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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA, Plaintiff, v. ERIC KURT PATRICK, Defendant.	CASE NO.: 05-16477CF10A JUDGE: ILONA M. HOLMES

ORDER DENYING DEFENDANT'S CORRECTED MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE AS TO CLAIM 7

THIS CAUSE came on for evidentiary hearing On October 5, 2018, before this Court by order of the Florida Supreme Court as to claim 7 of Defendant's post-conviction motion, pursuant to Florida Rule of Criminal Procedure 3.851. After the conclusion of the hearing, counsels for both the State and the Defense asked this Court for time to submit their arguments in writing. This Court allowed counsels until November 5, 2018 to submit their memoranda. Defendant, through counsel, asked for an extension which was granted to November 20, 2018.

The Court has listened carefully to the testimony during the hearing, read the submissions of the parties and has conducted its own independent research. Being fully apprised in the premises, the Court finds as follows.

The procedural history and facts of this case are detailed in Patrick v. State, 104 So.3d 104 (Fla. 2012) (Patrick 1) and the Court's order directing an evidentiary

hearing is detailed in Patrick v. State, 246 So.3d 253 (Fla. 2018) (Patrick 2).[1] The Supreme Court held the following in the opinion:

"Because the juror's voir dire answers concerning homosexuality meet the Carratelli test for prejudice, the validity of the summary denial pf this claim depends on the performance prong. Failure to raise a meritorious issue is not deficient performance when it results from the exercise of professional judgment after considering alternative courses. Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000). Patrick (2), 246 So. 3d at 264.

The defense presented the testimony of George Reres and Dorothy Ferraro. Ms. Ferraro really had not independent recollection of the jury selection in this case. She had read her notes and the transcript but offered that she would just be speculating as to the reason or reasons why the defense did not strike Juror Martin. She did testify that no juror was struck or kept without Defendant's approval.

Mr. Reres, at the time of defendant's trial, had been in the Office of the Public Defender since 1982 (this case was tried in 2009). He had tried approximately 22-23 capital and murder cases. He had tried approximately 30 second degree murder and manslaughter cases.

Reres conceded that the State had a very strong case against Defendant. Because there was so much evidence, i.e., DNA, bloody shoeprint, eyewitnesses who

[1] To distinguish between the two opinions, the Court refers to them as Patrick I and Patrick 2.

could put Defendant inside of the victim's apartment and a confession, his strategy was a "shotgun" approach.

Reres testified that Defendant didn't want to be convicted and didn't want a life sentence. Reres felt that Juror Martin was a "winner" for the dense because he was very strong for a life sentence versus death.

Notwithstanding Martin's comments about homosexuals, Reres felt that he was a good juror to have for the penalty phase. Reres also testified that he was "going for a lesser offense. This Court took that to mean he was looking maybe for second degree murder or manslaughter.

Given the beating that the victim received in this case, manslaughter would have been farfetched in this Court's opinion. However, the second degree murder instruction contains the wording that Juror Martin used:

> **Ms. TATE:** If homosexuality in any way comes into play in this case with anyone involved would you not follow the law on that? Are you going to not hold me to the burden to prove those elements or hold me to a lesser burden or a higher burden or how do you feel about it?
>
> **Mr. MARTIN:** **Put it this way, if I feel the person was a homosexual I personally believe that the person is morally depraved enough that he might lie, might steal, might kill.**[2]

(ROA at 424).

[2] There was an unlawful killing of (victim) by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life (third element of second degree murder instruction).

Mr. Reres also testified that he always had a strategy for leaving a juror on- unless he'd run out of peremptories, then he would have asked for more. Mr. Reres testified that "sometimes objectionable jurors become acceptable because of the feeling that he or she can lead other jurors the way the defendant wanted them to go." Reres candidly admitted that he was looking at the penalty phase and that Juror Martin was better for that phase.

Reres also testified that he wanted a juror that had a bias against homosexuality. He thought that that would be favorable for one of the defenses advanced, that the victim had to tried to penetrate Defendant anally against Defendant's will. Reres testified that it was his strategy to keep Juror Martin. Reres also testified that Defendant had the ultimate say regarding the jurors.

