

IN THE SUPREME COURT OF FLORIDA

FLOYD MORGAN,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
)
 _____)

Case No. 63,679

FILED
SID J. WHITE
JUL 26 1984 ✓

CLERK, SUPREME COURT.

By *[Signature]*
Chief Deputy Clerk

APPELLANT'S REPLY TO THE SUPPLEMENTAL BRIEF
OF APPELLEE

Robert L. Weinberg
Michael P. Madow
Dianne S. McGaan

WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

J. Craig Williams

WILLIAMS & STAPP
136 East Bay Street
Suite 301
Jacksonville, Florida 32002
(904) 353-3631

COUNSEL FOR APPELLANT

In a supplemental brief filed with leave of this Court on June 6, 1984, appellant Morgan argued that the order below, denying his Rule 3.850 motion without an evidentiary hearing, should be reversed or vacated and remanded for reconsideration in light of the recent United States Supreme Court decision in Strickland v. Washington, 466 U.S. ____, 52 U.S.L.W. 4565 (U.S. May 14, 1984).

The State now responds that this same argument was rejected in Jackson v. State, ____ So.2d ____ (Fla. June 12, 1984) (hereinafter "Jackson III"). According to the State, "the standard applied below is not significantly different from that announced in Strickland and could not have affected the factfinding made below." Supplemental Brief of Appellee, filed June 28, 1984, at 4 (emphasis added). The State has misread Jackson III and has misconceived the issue presented in this appeal.

In Jackson III, supra, the appeal was from a circuit court order denying a second Rule 3.850 motion. As made plain by this Court's prior opinion in that case, Jackson had been afforded a full evidentiary hearing on his first 3.850 motion. See Jackson v. State, 437 So.2d 147, 149-50 (Fla. 1983), cert. denied, 104 S. Ct. 1016 (1984) (hereinafter "Jackson II"). After that evidentiary hearing, the circuit court found that the representation afforded Jackson had been adequate and that, in any event, he had not been prejudiced by his counsel's shortcomings. 437 So.2d at 149-50. In Jackson II, this Court

affirmed the circuit court's findings on the basis of the Knight standards. Id. Jackson subsequently filed a second 3.850 motion, arguing that the standards announced by the Supreme Court in Strickland mandated a different result. This Court disagreed, holding in Jackson III that the Knight and Strickland standards are not sufficiently different to have affected the earlier factfinding. In other words, Jackson III held in effect that the evidence adduced at the evidentiary hearing on the first 3.850 motion no more entitled Jackson to relief under Strickland than it had under Knight. See slip op. at 3.

The Supreme Court's decision not to remand in Strickland was based on like reasoning. Washington, like Jackson, had had a full evidentiary hearing on his ineffective assistance claim. On the basis of the evidence adduced in that hearing, the federal district court, applying the DeCoster-Knight standards, determined that there was no "likelihood that counsel's inaction affected the outcome of the sentence." See Washington v. Strickland, 693 F.2d 1243, 1249 (11th Cir. 1982) (en banc). The Supreme Court, while rejecting the DeCoster-Knight "outcome-determinative" test in favor of a less stringent "reasonable probability" test, held that the evidentiary record left no doubt that Washington was not entitled to relief under either test:

Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles. The record makes it possible to do so. There are no conflicts between the state and federal courts

over findings of fact, and the principles we have articulated are sufficiently close to the principles applied both in the Florida courts and in the District Court that it is clear that the factfinding was not affected by erroneous legal principles. See Pullman-Standard v. Swint, 456 U.S. 273, 291-292 (1982).

Slip op. at 28, 52 U.S.L.W. at 4573 (emphasis added). A remand was unnecessary because the district court's application of the tougher Knight standards to the evidence in the record was, in effect, harmless error.

