[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 15-15228

BILLY LEON KEARSE,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 2:09-cv-14240-WJZ

Before WILSON, LUCK, and ED CARNES, Circuit Judges.

LUCK, Circuit Judge:

Billy Kearse was convicted and sentenced to death for the 1991 murder of police officer Danny Parrish. Thirty years later, Kearse appeals the denial of his petition for a writ of habeas corpus under 28 U.S.C. section 2254. He contends that the Florida Supreme Court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984) in denying claims that his trial counsel was ineffective because he failed to investigate and prepare for the testimony of the state's mental health expert and he failed to investigate and present evidence of Officer Parrish's prior misconduct and difficulties dealing with the public. Kearse also contends that the Florida Supreme Court unreasonably applied *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005) in concluding that his death sentence was not cruel and unusual even though he had low-level intellectual functioning, mental and emotional impairments, and was eighteen years and eighty-four days old at the time of the murder. After careful review of the briefs and the record, and with the benefit of oral argument, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Murder

On the night of January 18, 1991, Kearse and his friend, Rhonda Pendleton, decided to pick up some pizza. On their way back to Pendleton's home in Fort Pierce, Florida, Kearse drove the wrong way down a one-way street. Officer Parrish saw Kearse driving the wrong way and pulled him over for a traffic stop. Kearse couldn't give Officer Parrish a valid driver's license because he didn't have one and he lied about his name and date of birth. Officer Parrish told Kearse that he would write Kearse three tickets and let him go if Kearse would tell him his real name.

Kearse kept lying about his name, so Officer Parrish told Kearse to get out of the car and put his hands on top of it. When Officer Parrish went to handcuff Kearse, Kearse told Officer Parrish not to touch him and called Officer Parrish a "lying ass pig" and said "I'm not going no mother fuckin' where with you." At some point, Officer Parrish accidentally hit Kearse below the eye with his handcuffs while trying to control Kearse. A physical struggle followed during which Kearse snatched Officer Parrish's service pistol.

Kearse shot Officer Parrish, causing Officer Parrish to fall back. Kearse briefly paused while Officer Parrish pleaded for his life—"Come on, man, don't do it, don't do it"—before firing off another round of bullets. He fired again and again and again and again and again and again and again and again and again and again

and again—a total of thirteen bullets into Officer Parrish, killing him.

Kearse kept Officer Parrish's pistol, drove Pendleton home, and flattened his car's tire "[t]o keep the police off [him]." He told Pendleton that he killed Officer Parrish because he was on probation, he wasn't sure if there was a warrant out for his arrest, and he didn't want to go back to prison so soon after his release the month before. Kearse was arrested later that night and confessed that he shot Officer Parrish.

The Trial

The State of Florida charged Kearse with first-degree murder and robbery with a firearm. Robert Udell, a defense attorney experienced with capital cases, was appointed to defend Kearse.

After a week-long trial in October 1991, the jury convicted Kearse on both counts. As required by Florida's capital-sentencing statute, the state trial court then held a separate sentencing hearing in front of the jury. The jury recommended that Kearse be sentenced to death, and the state trial court sentenced Kearse to death consistent with the jury's recommendation. The Florida Supreme Court affirmed Kearse's convictions but remanded for resentencing because of "errors relate[d] to the penalty phase instructions and the improper doubling of aggravating circumstances." *Kearse v. State*, 662 So. 2d 677, 685, 686 (Fla. 1995).

Resentencing

Resentencing was set for Monday, December 9, 1996. Thirteen days before the resentencing hearing, the state moved to have its mental health expert, Dr. Daniel Martell, examine Kearse. In response, Mr. Udell moved to continue the resentencing or to strike Dr. Martell as a witness. Mr. Udell argued that he only heard about the state's intent to use Dr. Martell as an expert witness after the state responded to a discovery demand on November 30. And he said he could not attend Dr. Martell's examination on the state's proposed dates because of scheduling conflicts. Mr. Udell also moved to: (1) limit the use of any information gathered from the examination; (2) declare unconstitutional Florida Rule of Criminal Procedure 3.202—the newly established rule that permitted the state to examine Kearse;[1] (3) prohibit application of rule 3.202; and (4) limit the scope of the examination.

On December 3, 1996, the state trial court held a hearing on Mr. Udell's motions. The state trial court granted the state's motion to examine Kearse and set the examination for December 5,

[1] Rule 3.202 first became effective on January 1, 1996. *See Amends. to Fla. Rule of Crim. Proc. 3.220—Discovery (3.202—Expert Testimony of Mental Mitigation During Penalty Phase of Cap. Trial)*, 674 So. 2d 83, 83–84 (Fla. 1995). It was later amended on May 2, 1996. *Id.* at 85. At the time of Kearse's resentencing, rule 3.202 provided that, "in those capital cases in which the state gives notice of its intent to seek the death penalty within 45 days from the date of arraignment . . . the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the state." *Id.*

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