

IN THE SUPREME COURT OF FLORIDA

MARTIN GROSSMAN,

Appellant,

v.

Case No. SC05-1688

Lower Tribunal CRC84-11698CFANO

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This is an appeal from the summary denial of a successive motion for postconviction relief. Appellant Grossman was convicted of murder and sentenced to death in 1985. The facts of the case are summarized in this Court's opinion on direct appeal, Grossman v. State, 525 So. 2d 833, 835-36 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989):

Appellant and a companion, Taylor, drove to a wooded area of Pinellas County on the night of December 13, 1984, to shoot a handgun which appellant had recently obtained by burglarizing a home. Appellant lived in neighboring Pasco County at his mother's home and was on probation following a recent prison term. Wildlife Officer Margaret Park, patrolling the area in her vehicle, came upon the two men and became suspicious. She left her vehicle with the motor, lights, and flashers on, and took possession of appellant's weapon and driver's license. Appellant pleaded with her not to turn him in as having a weapon in his possession and being outside of Pasco County would cause him to return to prison for violation of probation. Officer Park refused the plea, opened the driver's door to her vehicle and picked up the radio microphone to call the sheriff's office. Appellant then grabbed the officer's large flashlight and struck her repeatedly on the head and shoulders, forcing her upper body into the vehicle. Officer Park reported "I'm hit" over the radio and screamed. Appellant continued the attack, and called for help from Taylor, who joined in the assault. Officer Park managed to draw her weapon, a .357 magnum, and fired a wild shot within the vehicle. Simultaneously, she temporarily disabled Taylor by kicking him in the groin. Appellant, who is a large man, wrestled the officer's weapon away and fired a fatal shot into the back of her head. The spent slug exited her head in front and fell into a drinking cup inside the vehicle. Blood stains, high velocity

splatters, the location of the spent slug, and the entry and exit wounds show that the victim's upper body was inside the vehicle with her face turned inward or downward at the moment she was killed. Appellant and Taylor took back the seized handgun and driver's license, and fled with the officer's weapon. They returned to the Grossman home, where they told the story of the killing, individually and collectively, to a friend who lived with the Grossmans. The friend, Brian Hancock, and Taylor buried the two weapons nearby. Appellant, who was covered with blood, attempted unsuccessfully to burn his clothes and shoes which Taylor later disposed of in a nearby lake. Approximately a week later appellant and Taylor, individually and collectively, recounted the story of the murder to another friend, Brian Allan. Approximately eleven days after the murder, Hancock told his story to the police and appellant and Taylor were arrested. Taylor, upon his arrest, recounted the story of the murder to a policeman and, later, appellant told the story to a jailmate, Charles Brewer. Appellant and Taylor were tried jointly over appellant's objection. At trial, the state introduced the testimony of Hancock, Allan, and Brewer against appellant. The state also introduced Taylor's statement to the policeman against Taylor only. In addition, the state introduced the charred shoes, the two weapons, prints taken from the victim's vehicle, testimony from a neighbor who observed the attempted burning of the clothes, appellant's efforts to clean the Grossman van, and the changing of the van tires. Expert testimony as to the cause of death and the significance of blood splatter evidence was also introduced by the state. The jury was instructed that Taylor's admissions to the policeman could only be used against him, not appellant. The jury was instructed on premeditation and felony murder based on robbery, burglary, and escape. A general verdict of first-degree murder was returned against the appellant and Taylor was found guilty of third-degree murder. The judge followed the jury's twelve-to-zero recommendation that the appellant be sentenced to death.

Grossman's sentence is supported by four aggravating circumstances: (1) the murder was committed during the course of a robbery or burglary; (2) the murder was committed for the purpose of avoiding arrest; (3) the murder was committed to disrupt or hinder law enforcement; and (4) the murder was especially wicked, evil, atrocious, or cruel.

Grossman previously litigated a postconviction appeal and a petition for writ of habeas corpus in this Court, to no avail. Grossman v. Dugger, 708 So. 2d 249 (Fla. 1997). Thereafter, a successive habeas petition was filed on August 14, 2003, and denied on May 7, 2004. Grossman v. Crosby, 880 So. 2d 1211 (Fla. 2004). Grossman filed a petition for writ of habeas corpus in the United States District Court, Middle District of Florida, which was denied, Grossman v. Crosby, 359 F. Supp. 2d 1233 (M.D. Fla. 2005), and is currently on appeal to the Eleventh Circuit Court of Appeal, Case No. 05-11150-P.

