

IN THE MISSOURI SUPREME COURT

ANDRE V. COLE,)	
)	
Appellant,)	
)	
vs.)	No. SC85830
)	
STATE OF MISSOURI ,)	
)	
Respondent.)	

Appeal from the Circuit Court of the County of St. Louis, Missouri
Twenty-first Judicial Circuit, Division 9
The Honorable David Lee Vincent, Judge

APPELLANT’S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant incorporates the Jurisdictional Statement from his original brief.

STATEMENT OF FACTS

Appellant incorporates the Statement of Facts from his original brief.

ARGUMENT I¹

This Court's finding on direct appeal of no plain error with respect to statements made during the state's guilt and penalty phase closing arguments was not tantamount to a finding of no Strickland prejudice, therefore Cole is not foreclosed from asserting that defense counsel rendered ineffective assistance by failing to object to the improper arguments. Cole was prejudiced by counsel's failure to object to the improper arguments.

Respondent argues that Cole's challenge to defense counsel's failure to object to various portions of the state's guilt and penalty phase closing arguments is an attempt to relitigate issues already determined by this Court on Cole's direct appeal (Resp. Br. 10-14). Respondent's argument is incorrect. This Court's opinion on direct appeal does not foreclose post-conviction review of Cole's claim.

Counsel rendered ineffective assistance when she failed to object when the prosecuting attorney: 1) claimed that he could not think of a case more important to the people of St. Louis County, 2) stated that people charged with crimes are usually guilty of those crimes, 3) argued that a not guilty verdict would tell Terri Cole, a dying woman, that she was a liar, and 4) referred to Cole as a convicted

¹ Cole maintains each of the arguments presented in his original brief. Only those arguments to which he finds it necessary to reply are contained herein. All arguments are incorporated by reference.

killer. On direct appeal, Cole argued that the trial court plainly erred in allowing the prosecuting attorney to make these arguments.

With respect to the first three of these arguments, this Court wrote, “finding no error of law an extended opinion on these issues would have no precedential value.” State v. Cole, 71 S.W.3d 163, 170 (Mo. banc 2002). A finding of “no error of law” is not the same as a finding of no Strickland prejudice.² This Court’s finding indicates that the trial court did not plainly err in failing to *sua sponte* intervene during the state’s closing argument. This Court’s opinion did not hold that the arguments were not improper, or that the arguments, although improper, could not have had an effect on the outcome.

With respect to the fourth argument, this Court wrote,

The misstatement by the prosecutor referring to the Appellant as a ‘convicted killer’ was a single inadvertent remark not prejudicing Appellant because the jury had already been presented with the precise nature of his actual prior convictions, none of which involved a homicide. Statements made in closing argument will rarely amount to plain error, and any assertion that the trial court erred for failure to intervene *sua sponte* overlooks the fact that the absence of an objection by trial counsel may have been strategic in nature. Id. at 170-171.

² Strickland v. Washington, 104 S.Ct. 2052 (1984).

This Court’s recognition that plain error relief is rarely granted, because defense counsel may have decided not to object as a matter of strategy, suggests that this Court was not foreclosing post-conviction review of the argument in the context of an ineffective assistance of counsel claim.

Respondent asserts, without citation to authority, that, “‘prejudice’ on direct appeal . . . cannot be reasonably distinguished from Strickland prejudice . . .” (Resp. Br. 13). This statement is contrary to Deck v. State, 68 S.W.3d 418, 427-428 (Mo. banc 2002), in which this Court wrote, “The reason why the standards of review of preserved and unpreserved error on direct appeal are different from each other, and why *both are in turn different from the standard of review of a post-conviction motion*, is explained by the very different focuses of the inquiries under each standard.” The standards of review for preserved and unpreserved error presuppose “that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged.” Id. at 428, quoting Strickland, 104 S.Ct. 2052, 2068. A claim of ineffective assistance of counsel, however, asserts “the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are weaker and *the appropriate standard of prejudice should be somewhat lower*” Id. (emphasis added). Thus, a finding of “no prejudice” on direct appeal is not the same as a finding of no Strickland prejudice. This Court should address the merits of Cole’s claim.

Respondent characterizes the prosecutor's statement that he could not think of a case more important to the people of St. Louis County as merely a reference to the fact that it was a first degree murder case in which the state sought the death penalty (Resp. Br. 17-18). The prosecutor's argument was not just a generic reference to the nature of the case. The prosecutor said he could not think of a more important case than "the case you've heard here over the last week" (Tr. 1415). His argument was a specific reference to the prosecution of Cole. In the prosecutor's opinion, Cole's case, not just any first degree murder case, was the most important case to the people of St. Louis County.

