

IN THE SUPREME COURT OF FLORIDA

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S. J. WHEAT

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ANTHONY BERTOLOTTI,

Appellant,

v.

CASE NO. 91432

STATE OF FLORIDA,

Appellee.

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ANSWER BRIEF OF APPELLEES FROM  
THE DENIAL OF POST-CONVICTION RELIEF

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TABLE OF CONTENTS

	<u>PAGES</u>
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF ARGUMENT.....	1a
ARGUMENT	
I.    BERTOLOTTI WAS PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, AND A REASONABLE DEFENSE TO FIRST-DEGREE FELONY MURDER, WAS PRESENTED.....	2-5
II.   TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BY UNREASONABLY AND PREJUDICIALLY FAILING TO PROVIDE COMPETENT MENTAL HEALTH ASSISTANCE FOR THE DEFENDANT.....	6-16
III.  COUNSEL WAS EFFECTIVE AND DID NOT FAIL TO INVESTIGATE AND PRESENT STATUTORY AND NON-STATUTORY MITIGATING FACTORS.....	17-19
IV & V. THE REMAINING CLAIMS RAISED BY THE DEFENDANT IN POST-CONVICTION PROCEEDINGS ARE PROCEDURALLY BARRED FROM CONSIDERATION BY THE LOWER COURT AND THIS COURT, AS WELL.....	20
CONCLUSION.....	21
CERTIFICATE OF SERVICE.....	22

STATEMENT OF THE CASE AND FACTS

The factual history of this case is contained in this court's decision on direct appeal, Bertolotti v. State, 476 So.2d 130 (1985). The state refers the court to the argument section of his brief as to the facts and evidence presented in the course of proceedings below and is not specifically recite them herein due to time constraints.

SUMMARY OF ARGUMENT

Counsel was not ineffective in not utilizing a futile and nonexistent insanity or intoxication defense and persuasively argued for a lesser conviction of second-degree murder. Counsel adequately investigated Bertolotti's background and no persuasive mitigating evidence has been brought forward to indicate that the sentencing outcome should have been different.

I. BERTOLOTTI WAS PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, AND A REASONABLE DEFENSE TO FIRST-DEGREE FELONY MURDER, WAS PRESENTED.

The defendant first contends that the defense of voluntary intoxication was raised by the evidence and that defense counsel should have availed himself of such defense to negate the underlying felonies in the felony-murder charge and should have requested a jury instruction on intoxication at the guilt phase.

The state first takes issue with the statement that the defense of voluntary intoxication was raised by the evidence. In his first confession Bertolotti claimed that shortly before the murder he had met a Hawaiian friend named Clay who had previously lived next door to him. Clay supposedly gave him a quaalude which made him "high" at the time of the murder (Ex. 42). Claudio F. Garalde, a former neighbor of Bertolotti, who was Hawaiian, and known by the nickname "Clay", came forward at trial and testified in the guilt/innocence phase and the penalty phase that he had not even seen Bertolotti on the day of the murder, let alone provided him with a quaalude (R 948; 1359-1360). Defense counsel brought out on cross-examination the fact that Garalde had been convicted of two felonies, was still on probation and had been banished from seven counties in Georgia (R 949).

Bertolotti presented no independent evidence to prove that he was intoxicated at the time of the crime, aside from the self-serving statement in his confession, which did not even provide a basis for the testimony of a mental health expert. Johnson v. State, 478 So.2d 885 (Fla. 3d DCA 1985). In view of Bertolotti's two statements to the police and his criminal record he was not put on the stand to bolster his contention that he was "high" at the time of the murder nor was there any testimony that "high" equated with intoxication for purposes of supporting that defense so as to negate intent.

In retrospect there is another, even more compelling reason for his not testifying: he simply never took a quaalude at all. In the course of post-conviction proceedings he was examined by Doctor Robert Kirkland and Bertolotti admitted to him that he had never taken a quaalude on the day of the murder and was simply trying to "muddy the water" in his statement to the police. It is incredible to believe that this fact was not discovered prior to the raising of this meritless claim.

It is clear that voluntary intoxication is not a defense in law unless the ingestants cause one to be intoxicated to the extent that an intent to kill cannot be formed, Wiley v. Wainwright, 793 F.2d 1190, 1194 (11th Cir. 1986), and jury instructions need not be given when there is no evidence that a defendant was intoxicated. Gardner v. State, 480 So.2d 91, 93 (Fla. 1985).

In the present case there was no evidence of intoxication. Bertolotti's course of action on the day of the murder evidences a specific intent to kill as well as to commit the underlying felonies supporting the felony murder charge to the degree that a defense of voluntary intoxication would have been inconsistent with the facts of the case. Bertolotti subsequently told Doctor Kirkland that on the day of the murder he had become dissatisfied with the idea of temporary employment and walked about the Rosemont area, following a specific plan to rob someone, knowing exactly what he was doing. In view of the circumstances in this case, especially the detailed confessions, which amply demonstrate intentional, purposeful action by Bertolotti before, during, and after the brutal assault (to avoid detection), counsel can certainly not be deemed as having acted unreasonably in eschewing a defense of voluntary intoxication in favor of arguing that there was no evidence to support the underlying felonies, and that the killing itself was not premeditated but of a "depraved mind" (second degree murder) nature.





































