IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZIEGLER, JR.,

Appellant,

-vs- CASE NO. 63,606

STATE OF FLORIDA,

Appellee.

BRIEF OF APPELLANT WILLIAM THOMAS ZEIGLER, JR.

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INTRODUCTION

The Record on Appeal consists of two (2) volumes. Volume One contains Appellant's Motion to Vacate and the various Motions and Orders related to the case. Volume Two consists of the transcript of oral arguments on the Motion held on March 25, 1983. References to the record will be to these two (2) volumes with the appropriate page number.

Appellant will be referred to as Appellant or Zeigler. Appellee will be referred to as Appellee or the State.

STATEMENT OF CASE AND FACTS

This is an appeal from an Order entered by the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida denying a Motion to Vacate Judgment and Death Sentence. The Order was entered by the Honorable JAMES S. BYRD, Circuit Judge, who was sitting as a specially appointed Judge of the Fourth Judicial Circuit, in and for Duval County, Florida. While the Indictment in this cause was returned in the Ninth Judicial Circuit, in and for Orange County, Florida, venue was transferred to Duval County, Florida at the time of trial where it remains. In the Trial Court, Appellant, WILLIAM THOMAS ZEIGLER, JR., was the Defendant, and the Appellee, the State of Florida, was the prosecution.

On January 14, 1983, Appellant, ZEIGLER, filed a Motion to Vacate, Set Aside or Correct Conviction and Sentence (R-Vol. I, P.7). The State of Florida filed its response to said Motion on February 24, 1983 (R-Vol. I, P166). On March 25, 1983, a Preliminary Hearing for the purpose of receiving oral argument on the Motion was held to determine if a hearing should be held on any or all of the contentions in Zeigler's Motion to Vacate. Judge James S. Byrd presided at

said hearing. After arguments of counsel (R-Vol. II), an Order was issued, denying a hearing. (R-Vol. II, P. 174) Notice of Appeal to this Court was filed on April 25, 1983.[1]

The hearing held by Judge Byrd on March 25, 1983 on Zeigler's Motion to Vacate was for the sole purpose of determining what issues in the Motion would require a hearing under Fla. R. Crim. P. 3.850.

At the hearing, counsel for Appellant first attempted to determine where the record in the case was located in order to focus on those portions of the record which would be attached to the Order in the event his Motion was denied. As required by Fla. R. Crim. P. 3.850, counsel for Appellant had been relying on copies of the record which were incomplete and had important sections of testimony missing. The record was apparently still in Duval County, where the trial was held after a change in venue from Orange County. Judge Byrd was sitting as a specially appointed Judge of Duval County for the purpose of this hearing. Appellant had filed a Motion to transport the record back to Orange County for the purpose of the hearing. However, only the actual physical

[1] A further Statement of Case and Facts of proceedings prior to Zeigler's Motion to Vacate can be found in the record as part of Appellant's Motion to Vacate. (R-Vol. I, P. 8-31) Because of the expedited nature of this appeal, that part is omitted from this Brief. However, Appellant incorporates that part by reference in this appeal.

evidence in the case and those portions of the record which contained some pleadings and administrative material, such as payment vouchers, were received. Neither the Court nor Appellant had any material portion of the record applicable to them. (R-Vol. II, P. 23)

Appellant's Motion contained nineteen (19) separate issues. However, at the hearing, counsel asked the Court to consider the Motion as containing only one (1) issue. (R-Vol. II, P4) Appellant's argument was that, if the Court had a hearing, Appellant would be able to clearly demonstrate an insidious pattern of unfairness that existed from the day of Appellant's:

1. Arrest;
2. To the manner and conduct of the investigation;
3. To the presentation of false facts before the Grand Jury;
4. To the potential bias of the Trial Judge;
5. To the conduct of the trial;
6. The abuse of the jury; and
7. The overriding by the Trial Court of the jury recommendations of life.

It was Appellant's position that these abuses were so

severe that it formed a pattern of abuse that gave rise to a substantive attack on the proceedings because it denied Appellant the right to a fair trial under the Sixth Amendment of the United States Constitution. Appellant argued that this pattern was cognizable under Fla. R. Crim. P. 3.850 because the pattern could not be seen at the time of trial because the pattern was not complete until after trial.

