IN THE SUPREME COURT OF THE STATE OF DELAWARE

RALPH SWAN,	)	
	)	No. 247, 2010
Defendant Below-	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in and
v.	)	for Kent County
	)	
STATE OF DELAWARE,	)	ID No. 0002004767
	)	
Plaintiff Below-	)	
Appellee	)	

OPINION ON REMAND

Date of Remand: December 7, 2010
Date of Return: March 16, 2011

This case is on appeal from a decision of this Court denying defendant Ralph Swan's motion for post-conviction relief. The Supreme Court has remanded it with two inquires related to defendant's claim of ineffective assistance of Counsel at his penalty hearing. The Court denied an application from Swan to file a brief on remand as the order of remand did not appear to contemplate a re-opening of the record. The Court, however

did review pertinent portions of the Supreme Court briefs to help focus its response.

In 2001 Ralph Swan was convicted of first degree murder and associated crimes. The jury recommended a death sentence and the Court imposed it. The conviction and sentence were affirmed by the Delaware Supreme Court.[1] A co-defendant, Adam Norcross, was tried separately, also convicted and sentenced to death. His conviction and sentence also were affirmed.[2]

On November 4, 1996 Swan and Norcross smashed through a patio door at the home of Kenneth Warren and shot him to death in front of his wife and young son. They stole Mrs. Warren's purse. They were not arrested until February of 2000. A comprehensive and definitive statement

[1] Swan v. State 820A2 342 (Del 2003)
[2] Norcross v. State 816A2d 757 (Del. 2003)

of the facts of the crime can be found in the Supreme Court's affirmance opinions.

Swan's post-conviction motion asserted multiple claims for relief all of which were denied. This remand, as noted, only relates to his claim of ineffective assistance of counsel at his penalty hearing.

Swan first contends that his counsel failed to introduce evidence that he had been abused as a child by his mother and step-father. He produced at his post conviction hearing three witnesses to substantiate his claim of abuse. They were his younger step-brother, a step-aunt and a third grade friend. All said that they would have testified if asked at Swan's trial.

The Court rejected this claim of ineffectiveness because Swan failed to produce evidence that he had advised trial counsel that he had been abused or of the whereabouts of witnesses who could testify about his

childhood experiences. Moreover, Swan points to nothing else in the record that would have justified counsel's pursuing this line of inquiry.

Swan's trial counsel testified that Swan denied being abused and refused to provide information about his mother. Counsel had Swan's Delaware educational records and his Texas prison records. (Before returning to Delaware in 1996, Swan was serving a sentence for armed robbery in Texas.) Nothing in those records indicated childhood abuse.

Finally, counsel had full access to Swan's father and his family. Swan's father maintained contact with him until Swan's mother disappeared with him around age eleven. They were reunited in 1996 when Swan's father located him in a Texas prison and helped him get a parole. The family was unable to provide any information regarding abuse as claimed by Swan in this proceeding.

Because Swan introduced no evidence to rebut the above, the court found that trial counsel was not to be faulted for failing to discover evidence that Swan was an abused child.

Second, Swan contended that counsel should have presented evidence that at the time of the murder he suffered from post-traumatic stress disorder and was intellectually deficient. He had two expert witnesses who testified to that effect, based on interviews with Swan and testing conducted almost ten years after the murder. The Court rejected this claim for several reasons.

First, trial counsel testified that they observed no signs of mental illness or intellectual compromise. This comported with the Court's observation of Swan during pre-trial and trial proceedings. Swan responded appropriately in all interactions with the Court and, in fact, filed a *pro se* motion to disqualify one of his appointed trial counsel which had enough

merit to be considered by the Supreme Court on appeal, although the contention was ultimately rejected.

Second, the Court was not persuaded that the opinions would have been the same at the time of trial given the lapse of time (over three years of which was due to Swan and Norcross avoiding detection and apprehension) between the testing and the crime. The Court was also not satisfied that Swan's alleged post-traumatic stress disorder existed at the time of the murder instead of developing later as the result of the traumatic event of being convicted of murder, sentenced to death and residing on death row for five years.

Finally, the court noted that the expert opinions were heavily dependent on statements made by Swan regarding his abusive childhood. Since Swan presented no evidence that he would have cooperated with

experts retained by trial counsel, the Court found that these opinions could not have been formed by experts retained at the time of trial.

Against this background, the Delaware Supreme court asks this court to consider several United States Supreme court decisions and two decisions of the U.S. Court of Appeals for the Third Circuit. These decisions are all distinguishable because they are based on counsel having failed to conduct any investigation relative to penalty or having failed to use available evidence.

In Williams v. Taylor the Supreme Court found that "counsel did not begin to prepare for [the penalty] phase of the proceeding until a week before trial." And "failed to conduct an investigation that would have

uncovered extensive records graphically describing Williams' nightmarish childhood…"[3] No such showing was made here by Swan.

In Wiggins v. Smith, the Court found that counsel's "decision to end their investigation when they did … was [not] reasonable in light of the evidence that counsel uncovered in the social service records – evidence that would have led a reasonably competent attorney to investigate further."[4] Swan points to no records or other evidence that would have led his trial counsel to investigate further.

In Porter v. McCollum the Court found that counsel admitted "that he had only one short meeting with Porter regarding the penalty phase [and] did not obtain any of Porter's school, medical or military service records or

[3] 529 U.S. 362, 395 (2000)
[4] 539 U.S. 510, 534 (2003)

interview any member of Porter's family…" [5] This situation is not even remotely similar to the one at hand in this case.