The issue presented on this appeal is altogether different from that decided in Jackson III. No evidentiary hearing has ever been held in this case. No findings of fact have been made -- or, at least, could properly have been made.^{1/} The question here is thus not, contrary to the State's

^{1/} The State's response to Morgan's 3.850 motion contained numerous assertions about facts outside the record, including allegations about the pre-trial preparation and investigation undertaken by appellant's trial counsel. These allegations were purportedly based on a conversation between the trial counsel and the Assistant State Attorney on February 15, 1983. See, e.g., R-20 (trial counsel has advised that he did not fail to prepare or compose his closing argument); R-21 (trial counsel has advised that he discussed with Morgan the full range of offenses and sentences included in the indictment); R-25 (trial counsel has advised that he knows of no witnesses that can substantiate provocation); R-26 (trial counsel has advised that he did not contact or call family members because Morgan so insisted). If the circuit court did find that the facts were as alleged by the State without giving Morgan an opportunity to show otherwise at an evidentiary hearing, then it clearly committed reversible error. See, e.g., Friedman v. United States, 588 F.2d 1010, 1015 (5th Cir. 1979) (contested fact issues in § 2255 cases cannot be resolved on the basis of affidavit filed by trial counsel); Taylor v. United States, 487 F.2d 307 (2d Cir. 1973) (court may not dispense with evidentiary hearing in

(Footnote Continued)

supposition, whether the "factfinding" below was affected by the application of the Knight standards. The question, rather, is whether appellant's 3.850 motion properly pleads a legally sufficient ineffectiveness claim under either Knight or Strickland. As stated in appellant's Supplemental Brief, Strickland rejected the "likelihood" test of Knight in favor of a less stringent "reasonable probability" test. In Jackson III this Court did not have occasion to consider precisely how the new standard differed from the old, holding only that it did not differ "significantly" enough to entitle Jackson to relief. The Court there did not need to articulate the differences between the two standards because the evidentiary record left no doubt that Jackson was not entitled to relief under either. In the instant case, however, there is no record upon which it can be determined that the difference between the standards is without consequence. On remand, appellant should be granted leave to file an amended Rule 3.850 motion in light of Strickland, and the trial court, after an evidentiary hearing, should apply the new standard in the first instance.

§2255 cases because it chooses to credit counter-affidavits submitted by the government). Indeed, at oral argument in this case, Assistant Attorney General Marky conceded that the circuit court could not properly have relied on the State's response to find outside-the-record facts. It is thus very puzzling that the State's Supplemental Brief now concludes that the application of the Knight standards "could not have affected the factfinding below." Supplemental Brief of Appellee at 4 (emphasis added). If there was any factfinding below, it was plainly improper and cannot be relied upon to sustain the circuit court's order.

In any event, the State does not appear to challenge appellant's contention that the circuit court's denial of appellant's 3.850 motion on grounds of deficient pleading or legal insufficiency is a denial without prejudice.^{2/} Indeed, as noted in appellant's Supplemental Brief at 8 n.1, Assistant Attorney General Marky conceded at oral argument that a denial on these grounds would be a denial without prejudice. The State has not withdrawn that concession in its Supplemental Brief. Thus, even if this Court were to decide to affirm the order below on the ground that appellant's 3.850 motion failed adequately to plead a claim under either Knight or Strickland, appellant should be afforded the opportunity to cure the formal defect in an

^{2/} The decisions under 28 U.S.C. §2255, which have generally been considered persuasive for questions arising under Rule 3.850, see, e.g., Witt v. State, 387 So.2d 922, 928 (Fla. 1980); Roy v. Wainwright, 151 So.2d 825 (Fla. 1963), likewise hold that a denial is without prejudice to renewal where, as here, no evidentiary hearing has been held and the files and records of the case do not conclusively show that the prisoner is entitled to no relief. See, e.g., United States v. Donn, 661 F.2d 820, 823-24 (9th Cir. 1981); Mayes v. Pickett, 537 F.2d 1080, 1082-83 (9th Cir. 1976); Martinez v. United States, 344 F.2d 325, 326-27 (10th Cir. 1965). See also Sanders v. United States, 373 U.S. 1, 16 (1963); Wright & Miller, 3 Federal Practice & Procedure §602 at 518-519 (1982).

amended 3.850 motion, which would be heard and adjudicated under the Strickland standards.

Respectfully submitted,

WILLIAMS & CONNOLLY

By: Michael P Madow

Robert L. Weinberg
Michael P. Madow
Dianne S. McGaan

839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

WILLIAMS & STAPP

By: J. Craig Williams /m/m

J. Craig Williams
136 East Bay Street
Suite 301
Jacksonville, Florida 32002
(904) 353-3631

Attorneys for Appellant
Floyd Morgan

Dated: July 24th, 1984