This argument was rejected by the Trial Court.

Appellant in Point IX of his Motion listed the various points in which trial counsel was ineffective. (R-Vol. I, P. 133-135) It was Appellant's argument that Point IX of his Motion regarding ineffectiveness of trial counsel should be read in conjunction with Points I-VIII of his Brief in which the results of trial counsel's ineffectiveness is demonstrated as being prejudicial to Mr. Zeigler and would have resulted in a different outcome. While Points I-VIII in Appellant's Motion to Vacate were raised as substantive issues, they were not meant to be legally separable from Point IX alleging ineffective assistance of counsel.

It was Appellant's position that, if the Judge would not grant a hearing based on the substantive issues, then a hearing should be granted on the ineffectiveness of counsel as outlined in Point IX and elaborated on in Points I-VIII

of his Motion. This was pointed out to Judge Byrd at the hearing on March 25, 1983. (R-Vol. II, P. 68).

However, the Trial Judge rejected Appellant's argument and denied the Motion to Vacate in its entirety and refused to grant a hearing on any issue.

POINTS ON APPEAL

I

THE TRIAL COURT ERRED IN REFUSING TO GRANT AN EVIDENTIARY HEARING ON APPELLANT'S MOTION FOR POST-CONVICTION RELIEF.

II

THE TRIAL COURT COMMITTED ERROR IN FAILING TO ATTACH THOSE PORTIONS OF THE RECORD WHICH IT DETERMINED CONCLUSIVELY ESTABLISHED APPELLANT WAS NOT ENTITLED TO RELIEF.

I

THE TRIAL COURT COMMITTED ERROR IN FAILING TO ATTACH THOSE PORTIONS OF THE RECORD WHICH IT DETERMINED CONCLUSIVELY ESTABLISHED APPELLANT WAS NOT ENTITLED TO RELIEF.

The full record of the proceedings of the trial of this cause were not available to either Judge Byrd or counsel. The only portions of the record which were available contained mere portions of the pleadings and administrative material, such as witness vouchers. The transcript of the trial and the other portions of the record apparently were never transported from Duval County to Orange County for the purpose of the hearing, although counsel for Appellant had requested this be done by Motion and the Judge granted said Motion and issued an Order directing the Clerk of Duval County to transport the entire record to Orange County. (R-Vol. II, P. 23) Appellant was severely prejudiced by not having the material portions of the record available to him, either to prepare his Motion or prepare for the hearing. Likewise, Judge Byrd did not have the material portion of the record available to him in order to form an opinion as to Appellant's allegations. And, of course, no portion of

the record could be attached to Judge Byrd's Order denying Appellant's Motion, since they were not in the possession of the Clerk and were not available for review.

Where a Motion for post-conviction relief is denied and such denial is not predicated upon the insufficiency of the Motion on its face, a copy of that portion of the files and records which conclusively establish that the movant is entitled to no relief must be attached to the Motion. Fla. R. Crim. P. 3.850 is quite explicit in its terms: either the trial court must hold an evidentiary hearing or attach those portions of the record establishing no right to relief. Dowda v. State, 417 So.2d 1147 (Fla. 5th DCA 1982); Hayes v. State, 415 So.2d 871 (Fla. 1st DCA 1982); Brown v. State, 390 So.2d 447 (Fla. 5th DCA 1980); Collins v. State, 382 So.2d 418 (Fla. 5th DCA 1980); Calhoun v. State, 362 So.2d 726 (Fla. 1st DCA 1978).

In Meeks v. State, the movant, a death-sentenced individual was denied an evidentiary hearing by the trial court with regard to his ineffective assistance of counsel claim. In reversing the trial court's action, this Court discussed the attachment requirement and concluded:

> If the prisoner raises a matter that may properly be considered in a Rule 3.850 Motion, the trial judge reviewing the motion must either attach that portion of the case file or record which conclusively shows that the prisoner is entitled to no relief or grant an evidentiary hearing.

Id. at 676 (emphasis in original) (emphasis added).

By failing to attach those portions of the record establishing no entitlement to relief, the trial court placed counsel for Appellant in the position of being completely unable to respond to or rebut the trial court's conclusion.