Volume 11 of the appeal proceedings contains the defense voir dire and the selection of jurors for this trial. There were instances where the defense wanted a person that the State challenged for cause. For instance in the case of Mr. Moreno, the defense wanted him as a juror. This Court allowed the challenge for cause because the juror thought Defendant was already guilty and thought the only job the jurors would have is to determine whether Defendant gets life or death. Mr. Reres responded:

> **"I know he said that Judge. I thought I could work with him anyway but maybe that's just my ego talking."**

(ROA, vol. 11, pp. 1183-1184).

Counsel for Defendant showed Mr. Reres a sheet of paper with his notes regarding Juror Martin (Defense exhibit 1). Reres agreed that they were his handwriting and his notes. At the bottom of the paper, but crossed off are the words, (symbol of triangle which connotes Defendant) want out. Prempt. When asked what that meant Reres stated:

> **"I honestly don't recall. My best guess would be, we were all uncertain about Martin. Perhaps Mr. Patrick had some concerns initially and then he made those statements about homosexuality changed his opinion."**

(EH p.55).[3]

The trial record also reflects that Mr. Reres did not formally accept the panel. He didn't ask for more peremptories or raise any cause challenges (vol. 11, pp. 1189-1190).

This Court colloquied Defendant, under oath. He was asked if his attorneys were talking with him about the jury selection process, whether they were listening to him and whether they answered his questions (vol. 11, pp 1190-1191). The Court explained to Defendant that Reres was not accepting the panel/jury. Defendant was asked about the twelve (12) jurors. He was asked if he had a gut feeling about the jurors, that maybe his attorneys liked the juror but he didn't. His response was "I'm fine." The Court further asked if his attorneys had consulted with him about the jurors. Defendant responded "Yes" (vol. 11, p. 1191). Defendant did not raise any objections to the jurors or alternates (vol. 11, pp 1199—2000).

Mr. Reres' testimony was compelling to this Court. The defense argues that Reres' "purported strategy was "knee-jerk, "flippant", and "contradictory" (memorandum p. 4).

[3] Evidentiary hearing of October 5, 2018.

On the contrary, this Court found his testimony to be candid and credible. Yet no expert witnesses were called to dispute Reres' failure to challenge or preempt Juror Martin. Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Strickland v. Washington, 466 U.S. 668, 689 (1984). The question is would any other attorney have done the same thing or similar to what Mr. Reres did in defending his client?

The Defendant has the burden of showing that counsel's performance fell below the standard guaranteed by the Sixth Amendment.

This Court finds guidance in the case of Peterson v. State, 154 So. 3d 275 (2014). In Peterson, the attorney testified that in death eligible cases it was important for him to focus on the sentencing recommendation. He acknowledged that he sometimes, as in the post-conviction case, that he selected jurors that were not favorable to the defense in the guilt phases, but were favorable in the penalty phase. He testified that he had never, in 80 cases achieved seating a "perfect jury." Id at 282.

The Supreme Court has recognized that the strategy utilized by Mr. Reres is a reasonable one. Dillbeck v. State, 964 So. 2d 95, 102-103 (Fla. 2007) (held that counsel adopted a reasonable trial strategy of avoiding a death sentence by attempting to seat jurors likely to recommend a life sentence). See, also Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995) (juror seated even though she said she could not be impartial but she did not agree with the death penalty). Because Defendant has failed to carry

his burden and based upon the foregoing, it is

ORDERED AND ADJUDGED that the Motion for Post-conviction Relief, as to Claim 7, is **DENIED**.

DEFENDANT SHALL HAVE THIRTY (30) DAYS FROM THE RENDITION OF THIS ORDER TO FILE AN APPEAL.

DONE AND ORDERED in chambers at Fort Lauderdale, Broward County Florida, this 27th day of December 2018.

Ilona M. Holmes

ILONA M. HOLMES
CIRCUIT JUDGE

cc. Steven Klinger, Esquire, Assistant State Attorney
Suzanne Keffer, Chief Assistant, CCRC-South
Lisa-Marie Lerner, Assistant Attorney General