IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA

v.

Case No.: CRC04-04412CFAWS
UCN: 512004CF004412A000WS
Division: 4

JOE F. DAIAK,
SPN: 00459627, Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR POSTCONVICTION RELIEFAND DIRECTING THE OFFICE OF THE STATE ATTORNEY TO SET STATUS CHECK

THIS CAUSE is before the Court on Defendant's "Amended Motion for Postconviction Relief," filed by counsel on September 2, 2011, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. After due consideration of the motion, the record, the State's response to the Court's order to show cause, the testimony and evidence adduced at the evidentiary hearing, the parties' written closing arguments, and the relevant legal authority, the Court finds as follows:

PROCEDURAL HISTORY

The State charged Defendant by Amended Felony Information with four counts of second degree felony aggravated assault on a law enforcement officer (one count for each officer that was at the front door when Defendant fired two shots) on January 18, 2006. Defendant was found guilty after a jury trial, and he was sentenced to four concurrent sentences of twenty years (twenty-year minimum mandatory under 10-20-life) with the Department of Corrections. Defendant filed a direct appeal, and a mandate affirming was issued on June 25, 2008. Currently before the Court are the claims from Defendant's amended rule 3.850 motion. The Court has previously denied the following grounds from the instant motion: ground two in part,

ground three, ground four in part, ground five, ground nine in part, ground ten, ground thirteen, and ground fourteen. The Court convened an evidentiary hearing encompassing the remaining claims.

Ground one: Self Defense Jury Instruction

Defendant claims that trial counsel rendered ineffective assistance by failing to object to improper jury instructions on self-defense in the home and for failing to request that the Court give the proper instructions to the jury.

At the evidentiary hearing convened in this cause, trial counsel testified that Defendant was adamant about desiring that a stand-your-ground instruction be given to the jury, regardless of the fact that the Stand-Your-Ground Law (SYG) was not yet in effect at the time of Defendant's crimes.[1] Despite his testimony at the evidentiary hearing, the trial record shows that trial counsel did not attempt to have Defendant questioned on the record to ensure that he was amenable to having the SYG instruction given.

"Reasonable strategic decisions of trial counsel should not be second-guessed by a reviewing court." *Jones v. State*, 845 So. 2d 55, 65 (Fla. 2003). Furthermore, "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000).

In this case, even though trial counsel indicated at the evidentiary hearing that his choice of jury instruction in this case was strategic, the Court does not find that the strategy was reasonable. Regardless of the reason for seeking the SYG instruction, the fact remains that the instruction was inapplicable to the crimes committed. Defendant was not entitled to the SYG

[1] *See* transcript of evidentiary hearing at 48-50.

instruction, and counsel should not have argued that it be given. Therefore, counsel's assistance in this case was deficient.

The Court also finds that Defendant was prejudiced by the giving of the incorrect instruction. In the absence of an instruction on the correct rule of law, the jury could not possibly have made an informed decision about whether Defendant's actions in this case were justifiable in the eyes of the law. Essentially, Defendant's entire theory of defense was negated because counsel failed to ensure that the jury was given the proper instruction regarding justifiable use of deadly force. *See Carter v. State*, 469 So. 2d 194, 196 (Fla. 2d DCA 1985). The Court cannot find, therefore, that counsel's deficiency in this situation did not affect the verdict. The Court finds that there is a reasonable probability that, had the jury been properly instructed on the law regarding Defendant's justifiable use of force defense, the outcome may have been different. This allegation, therefore, entitles Defendant to relief.

Ground two: Defense of Home Jury Instruction

Defendant alleges ineffective assistance of counsel due to counsel's failure to object to an incomplete jury instruction with regard to defense of one's home in prevention of burglary. Specifically, Defendant states that the instruction given by the Court misled the jury because the Court did not instruct the jury that (1) if Defendant reasonably believed a burglary was being committed (as opposed to a completed act of burglary) then Defendant could use deadly force and (2) that there need not be actual proof of a burglary. Defendant alleges that he was prejudiced because the jury may have rejected Defendant's self-defense claim because there was no actual burglary committed by the deputies where the correct legal standard is whether Defendant reasonably believed that a burglary was in the process of being committed.

The Court finds the State's argument regarding ground two in their written closing argument to be persuasive. The Court thus adopts the State's reasoning as its own and denies ground two as not entitling Defendant to relief.