The law under Fla. R. Crim. P. 3.850 is clear: either the trial court must attach portions of the record to its Order or grant an evidentiary hearing. In neglecting to exercise either of the options, the trial court committed error and this cause must be remanded with instructions that the trial court adhere to the straight-forward procedures set forth by the Rule.

II

THE TRIAL COURT ERRED IN REFUSING TO GRANT AN EVIDENTIARY HEARING ON APPELLANT'S MOTION FOR POST-CONVICTION RELIEF.

Fla. R. Crim. P. 3.850 contemplates the granting of an evidentiary hearing upon the filing of a legally sufficient Motion for Post-Conviction Relief unless the Motion and the record conclusively establish that the prisoner is entitled to no relief. Meeks v. State, 382 So.2d 673 (Fla. 1980); Graham v. State, 372 So.2d 1363, 1366 (Fla. 1979). That Rule provides in pertinent part:

> If the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. In those instances when such denial is not predicated upon the legal insufficiency of the motion on its face, a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief shall be attached to the order. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting attorney of the court, grant a prompt hearing thereupon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that

> there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant him a new trial or correct the sentence as may appear appropriate. (Emphasis added)

In LeDuc v. State, 415 So.2d 721 (Fla. 1982), this Court recently reversed the denial of an evidentiary hearing in a post-conviction attack on a death sentence, which raised as one of its grounds the ineffectiveness of trial counsel. In doing so, this Court specifically held that an evidentiary hearing must be granted when a legally sufficient Motion for Post-Conviction Relief is filed, so long as the record does not conclusively establish that the petitioner is entitled to no relief. Id. at 722. Significantly, with regard to the claim of ineffective counsel, this Court remanded the case to the trial court with directions to conduct an evidentiary hearing.

This Court's decision in LeDuc, supra, is by no means an extraordinary one, or one changing an established principle of Florida jurisprudence. In Meeks, supra, which also involved a petitioner under sentence of death, the petitioner filed a Motion to vacate his conviction and alleged that he was denied effective trial counsel. He also requested an evidentiary hearing. The trial court denied both the Motion

and the request for an evidentiary hearing and an appeal was taken. In reversing the trial court's denial of an evidentiary hearing, this Court addressed the precise issue raised by the instant appeal and held:

> Pursuant to a Rule 3.850 Motion, a prisoner is entitled to an evidentiary hearing unless the Motion and the files and records in the case conclusively show that he is entitled to no relief. If the prisoner raises a matter that may properly be considered in a Rule 3.850 Motion, the trial judge reviewing the Motion must either attach that portion of the case file or which conclusively shows that the prisoner is entitled to no relief or grant an evidentiary hearing. Gunn v. State, 378 So.2d 105 (Fla. 5th DCA 1978); Payne v. State, 363 So.2d 164 (Fla. 3d DCA 1978); Payne v. State, 362 So.2d 688 (Fla. 2d DCA 1978). Based on our review of the record presented to this court, we cannot say that Appellant's specific allegations of ineffective assistance of counsel, considered collectively, conclusively show a lack of merit so as to obviate the need for an evidentiary hearing into the matter.
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> * * *
>
> Accordingly, to the extent that the trial court's Orders and amended Order deny relief under Rule 3.850 with respect to the ground of ineffective assistance of counsel, they are hereby reserved.

Id. at 676; Accord Demps v. State, 416 So.2d 808, 809 (Fla. 1982); Castro v. State, 419 So.2d 796 (Fla. 3d DCA 1982); Brown v. State, 409 So.2d 129, 130 (Fla. 5th DCA 1982); Livingston v. State, 383 So.2d 947 (Fla. 2d DCA 1980).

The case of Muhammed v. State, _____ So.2d ____, 8 FLW 1 (Fla. December 16, 1982) does not mandate a contrary result. In that case, this Court held that the factual allegations contained in the Motion, even if proven, were insufficient to establish a claim of ineffective counsel.

At the oral argument on Appellant's Motion (R-Vol. II), counsel for Appellant put forth two (2) arguments:

1. That there was a pattern of unfairness apparent in Appellant's trial that permeated the trial from the moment of his arrest, through the Grand Jury, the trial, the verdict and culminated in the overriding by the Trial Judge of the jury recommendations of life. These points were elaborated on in Points I-VIII of Appellant's Brief. These points were meant to be a substantive attack on the trial cognizable under Rule 3.850 as a pattern that was unavailable to trial counsel because the pattern was not complete until after trial.