This argument carried great weight with the jury, since the prosecutor, as the representative of the people of St. Louis County, could not think of a more important case. In combination with his argument that "people sitting in that chair . . . are usually there for a reason," the prosecutor clearly made known to the jury his personal belief that Cole was guilty of first degree murder. This argument that the charge of first degree murder was personally sanctioned by the prosecutor was particularly damaging, because the evidence of deliberation was so weak. A reasonable juror could easily have harbored doubts as to whether the state proved deliberation, yet been swayed by the prosecutor's personal assurance that he could not think of a more important case than Cole's and his assurance that Cole was charged for a reason.

With respect to the prosecutor's argument, "Don't tell Terri Cole, a dying woman, by your verdict that she is a liar," Respondent acknowledges that on direct

appeal, the state's position was that Terri's medical condition should not have been mentioned, because it was not relevant to her credibility (Resp. Br. 33; Resp. Direct Appeal Br. 47). Now, Respondent argues that the prosecutor's reference to Terri as "a dying woman" was provoked by defense counsel's attempts to portray Terri as a liar and defense counsel's argument that her cross-examination of Terri was hampered, because she did not want to appear to be an "animal" who would "go after" a dying person (Resp. Br. 31-32). Respondent cannot have it both ways. If the prosecutor's reference to Terri's medical condition was improper and not relevant to her credibility, then it cannot be justified as proper retaliation to defense counsel's attacks on Terri's credibility.

Respondent argues that Terri's condition was remarked upon by both parties and was well known to the jury, thus it could not have had an inflammatory effect (Resp. Br. 33). There is a big difference between the jury being informed that Terri was diagnosed with Lou Gehrig's disease after the stabbings occurred (Tr. 910), and the prosecutor telling the jury to give "the dying woman" justice and give the "cold-blooded killer sitting right across the table looking at you, exactly what he deserves . . . hold him fully accountable" (Tr. 1479-1480). This is the final argument the jury heard before retiring to deliberate (Tr. 1480).

Cole's claim of ineffective assistance of counsel is not precluded by this Court's finding of no plain error on direct appeal. Each of the prosecutor's arguments were improper, counsel did not act as a reasonably competent attorney in failing to object to the arguments, and Cole was prejudiced by her deficient

performance. This Court should reverse the judgment of the motion court and remand this case for a new trial due to counsel's failure to object to the guilt phase arguments. In the alternative, this Court should vacate the death sentence and impose a sentence of life without parole or remand for a new penalty phase due to counsel's failure to object to the penalty phase argument.

ARGUMENT II

Defense counsel did not make a reasonable, strategic decision to not present evidence of Cole’s good behavior in jail, rather counsel failed to conduct the investigation necessary to making an informed decision as to what evidence to present. Cole was prejudiced by defense counsel’s deficient performance.

“On one or two occasions” after visiting Cole in the jail, counsel “[said] a few things” to some unnamed jail personnel (PCR Tr. 368-369). That was the extent of her investigation of Cole’s adjustment to incarceration. Respondent admits that, “counsel’s efforts in uncovering evidence related to appellant’s good behavior in jail were minimal” (Resp. Br. 40-41). It would be more accurate to say that her efforts were practically non-existent. Respondent maintains that it was reasonable for counsel to curtail her investigation of Cole’s adjustment to jail and to focus exclusively on the friends and family members she chose to call in the penalty phase (Resp. Br. 42-43). Respondent asserts that counsel “weighed the alternatives” and made a strategic decision not to pursue evidence of Cole’s good behavior in jail (Resp. Br. 42). Respondent’s position is wrong.

Counsel knew that Cole had a job while in the jail, and this indicated to counsel that he was a good prisoner, because only inmates who obeyed orders were given jobs (PCR Tr. 372). Counsel knew that Cole attended church before he was incarcerated, but she could not recall whether she knew he attended religious services and Bible study classes while incarcerated (PCR Tr. 371).

Counsel did not ask Cole if he could provide the names of any people who led religious services in the jail (PCR Tr. 371). Respondent argues that Cole did not volunteer this information (Resp. Br. 42), but surely counsel had some duty to ask pertinent questions of Cole.