Ground four: Judgment of Acquittal (JOA)

Next, Defendant argues that his counsel was ineffective for failing to move for a JOA on three of the four counts for which Defendant was on trial. Defendant contends that counsel should have argued that Defendant had no knowledge of three of the four officers, as only one officer identified himself before Defendant fired his weapon. Defendant claims that had counsel rendered effective assistance by arguing a motion for JOA on Counts I, II, and III, the Court would have granted the motion, making the outcome in the instant case very different.

The Court finds this argument to be well taken. The evidence at trial was clear that only one officer had announced himself as the four victims approached the front door to speak with Defendant.[2] In fact, none of the four victims testified either that they had been able to see Defendant or that Defendant had seen them.[3]

The State argued in its written closing argument that, had trial counsel made the motion for JOA, it would have been denied, basing its contention upon three pieces of evidence: 1) the open front doors; 2) Defendant's movement toward the front of the house; and 3) Defendant's trial testimony that he had heard "voices" outside his home before firing his weapon.

Of course, Defendant's own testimony could not have been used to deny a motion for judgment of acquittal made immediately after the State had rested its case because Defendant had not yet testified. As for the testimony that the front door was open and Defendant apparently had moved toward the front of the house before firing, it may have influenced the Court's

[2] *See* Exhibit 1 attached to State's Response filed June 7, 2012, at 230, 314-16, 335-37, 371, and 378.
[3] *See id.* at 234-36, 316-18, 354-55, and 396.

decision with regard to the judgment of acquittal. However, the officers' statements regarding their positions around the front door at the time of the shooting do not indicate that all four officers were necessarily visible in the doorway. Only two of the officers were positioned in front of the open door.[4] Deputy Mitchell testified that he had been at the back of the group but had broken away from the group to attempt to look through a nearby window.[5] Deputy Meizo testified that he was on the south side of the door, "basically standing in front of [the] concrete outside wall," using the wall for cover.[6] Arguably, the State produced insufficient evidence at trial to prove that Defendant was actually aware of all four officers.

Hence, had counsel moved for a judgment of acquittal based on the State's failure to prove intent with regard to three of the officers, this Court finds that there is a reasonable probability that the Court would have granted a judgment of acquittal on one or more counts. Consequently, Defendant has proven both deficiency and prejudice, and he is entitled to relief on this claim.

Ground six: Telephone in Photograph

Defendant abandoned this claim at the evidentiary hearing. It cannot, therefore, be a basis for granting the instant motion.

Ground seven: Unlisted Expert

Defendant alleges ineffective assistance of counsel for failure to object to the State's calling Deputy Tanner as an unlisted expert witness. Defendant states that he was prejudiced because he was not able to depose Deputy Tanner or otherwise challenge this testimony prior to

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[4] *See id.* at 373-374.
[5] *See id.* at 316-318. Deputy Mitchell testified that he was unsuccessful in seeing Defendant through the window because window blinds blocked his view. *Id.*
[6] *See id.* at 355.

trial. Defendant additionally argues that his counsel should have sought a continuance in order to produce an expert to testify in rebuttal to Deputy Tanner's testimony.

Surrebuttal Witness

At the evidentiary hearing, Defendant adduced evidence focused, in large part, on the testimony that could have been adduced from Expert Kurt Gell had counsel called him as a surrebuttal witness at trial. However, as the State points out in their closing argument, the portion of this claim relating to counsel's ineffectiveness for failure to move for a continuance in order to call another witness is conclusively rebutted by the record. At trial, the Court asked Defendant if he wanted to call any additional witnesses to testify on his behalf. Defendant indicated, under oath, that he did not wish to have any further witnesses called to the stand.[7]

The Court finds that, had Defendant truly wanted another witness called, he would not have hesitated to inform the Court of his desire. During the colloquy initiated by the Court, Defendant indicated that his attorney had missed some issues during the trial that Defendant felt should have been covered. When the Court asked for examples, Defendant gave the Court specific examples of counsel's shortcomings. However, when the Court asked Defendant whether he wanted additional witnesses called, instead of indicating to the Court that he wanted his firearms trainer to testify, he stated that he did not want any further witnesses to be called.[8]

Additionally, the evidentiary hearing testimony is clear that, prior to trial, Defendant specifically asked trial counsel to get Defendant's former firearms trainer to testify on his behalf. Also, after hearing the expert testimony from Deputy Tanner, Defendant also requested that counsel move for a continuance to retain a firearms expert.[9] The Court cannot find, therefore,

[7] *See* Exhibit 1 attached to State's Closing Argument filed April 2, 2014, at 827-29.
[8] *See id.*
[9] *See* transcript of evidentiary hearing at 46 and 56.

that Defendant's assurance to the Court that no other witnesses were needed was simply due to lack of thought about the issue.