On May 16, 2005, Grossman filed a successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851, asserting that relief was required under Roper v. Simmons, 543 U.S. 551 (2005) (V1/1-33).¹ The court below

¹ References to the record in this appeal will cite to the volume and page number. References to the record in Grossman's prior postconviction appeal, Florida Supreme Court Case No. 87,121, are cited as "1PC-R." followed by the volume and page number.

denied Grossman's motion, finding it to be procedurally barred and without merit (V1/44-46). This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court properly denied Grossman's successive postconviction motion as procedurally barred and without merit. Roper v. Simmons, 543 U.S. 551 (2005), does not compel reversal of Grossman's death sentence, since Grossman was 19 years old when he killed Officer Park. To the extent that Grossman claims new mental mitigation is available, his claim is procedurally barred.

ARGUMENT

WHETHER THE TRIAL COURT PROPERLY DENIED GROSSMAN'S
SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF.

Grossman challenges the trial court's summary denial of his successive postconviction motion. This Court will affirm a summary denial where the claims are facially invalid or conclusively refuted by the record. Foster v. State, 810 So. 2d 910, 914 (Fla.), cert. denied, 537 U.S. 990 (2002). Even taking the facts offered in Grossman's successive motion as true, the record conclusively demonstrates that he is not entitled to relief. Therefore, this Court must affirm the summary denial entered below.

Grossman asserts that his death sentence is unconstitutional in light of Roper v. Simmons, 543 U.S. 551 (2005). Although he acknowledges that he was over eighteen years of age when he killed Officer Park, he claims that a 2004 article on a brain-mapping study offers newly discovered evidence that must be considered with Roper in determining the propriety of his death sentence. The court below properly denied relief on his untimely motion.

Grossman's motion asserted that this claim could not have been presented earlier because Roper was not decided until 2005. However, Grossman clearly has no claim under Roper. In Roper,

the United States Supreme Court held that the Eighth Amendment's prohibition against cruel and unusual punishment forbids the execution of a defendant that was a juvenile at the time of the crime. Since Grossman was not a juvenile at the time of his crime, as the court found below, he is not entitled to relief under Roper. Hill v. State, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006) (noting Roper prohibition only applies to chronological age of defendant).

Grossman also asserts that newly discovered evidence suggests that the statutory mental mitigating factors apply in this case. Relief for newly discovered evidence requires a showing of facts unknown to the trial court, parties, or counsel at the time of trial, that could not have been discovered with due diligence, and would probably result in an acquittal on retrial. Robinson v. State, 865 So. 2d 1259, 1262 (Fla.), cert. denied, 540 U.S. 1171 (2004); Jones v. State, 709 So. 2d 512, 521 (Fla.), cert. denied, 523 U.S. 1040 (1998). The alleged new evidence is an article published in 2004, concerning a brain mapping study which reaches the unremarkable conclusion that the frontal brain lobes may not be fully developed until an individual is about twenty-five years old. Grossman has not even attempted to show that this article amounts to newly discovered evidence requiring vacation of his death sentence.

In fact, this Court has said that newly discovered evidence is, by its very nature, evidence that existed but was unknown at the time of trial. Wright v. State, 857 So. 2d 861, 871 (Fla. 2003), cert. denied, 541 U.S. 961 (2004).

There is nothing regarding this article or the study it describes which supports a legitimate claim of newly discovered evidence. See Robinson, 865 So. 2d at 1263-64 (finding allegation of newly discovered evidence to be procedurally barred, where evidence was alleged to be updated and revised statistical data, but was consistent with similar evidence previously presented on same issue); Commonwealth v. LaFave, 714 N.E.2d 805, 813 (Mass. 1999) (adopting rule that expert testimony will not be considered newly discovered evidence as the basis for a new trial "simply because recent studies may lend more credibility to an expert that was or could have been presented at trial"). There is no allegation that Grossman's brain was particularly underdeveloped for his age, and no explanation as to how this relates to statutory mitigation.

Even if Grossman could identify some mitigating value to the 2004 article, he cannot establish that such evidence could not have been discovered previously. Although the article may not have existed at the time of trial, brain mapping has been known as a psychological tool for many years. See State v.

Hughes, 969 P. 2d 1184, 1193 (Ariz. 1998) (noting defense expert's testimony regarding "brain mapping" technique); Williamson v. Haynes Best Western, 688 So. 2d 1201, 1215, n.14 (La. App. 1997).