2. Point IX of Appellant's Brief argued that counsel for Appellant was ineffective on the various points. While in retrospect, the drafting of Appellant's Point IX could have elaborated the factual basis upon which they were raised, this could only be a task of redundancy, since the substance of the points raised in Point IX and their prejudicial

effect on the trial outcome were fully elaborated in Points I-VIII.

Thus, Appellant's argument was that, if the court did not find that Rule 3.850 permitted a hearing on Points I-VIII, then, in that case, a hearing should be held on Point IX - ineffectiveness of counsel - and the facts supporting this claim would be the same facts extensively elaborated on in Points I-VIII.

Three (3) points raised by Appellant clearly demanded a hearing, for they were outside the record entirely and were raised by Appellant through allegation, either in the Motion or at oral argument.

1. As elaborated on in Point II of Appellant's Motion to Vacate (R-Vol. I, P. 48-57), the allegation by a former Chief Deputy of Orange County that he attended a conference with the State Attorney, the Trial Judge and the investigators of the case, prior to trial. At this conference, defense counsel was not present and the allegation was that the Trial Judge reviewed evidence and exhibited bias to Appellant. This allegation was not made known to counsel until well after the trial.

2. As elaborated on in Point IV (R-Vol. I, P. 64-67), the allegation of two (2) witnesses that they had information

to the defense of Zeigler, but were told by members of the Sheriff's Office that it was not important. This amounted to nothing less than the suppression of evidence favorable to Appellant.

3. As elaborated on in the hearing of March 25, 1983 (R-Vol. II, P. 23-26), that the major witnesses' identification of Zeigler was so laced with the substantial likelihood of misidentification that a hearing should have been held, if not on the merits, then at least on ineffectiveness of counsel. A hearing on this issue would have revealed that:

(a) The witness, Felton Thomas, had never seen Zeigler prior to the night of the crime.

(b) That, on the night of the crime, in violation of established police procedure, he was not asked to identify Zeigler by physical description, clothing, race, photograph or any other means.

(c) That Felton Thomas disappeared for five (5) days after the crime.

(d) That, during this period, Zeigler was arrested and his picture was extensively published in the newspaper.

(e) That the picture of Zeigler in the newspaper was the direct result of the police action of notifying the newspaper and pulling a covering off Zeigler's face by a

police officer so that he could be photographed and his picture published.

(f) That the witness, Felton Thomas, a migrant worker, was taken as a material witness and provided a witness fee and a motel room - luxuries for a person of his status.

(g) That the inconsistencies of Felton Thomas' statement to the police was permeated with inconsistencies, both internal and external, as elaborated on in the Statement of Facts in Appellant's Motion. (R-Vol I, P. 18-21)

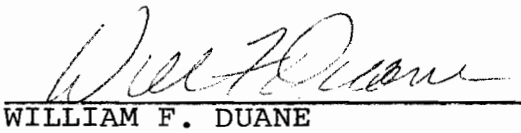
(h) That it was, at the minimum, ineffectiveness of counsel not to seek the suppression of Felton Thomas' statement by trial counsel.

A hearing should have been conducted on these issues, as well as the other points of ineffective assistance of counsel raised in Point IX of his Motion to Vacate and elaborated on in Points I-VIII of said Motion, as well as the Points X-XIX concerning the imposition of the death sentence.

CONCLUSION

Based upon the arguments presented herein, there can be no dispute that the trial court committed error in dismissing Appellant's Motion for Post-Conviction Relief, without conducting an evidentiary hearing. The Trial Court committed further error in denying Appellant's Motion without first conducting an evidentiary hearing on Appellant's claims or attaching portions of the record establishing that Appellant was not entitled to relief. For these reasons, the Trial Court's Order of Dismissal must be reversed and this cause must be remanded to that Court for further proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the State Attorney, Ninth Judicial Circuit, 250 North Orange Avenue, Suite 900, Orlando, Florida, 32801, and the Office of the Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida, this 20th day of July, 1983.

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