The Court further notes that the evidentiary hearing record shows that Defendant is a legally trained, former member of the Florida Bar.[10] The Court finds that Defendant's status as a former attorney put him in the position of having ample ability to understand the right that he was waiving when he told the Court that he wanted no other witnesses called. At the evidentiary hearing, trial counsel testified that Defendant was very active in researching his own case, determining strategy, and even selecting jury instructions.[11]

Defendant cannot now go behind his sworn testimony to the Court. *See Stano v. State*, 520 So. 2d 278, 280 (Fla. 1988). While the law is clear that no defendant may make sworn representations to the court without those representations being held meaningful, the Court finds that Defendant's legal training makes the inquiry weigh even more heavily against granting relief on this ground.

Importantly, the Court finds that trial counsel had listed Mr. Gell as a potential defense witness and had contacted Mr. Gell on Defendant's behalf, but Mr. Gell was not willing to testify at the trial.[12] Trial counsel also testified to these facts at the evidentiary hearing.[13] The Court finds counsel's testimony on this point to be credible. *Wyatt v. State*, 78 So. 3d 512, 523 (Fla. 2011) (noting that the trial court's determination of witness credibility will not be overturned provided there is competent substantial evidence to support the determination). Trial counsel cannot, therefore, have been found ineffective for failing to call Mr. Gell to testify on

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[10] *See* transcript of evidentiary hearing at 42-43.
[11] *See* transcript of evidentiary hearing at 42-44, and 50.
[12] *See* Exhibit 1 attached to State's Closing Argument filed April 2, 2014, at 142-45.
[13] *See* transcript of evidentiary hearing at 46-47.

Defendant's behalf. Based upon all of these considerations, the Court finds that Defendant cannot be entitled to relief on this portion of ground seven.

Richardson[14] Hearing

Defendant's argument that a *Richardson* Hearing should have been held is equally fruitless. With regard to this point, Defendant has not shown how he was prejudiced by counsel's failure to move for a *Richardson* hearing. Assuming without deciding that a *Richardson* violation occurred, Defendant has not shown that the discovery violation prejudiced him.

When a discovery violation has occurred, the court must determine "whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense. . . . [in] that the defendant's trial preparation or strategy would have been materially different had the violation not occurred. . . . [in other words, the information] reasonably could have benefited the defendant." *Giles v. State*, 916 So. 2d 55, 58 (Fla. 2d DCA 2005), *quoting State v. Schopp*, 653 So. 2d 1016, 1020 (Fla. 1995). Moreover, "the harmless error standard in *Schopp* does not focus on the discovery violation's effect on the verdict. . . . [but on] whether there is a reasonable possibility that the discovery violation materially hindered the defendant's trial preparation or strategy." *Muniz v. State*, 988 So. 2d 1194, 1197 (Fla. 2d DCA 2008) (internal quotations omitted).

In this case, the record shows that the State had informed Defendant and his counsel that, if Defendant himself or a weapons expert were to have testified to Defendant's firearms experience, the State would call a rebuttal expert.[15] Although Deputy Tanner was not named as the specific expert that the State intended to use as their rebuttal witness, Defendant has not

[14] *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).
[15] *See* Exhibit 1 attached to State's Closing Argument filed April 2, 2014, at 145. *See also* transcript of evidentiary hearing at 46-48.

alleged that the State could not have listed, qualified, and used, Deputy Tanner as their firearms expert had they listed him as such. Because Defendant was aware that the State planned to call an expert to rebut his claims of firearm proficiency, Defendant has not shown that, had he known the expert's name, his defense at trial would have been "materially different" from the defense presented.

Additionally, Defendant has not shown that, had his counsel requested a *Richardson* hearing, the Court would have excluded Deputy Tanner's expert testimony. Witness exclusion is an "extreme" remedy, and should not be used when another, less drastic remedy is available. *See Donaldson v. State*, 656 So. 2d 580, 581 (Fla. 1st DCA 1995). Defendant has not shown that exclusion of this witness was the only viable remedy.

