS CELL PHONE.

Appellee previously argued in its Answer Brief that the circuit court properly denied Smith's *Riley* claim because it was procedurally barred, and even if it was not procedurally barred, *Riley* would not be retroactive to Smith. Appellee maintains its previous argument but adds that even if *Riley* were retroactive to Smith, he would not be entitled to relief given that the evidence from the relinquishment proceeding now shows that law enforcement had initially obtained a search warrant to search

Smith's cell phone. *Riley*, which deals with whether a warrantless search is lawful under the search incident to arrest exception, does not even apply to this case. Based on all the reasons set forth in its Answer Brief and Supplemental Brief, the circuit court's denial of relief of this claim requires affirmance.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's denial of postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of August, 2019, I electronically filed the foregoing with the Clerk of the Court by using the E-Portal Filing System which will send a notice of

electronic filing to the following: Eric C. Pinkard, CCRC, and Rachel Paige Roebuck, Law Office of the Capital Collateral Regional Counsel-Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, **pinkard@ccmr.state.fl.us, roebuck@ccmr.state.fl.us,** and **support@ccmr.state.fl.us**.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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