In Sears v. Upton[6] the State conceded that a constitutionally inadequate investigation had been conducted into defendant's metal status and that an appropriate investigation would have disclosed significant cognitive and psychological problems. Here there is no evidence of an inadequate investigation because defendant has failed to demonstrate what investigation would have turned up the evidence he says should have been presented.

In Jermyn v. Horn, a Third Circuit decision, the Court found that counsel was deficient in failing "to investigate the circumstances surrounding Jermyn's childhood, even though counsel admitted that he was

[5] 130 S.Ct. 447, 453 (2009)
[6] 130 S.Ct. 3259 (2010)

aware that Jermyn had claimed that he was abused as a child."[7] Again a circumstance not presented in this case.

Outten v. Kearny,[8] also from the Third Circuit, is likewise inapplicable here, because the Court found that Counsel's investigation into Outten's childhood was only cursory, that evidence of abuse was readily available and that counsel's error was to pursue the wrong theory of mitigation. As noted many times before, here there was no readily available evidence of abuse because Swan denied being abused.

Finally in Rompilla v. Beard,[9] the Supreme Court reversed a decision of the Third Circuit on very limited grounds. Rompilla, according to the opinion was unhelpful in developing a mitigation strategy and was obstructive by sending counsel off on false leads. And, much like Swan, he also told his counsel that his childhood and schooling were normal. Post-

[7] 266 F.3d 257,306 (3rd Cir 2001)
[8] 464 F.3d 401 (3rd Cir 2006)
[9] 545 U.S. 374 (2005)

conviction counsel, however, developed evidence to the contrary. Justice Souter writing for four members of the five Justice majority noted that trial counsel failed to pursue leads identified by post-trial counsel but found only that it was "debatable" that counsel was obligated to follow those leads. Instead, the majority opinion rests solely on the failure of trial counsel to research the circumstances of a prior conviction that the prosecutor identified as an aggravating circumstance. Justice O'Connor in her concurring opinion makes it clear that she joined in the majority only on the latter basis.[10] Rompilla does not hold that defense counsel is obligated to pursue every conceivable lead in mitigation.

These cases do not lead the Court to alter its conclusion that trial counsel for Swan was not ineffective.

[10] Justice O'Connor retired shortly after the Rompilla decision. Ironically, she was replaced by the author of the Third Circuit opinion, Samuel Alito.

Second, the Supreme Court asks this Court for its opinion regarding the prejudice prong of Strickland v. Washington.[11] Under this test a defendant in order to secure relief must demonstrate that it is "reasonable likely" that but for counsel's errors the result in the case would have been different, i.e., that a death sentence would not have been imposed. The "likelihood of a different result must be substantial and not just conceivable."[12] Since the Court has not found counsel deficient, it must assume that the evidence of post-conviction evidence of childhood abuse, deficient intellect and post-traumatic stress disorder would have been presented at Swan's penalty hearing.

Swan's jury recommended a death sentence by a vote of seven-to-five. The Court, however, cannot find that there is a substantial likelihood

[11] 466 U.S. 668 (1984)
[12] Harrington v. Richter 562 U.S. ___ 2011.

that the vote would have favored life imprisonment if the jury had been presented with the post-conviction evidence.

First the evidence of childhood abuse was confined to a period before Swan was taken from Delaware, fifteen or more years before the murder. It is thus just debatable as to whether the abuse would have been a significant mitigating factor.

Second, evidence of Swan's intellectual deficit would have been countered by evidence that he held responsible jobs before and for at least three years after the murder. It would also have been countered by the evidence that Swan attempted to pass a note to Norcross after their arrest giving him legal advice; namely not to make any statements and to recant any he had made. There was thus ample evidence that regardless of his IQ Swan was a savvy person.

Finally, the alleged PTSD diagnosis would have been rebutted by the fact that Swan was able to function normally in society for the three years after the murder and before his arrest.

Although the Court has concluded that jury's recommendation would not have changed, the inquiry cannot end there. Under Delaware law as it existed at the time, the jury's recommendation was just advisory. The final determination of penalty rested with the trial judge.[13] Having heard all of the evidence during the guilt and penalty phases of the trial and all of the post-conviction evidence, the Court finds that the new evidence would not have altered its conclusion that the aggravating circumstances outweighed the mitigating circumstances and justified the imposition of the death penalty. The Court thus finds no prejudice to Swan from the omission of later discovered evidence from his penalty hearing.

[13] State v. Swan 2001 WL1012265 (Del. Super)

Finally it is worth noting that the Supreme Court in affirming Swan's sentence held as follows:

> "The aggravating circumstances are, as the trial Judge noted, "overwhelming." What happened on November 4, 1996 was "every family's worst nightmare." Society deems the home as the one place where a person would feel secure from the elements that may place their family at risk. The members of Warren's family may never again enjoy that feeling of safety in one's home. The fact that Swan and Norcross executed Warren in his own home in front of his wife and son is an aggravator of utmost proportions.
>
> "The ruthlessness of the crime is compounded by the fact that Swan saw the Warren family through the patio doors before he broke in. Swan knew he would be confronting Warren. Swan had a gun and could have demanded valuables, Tina's purse or Kenneth's wallet. But Warren was given no chance to comply with any demands. He was attacked immediately and brutally murdered."[14]

The Court does not find that the post-conviction penalty evidence would have altered the ultimate result.

The case is returned to the Supreme Court.

Judge John E. Babiarz, Jr.

[14] Swan v. State, id at 360-361