Defendant also alleges that counsel should have moved for a continuance to depose the witness. However, Defendant does not allege what facts counsel would have learned by deposing this witness, nor does he allege how counsel's cross examination of this witness or overall rebuttal strategy would have changed had he been granted a continuance in order to depose Deputy Tanner in his expert capacity. *See Ferrell v. State*, 29 So. 3d 959, 969-70 (Fla. 2010). Consequently, the Court does not find that Defendant has proven that his counsel's failure to move for a Richardson hearing in any way prejudiced him. Ground seven does not entitle Defendant to relief.

Ground eight: Motion to Suppress

In this ground, Defendant contends that the evidence from inside the house, including the bullet holes and medication bottle, should have been suppressed because the police did not obtain a warrant before entering and searching the home, although there would have been sufficient time to do so.

"[W]here defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious." *McDonald v. State*, 952 So. 2d 484, 497 (Fla. 2006). Furthermore, "[e]vidence that is obtained pursuant to unconstitutional police procedures may still be admissible if it is shown that the evidence would ultimately have been discovered by legal means." *Lowe v. State*, 751 So. 2d 177, 179-180 (Fla. 2d DCA 2000).

In this case, Defendant has not alleged that the police could not have procured a warrant, had they sought one. Nor has Defendant shown that the police would have been unable to discover the evidence by other legal means after Defendant had been taken into custody. If the evidence would have been discovered anyway, the alleged unconstitutionality of the means used to discover the evidence is not a bar to the use of the evidence. Defendant has failed to show that counsel was deficient or that his defense was prejudiced by counsel's failure to file a motion to suppress that has not been shown to have been meritorious.

Additionally, at the evidentiary hearing, counsel testified that Defendant did not wish for counsel to file a motion to suppress the evidence uncovered in his home. Counsel testified that Defendant felt that such evidence was powerful proof that he was not guilty of the charged offenses.[16] The Court finds counsel's testimony in this regard to be credible. Also, as noted above, reasonable strategic decisions do not constitute ineffectiveness of counsel. The Court does not find counsel's failure to file a motion to suppress to have been unreasonable. This allegation, therefore, cannot entitle Defendant to relief.

[16] *See* transcript of evidentiary hearing at 44-45.

Ground nine: CAD Logs

Defendant alleges that counsel was ineffective by not requesting a *Richardson* hearing, moving for a mistrial, or asking for a continuance based upon the State's alleged *Brady*[17] violation. The substance of the alleged *Brady* violation is the State's failure to disclose Computer Aided Dispatch (CAD) logs demonstrating the time of the arrival of law enforcement on the scene, the time of the gunshots, and the time of the SWAT team entry into Defendant's home. Defendant argues that the CAD logs were not produced by the State until mid-trial, despite the State's clear obligation to produce them given the Defense's filing a motion for a Statement of Particulars. Defendant ultimately argues that counsels' failure to request a *Richardson* hearing, move for a mistrial, or ask for a continuance based on this *Brady* violation prejudiced Defendant. He argues that the documents were absolutely necessary for Defendant to prepare his defense and prove that the State deliberately misled the jury and the Court as to the timetable of the events.

The Court finds the State's argument regarding this issue in the written closing argument to be well reasoned and well supported. The Court therefore adopts the State's reasoning as its own with regard to this ground. The Court finds that ground nine does not entitle Defendant to relief.

Ground eleven: Right to Remain Silent

Defendant alleges that counsel was ineffective by failing to object to improper testimony on Defendant's right to remain silent. A law enforcement officer testified at trial that when the officer encountered Defendant in his home, Defendant "kept asking for his attorney, Shahan, by name." Defendant cites case law holding that a request for an attorney is evidence of a comment

[17] *Brady v. Maryland*, 373 U.S. 83 (1963).

on the right to remain silent. Defendant alleges that this comment was prejudicial. Defendant argues that this issue should have been preserved for appeal by an objection by counsel.