Grossman's request for an evidentiary hearing to explore this claim of purported new mental mitigation was properly denied. Clearly, his opportunity to offer evidence of mental mitigation passed many years ago. No mental health evidence was offered at his initial penalty phase proceeding in 1985. Although Grossman's original postconviction motion to vacate asserted that he was denied a competent mental health examination by the defense expert consulted at the time of trial, Dr. Sidney Merin, Grossman's claim was denied as procedurally barred and insufficiently pled (1PC-R. V10/1803-04). One difficulty with consideration of this issue in postconviction was Grossman's refusal to waive confidentiality with this expert. Prior to the evidentiary hearing, the State wanted to question Dr. Merin as to what he knew and his conclusions at the time of trial, in order to rebut Grossman's claim that counsel had been ineffective for failing to provide Merin with necessary information; however, Grossman refused to waive confidentiality (1PC-R. V11/1959-60, 1968-71). During trial counsel McCoun's testimony, the State was not permitted to

explore his investigation into Grossman's mental health (1PC-R. V11/2032). By avoiding the issue at the evidentiary hearing and refusing to waive confidentiality with regard to Merin's examination, Grossman has defaulted on any claim of mental mitigation and cannot establish that his attorneys did not know about or could not have discovered information similar to that included in the 2004 article.

In addition, as the court below recognized, the Roper decision noted scientific and sociological studies confirming that youth generally possess a lack of maturity and an underdeveloped sense of responsibility, resulting in impetuous and ill-considered actions and decisions and therefore reduced moral culpability. Roper, 543 U.S. at ___ [125 S.Ct. 1183, 1195]. In light of studies much like the one Grossman has offered, the Roper Court decreed that, "a line must be drawn," and the appropriate line, for Eighth Amendment purposes, falls on a defendant's eighteenth birthday. Roper, 125 S. Ct. at 1198.

Grossman appears to seek a rule extending Roper's "bright-line" of eighteen years old to the age of twenty-five, based on the article's conclusion that the frontal lobe area of the human brain may not fully develop until the age of twenty-five. However, his claim does not offer the appropriate legal analysis

for the issue he presents. Roper's prohibition can only be extended by objective indicia of a national consensus against execution of offenders twenty-five years old or younger at the time of the crime. Grossman has not identified a single jurisdiction to have implemented legislation prohibiting the execution of defendants in this category.

Grossman's reliance on dicta from Urbin v. State, 714 So. 2d 411 (Fla. 1998), relating to the weight to be given age as a mitigating factor, is misplaced and offers no basis to reverse the summary denial entered below. The fact that the seventeen year old defendant's death sentence was disproportionate in Urbin does not establish that Grossman's sentence is cruel and unusual under Roper.

This Court properly refused to extend Roper beyond its unequivocal facts in Hill, supra. Other courts have agreed, and no court has granted relief under Roper to a defendant that was an adult at the time of the murder. In Moreno v. Dretke, 362 F. Supp. 2d 773, 812-813 (D. Tex. 2005), the court refused to grant relief to a defendant that committed a murder when he was eighteen, although much of the planning and preparation took place when he was seventeen. See also Jordan v. State, 2005 Miss. LEXIS 305, 42-43 (Miss. May 19, 2005) (refusing to grant relief to a defendant that committed murder when he was

eighteen); Hodges v. State, 912 So. 2d 730 (Miss. 2005) (same), cert. denied, 74 U.S.L.W. 3322 (Nov. 28, 2005).

Finally, even if the 2004 article, read in conjunction with Roper, offered a basis to conclude that the statutory mental mitigating factors could be applied in this case -- which Grossman has not alleged with specificity -- there is no possibility of an "acquittal" from the death penalty in this case. Given the strong aggravating factors and the brutal, senseless nature of Officer Park's murder, no reasonable juror would find Grossman's immaturity to outweigh the aggravation. The judge and jury already considered in mitigation Grossman's claims that he had no prior history of violence, had a deprived and difficult adolescence, was only nineteen, expressed remorse for the crime, and had been a well-behaved and cooperative prisoner -- but found this evidence did not outweigh the aggravating factors. The jury's unanimous recommendation for a death sentence, when the jury already knew Grossman to be a young man, demonstrates the egregious facts involved and the propriety of Grossman's sentence.

Viewed against his record, Grossman's assertion that newly discovered evidence suggests that mental mitigating factors may be applied in this case offers no substantive basis for relief. Because his allegations are conclusively refuted by the record,

this Court must affirm the order denying his successive motion to vacate.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm the Order entered below summarily denying Grossman's successive motion to vacate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Richard E. Kiley and James Viggiano, Jr., Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Dr., Suite 201, Tampa, Florida, 33619, this _____ day of January, 2006.

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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).

COUNSEL FOR APPELLEE