Counsel did not interview Bradford, Cochrel, or Sister Klump (PCR Tr. 276, 289, 368-369, 371). These were obvious witnesses to investigate and could easily have been located. Bradford was the supervisor of the fifth floor housing unit where Cole was incarcerated (PCR Tr. 272). Cochrel was a housing unit officer on the fifth floor (PCR Tr. 283). Both men had daily contact with Cole (PCR Tr. 273, 284). Sister Klump could have been contacted through Richard Bruenderman, the jail employee who coordinated the volunteer religious service providers (PCR Tr. 299-300).

“Counsel cannot make a strategic decision against pursuing a line of investigation when he or she has not yet obtained the facts upon which such a decision could be made.” Cravens v. State, 50 S.W.3d 290, 295 (Mo. App. S.D. 2001). “Failing to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy.” Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991). Counsel did not learn enough about Cole’s adjustment to incarceration to make a reasoned decision not to use evidence of his good adjustment in the penalty phase. See, State v. Butler, 951 S.W.2d 600, 610 (Mo. banc 1997)(defense counsel failed to interview several witnesses who could have linked a person other than the defendant to the charged offense). Counsel did not

consciously reject the evidence that could have been proffered by Bradford, Cochrel, and Sister Klump for strategic reasons; she never investigated the evidence.

Respondent asserts that Cole was not prejudiced, because: 1) the evidence of Cole's good behavior in jail was cumulative to the evidence presented by counsel during penalty phase; 2) the prosecutor did not portray Cole as "violent toward society at large or potentially dangerous to other prisoners or corrections officers," therefore "evidence of appellant's ability to adjust favorably to life in jail was of only limited evidentiary value in terms of what aggravating evidence it tended to refute; 3) the evidence of Cole's good behavior and good adjustment to jail would have undermined counsel's closing argument that a sentence of life without parole was an adequate punishment, in that the evidence would have shown that Cole was "content and living a reasonably normal life in prison" (Resp. Br. 46-51).

The testimony of Bradford, Cochrel, and Sister Klump was not cumulative to that of the witnesses offered at trial. None of the penalty phase defense witnesses testified about Cole's adjustment to jail or his behavior while in jail. None of them had the opportunity to have daily contact with Cole while he was in jail nor did they have the training and experience of Bradford and Cochrel to enable them to testify that Cole was "an ideal inmate," who followed all the rules and was an "exceptional" worker (PCR Tr. 275, 285). Cochrel felt that Cole was "quite different" from the other inmates (PCR Tr. 286). A reasonable juror who

heard Cochrel's testimony could have readily concluded that Cole was not the worst of the worst and thus deserving of the death penalty. None of the penalty phase defense witnesses were objective; they were either related to Cole or a friend of his family. Bradford, Cochrel, and Sister Klump had no motivation to testify favorably for Cole.

Respondent's observation that this evidence "was of only limited evidentiary value in terms of what aggravating evidence it tended to refute" is contrary to the law. The jury instructions require the jurors to consider any facts and circumstances which mitigate punishment. See MAI-CR3d 313.44A. Mitigating evidence has value apart from its tendency to rebut a specific aggravating factor. In determining prejudice, a state court commits error if it fails to consider that mitigating evidence may alter the jury's selection of penalty, even if the mitigating evidence does not undermine or rebut the prosecution's death-eligibility case. Williams v. Taylor, 120 S.Ct. 1495, 1515-1516 (2000).

Respondent's assertion that evidence of Cole's good behavior in jail would have undermined defense counsel's argument that life without parole was an adequate punishment is meritless. Respondent makes an untenable leap of logic in asserting that because Cole followed all the jail rules, worked hard, was respectful, and attended religious services, he therefore was comfortable, content, and living a normal life in jail (Resp. Br. 51). No reasonable juror would conclude that Cole's good behavior in jail meant he was too happy and therefore needed to be executed. Furthermore, Respondent's assertion is not based on any purported strategy stated

by defense counsel during her post-conviction testimony. It is, rather, a manufactured justification created in hindsight.

This Court should reverse the motion court's judgment, vacate the death sentence, and impose a sentence of life without parole or remand for a new penalty phase.

ARGUMENT IV

Defense counsel did not make a reasonable, strategic decision to not present evidence of Cole’s mental state at the time of the offenses, rather counsel failed to conduct the investigation necessary to making an informed decision as to what evidence to present. Cole was prejudiced by defense counsel’s deficient performance.