Defendants in all criminal cases have the absolute constitutional right not to incriminate themselves. *See* Fla. Const. Art. I, § 9 and USCS Const. Amend. 5. An accused may invoke this right to remain silent without fear that the invocation will be used against the accused at trial. *See Green v. State*, 27 So. 3d 731, 735 (Fla. 2d DCA 2010). If a comment made at trial "is fairly susceptible of being construed by the jury as a comment on the defendant's exercise of his or her right to remain silent, it violates the defendant's right to silence." *Id.* "Admission of a defendant's statement requesting an attorney amounts to a comment on the defendant's right to remain silent." *Grier v. State*, 934 So. 2d 653, 655 (Fla. 4th DCA 2006). Furthermore, unless a comment on a defendant's right to remain silent can be shown to have been harmless error, the trial court's denial of the motion for mistrial regarding the comment will be reversed. *See Elisha v. State*, 949 So. 2d 271, 274 (Fla. 4th DCA 2007).

The Court finds that counsel was deficient for failing to object to the officer's testifying that Defendant asked for his attorney. At the evidentiary hearing, trial counsel testified that he made a strategic choice not to object to the testimony because he felt that the objection would simply highlight the error. However, the Court does not find such a strategy in this case to have been reasonable.

Deputy Roehrig's testimony clearly stated that Defendant would not respond to questions and that he "kept asking for . . . his attorney."[18] The Court finds that the officer's testimony that Defendant asked for his attorney was a comment on Defendant's right to remain silent, and counsel was deficient for failing to object and move for a mistrial.

[18] *See* Exhibit 1 attached to State's Closing Argument filed April 2, 2014, at 496.

The Court finds that prejudice in this case has been established. Had counsel objected and moved for a mistrial, a mistrial would properly have been granted. In this case, the verdict essentially hung on the jury's determination of Defendant's credibility. This Court cannot find that the evidence of Defendant's lack of cooperation after his arrest did not adversely affect the jury's view of Defendant's credibility. This error was further highlighted when Defendant testified that he would have been very cooperative had he known that the people outside his residence were law enforcement.[19] Because the jury had been told that Defendant refused to cooperate after his arrest and instead said only that he wanted his attorney, there is a substantial probability that the jury believed that Defendant's testimony was not credible. This Court cannot find that the comment on Defendant's silence was harmless or would not have warranted a mistrial. Ground eleven has been shown to entitle Defendant to a new trial.

Ground twelve: Baker Act

Defendant alleges ineffective assistance of counsel for counsel's failure to object to comments made by the prosecutor that Defendant had been committed pursuant to the Baker Act after his arrest. Defendant alleges that no evidence was presented at trial regarding this and Defendant alleges prejudice stemming from mentioning the Baker Act and his possible suicidal behavior. Furthermore, Defendant argues that the trial court had previously decided that the Baker Act was not to be mentioned, and the State disregarded this ruling.

The Court finds the State's argument on this ground in their written closing argument to effectively refute the Defendant's contention in this ground. The Court therefore adopts the State's reasoning on ground twelve and does not find this ground to entitle Defendant to relief.

[19] *See* Attachment 1, excerpt from trial transcript at 662.

Ground fifteen: Cumulative Error

"Where multiple errors are found, even if deemed harmless, the cumulative effect of such errors may deny to defendant the fair and impartial trial that is the inalienable right of all litigants." *Braddy v. State*, 111 So. 3d 810, 860 (Fla. 2012) (internal quotation omitted). Even were the above-enumerated errors insufficient, standing alone, to warrant granting Defendant a new trial, the Court finds that the magnitude and numerosity of the errors—including a witness's commenting on Defendant's right to remain silent, the jury's being instructed incorrectly on the sole defense theory, and counsel's missing an opportunity for judgments of acquittal on multiple charges—requires that Defendant's convictions be vacated. The Court finds that Defendant must be granted a new trial.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1) Defendant's motion for postconviction relief is **GRANTED** with regard to grounds one, four in part, eleven, and fifteen.

2) Defendant's motion for postconviction relief is **DENIED** with regard to each of Defendant's other grounds for relief.

3) The Judgment and Sentence of December 1, 2006, are hereby **VACATED**.

4) It is further **ORDERED** that the Office of the State Attorney shall contact the Court **within 15 days** of the date of this order to **SET A DATE FOR A STATUS CHECK**.

DONE and ORDERED in Chambers at New Port Richey, Pasco County, Florida, this 20 day of June, 2014.

William R. Webb, Circuit Judge

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