Respondent argues that because defense counsel obtained evaluations of Cole’s competency and criminal responsibility, she therefore adequately investigated any mitigating circumstances concerning Cole’s mental state at the time of the offenses (Resp. Br. 80-85). It is correct that neither Dr. Scott nor Dr. Armour diagnosed Cole with a mental disease or defect, but that does not mean that it was reasonable for defense counsel to forgo further investigation of potential mitigating evidence regarding Cole’s mental state. The evaluations, in fact, should have alerted counsel to the need for additional investigation.

Dr. Scott wrote that Cole’s repeated stabbing of Curtis “may reflect a frenzied, out-of-control attack” (Ex. B, p. 5). Dr. Scott also wrote that, “during the alleged attack, the defendant reportedly questioned Victim #1 [Terri], asking her why she would do this to him and repeatedly stating that he loved her. Such statements in the context of their off-and-on relationship suggest that he was reacting out of anger, rejection, and/or hurt” (Ex. B, p. 6). Also, both Dr. Scott and Dr. Armour diagnosed Cole with alcohol abuse (Ex. A, p. 6; Ex. C, p. 8).

Respondent relies heavily on defense counsel's post-conviction testimony that she interviewed Cole, Cole's mother, and Cole's sister and they did not mention any mental health problems (Resp. Br. 85). Even if this testimony is true,³ it does not excuse counsel's failure to obtain Cole's medical records and to interview his doctor, Dr. Duhart. Counsel admitted she made no attempt to obtain the records (PCR Tr. 440-441). Counsel should have obtained Cole's medical records as a matter of course, but Dr. Scott's and Dr. Armour's diagnoses of alcohol abuse definitely should have alerted counsel to the need for Cole's medical records. The medical records and an interview of Dr. Duhart would have alerted counsel to the fact that Cole had been previously diagnosed with depression and that this diagnosis was made at the time of his separation from Terri (PCR Tr. II 60; Tr. 1515).

Defense counsel testified that Cole's family denied that he had an alcohol problem or any other medical infirmities, but if they had told her, she would have obtained his medical records and "would have explored that with the doctors who were doing the evaluations as well as perhaps finding someone else who was particularly acquainted with if he was an alcoholic with that problem" (PCR Tr. 464-465). Why then did counsel not obtain Cole's medical records after Dr. Scott and Dr. Armour diagnosed Cole with alcohol abuse?

³ Lillie Cole testified that defense counsel did not ask her if she had observed any signs of depression in Cole (PCR Tr. II 26).

Even if Cole's mother and sister did not mention Cole's depression to defense counsel, it was not reasonable for counsel to assume that no other witness could provide pertinent information about Cole's mental state. Counsel knew that James Dawson and Pete Ruffino were going to testify at trial, but she did not even question them about Cole's mental state (PCR Tr. 13, 35-36, 39). Both Dawson and Ruffino could have testified as to how depressed Cole was because he was unable to see his children and because Terri told him the boys had a new daddy (PCR Tr. 8-9, 33-34).⁴

This is not a case in which defense counsel, after conducting the necessary investigation, reasonably concluded not to present penalty phase evidence of Cole's mental state, rather counsel did not conduct the investigation required to make a reasonable decision whether to present evidence of Cole's mental state. This Court should reverse the judgment of the motion court, vacate the death sentence, and impose a sentence of life without parole or remand this case for a new penalty phase.

⁴ Respondent states that the amended motion only asserted that Dawson would testify about Cole's drinking (Resp. Br. 91). This is incorrect. The amended motion alleged that Dawson would have testified about his conversation with Cole in which Cole told him about Terri's comment that the boys had a new daddy (PCR L.F. 284).

CONCLUSION

Based on the argument presented in Point I, Cole asks this Court to reverse the judgment of the motion court and remand this case for a new trial, or in the alternative, remand for a new penalty phase. Based on the arguments presented in Points II, III, and IV, Cole asks this Court to reverse the judgment of the motion court, vacate the death sentence, and impose a sentence of life without parole or remand for a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Rebecca Kurz, hereby certify as follows:

1. The attached brief complies with the limitations contained in Rule 84.06(b).

The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. The brief contains 3,524 words, which does not exceed the 7,750 words allowed for an appellant's brief.

2. The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which the Public Defender System installed on _____, 2004. According to that program, this disk is virus-free.

3. Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid, to Mr. Shaun Mackelprang, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 on the ___ day of October, 2004.

Rebecca L. Kurz