

IN THE SUPREME COURT OF FLORIDA

PAUL WILLIAM SCOTT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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CASE NO. 65,060

**FILED**

SID J. WHITE

JUN 25 1984

CLERK, SUPREME COURT

By  Chief Deputy Clerk

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The Appellant was the defendant in the court below. The Appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appear before this Court. The symbol "R" will be used to designate the record on appeal.

STATEMENT OF THE CASE AND FACTS

The Appellee accepts the Appellant's Statements of the Case and Facts as being a substantially true and correct account of the proceedings below.

POINT INVOLVED ON APPEAL

Appellee respectfully rephrases Appellant's Point  
On Appeal as follows:

WHETHER THE TRIAL COURT ERRED IN DISMISSING  
THE APPELLANT'S MOTION TO VACATE JUDGMENT  
AND SENTENCE WITHOUT PREJUDICE WHERE THE  
OATH WAS NOT AS CONTEMPORATED BY RULE 3.850  
OF THE FLORIDA RULES OF CRIMINAL PROCEDURE  
BECAUSE IT WAS QUALIFIED?

ARGUMENT

POINT ON APPEAL

THE TRIAL COURT DID NOT ERR IN DISMISSING THE APPELLANT'S MOTION TO VACATE JUDGMENT AND SENTENCE WITHOUT PREJUDICE WHERE THE OATH WAS NOT AS CONTEMPLATED BY RULE 3.850 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE BECAUSE IT WAS QUALIFIED (Restated).

Rule 3.850 of the Florida Rules of Criminal Procedure provides that a prisoner under sentence of a court of Florida, may file a motion to vacate his conviction and sentence on the ground that the judgment or sentence was entered in violation of the Constitution or Laws of the United States, or of the State of Florida. Rule 3.850 states that a motion for such relief may be made at any time, and "shall be under oath" and include certain information. The rule then specifically provides that "[t]he court will refuse to receive any motion filed pursuant to this rule which is not in substantial compliance with the requirements hereof." (emphasis added). It is well established a trial court, must as a matter of law dismiss a motion to vacate, where the motion is not in substantial compliance with Rule 3.850. See Swain v. State, 355 So. 2d 865 (Fla. 1st DCA 1978). Thus, a trial court must dismiss a motion to vacate that is not under oath. See Roy v. Wainwright, 151 So. 2d 825, 828-829 (Fla. 1963); Daniels v. State, \_\_\_ So. 2d \_\_\_, Case No. 83-2762, Fla. 4th DCA, opinion filed May 30, 1984 [9 FLW 1188]; Rawls v. State, 391 So. 2d 694 (Fla. 5th DCA 1980); Clothier v. State, 375 So. 2d

874 (Fla. 2d DCA 1979); Delaney v. State, 375 So. 2d 869 (Fla. 2d DCA 1979); Williams v. State, 375 So. 2d 611 (Fla. 2d DCA 1979); Monroe v. State, 371 So. 2d 683 (Fla. 2d DCA 1979).

In the instant case, the motion for post-conviction relief concluded with the following verification:

Before me, the undersigned authority, personally appeared PAUL WILLIAM SCOTT, who, being first duly sworn, says that he has personal knowledge of the allegations in the foregoing MOTION TO VACATE JUDGMENT AND/OR SENTENCE and that the allegations and statements contained therein are true and correct to the best of his knowledge. (emphasis supplied).

The trial court held that such a verification was not an oath as contemplated by Rule 3.850 because of the qualification. Appellee submits that the trial court correctly interpreted the requirements for a proper motion to vacate judgment and sentence.

"An oath is a solemn adjuration to God to punish the affiant if he swears falsely. The sanction of the oath is a belief that the Supreme Being will punish falsehood." Birmingham Ry., Light & Power Co. v. Jung, 161 Ala. 461, 49 So. 434 (1909). See also Markey v. State, 47 Fla. 38, 37 So. 53, 60 (Fla. 1904). "An oath may be undertaken by an unequivocal act in the presence of an officer authorized to administer oaths by which the declarant knowingly attests the truth of a statement and assumes the obligation of an oath." Youngker v. State, 215 So. 2d 318, 321 (Fla. 4th DCA 1968). The purpose of the oath in legal proceedings is to prevent the use of false allegations and to submit the declarant to the penalties of perjury. See State v. Upton, 392 So. 2d 1013, 1016 (Fla. 5th DCA 1981); Monroe v. State, supra, 371 So. 2d at 684.



Appellee submits that a verification that states that allegations are "true and correct to the best of his knowledge" are nothing more than a statement that so far as declarant's knowledge goes, the facts are true. Hahn v. Frederick, 66 So. 2d 823, 825 (Fla. 1953). See also State v. Moore, 423 So. 2d 1010 (Fla. 4th DCA 1982); State v. Martin, 422 So. 2d 12 (Fla. 2d DCA 1982); State v. Upton, supra, 392 So. 2d at 1016. Thus, in order for the "sworn" statement to support the facts in substance, the statement or affidavit must be that the declarant has knowledge of the facts and he knows them to be true. Hahn v. Frederick, supra. See also Thompson v. Citizens National Bank of Leesburg, Florida, 433 So. 2d 32, 33 (Fla. 5th DCA 1983); Campbell v. Salman, 384 So. 2d 1331, 1333 (Fla. 3d DCA 1980); Orthwein v. Cobbs Fruit & Preserving Company, 229 So. 2d 607, 608 (Fla. 1st DCA 1969); P & T Electric Co. Inc. v. Spadea, 227 So. 2d 234, 236 (Fla. 4th DCA 1969).

The oath by Appellant in the instant case is simply not in substantial compliance with Rule 3.850. Effective January 1, 1978, this Court approved Rule 3.987 of the Florida Rules of Criminal Procedure which provides a model form for use in motions for post-conviction relief pursuant to Rule 3.850. In Re Florida Rules of Criminal Procedure, 353 So. 2d 552 (Fla. 1977). In said form the following appears as the form for the verification of the motion:

Before me, the undersigned authority, this day personally appeared \_\_\_\_\_, who first being duly sworn, says that he is

the Defendant in the above-styled cause, that he has read the foregoing Motion for Post-Conviction Relief and has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct.

---

  
(your signature)

Thus from the model form, this Court has required that the verification state that the defendant<sup>1</sup>, have personal knowledge that the facts and matters alleged are true and correct, not that such is to the "best of his knowledge."

Appellee submits that the verification required under Rule 3.850 is similar, if not substantially the same as that required for a sworn motion to dismiss under Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure. The district courts have repeatedly held that an attestation which is qualified by the words "to the best of his knowledge and belief" are inadequate to withstand summary dismissal. See State v. Moore, supra, 423 So. 2d at

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FOOTNOTE 1

1 Appellee further submits that it is the defendant, not his counsel which must file the motion under oath. But see Goldstein v. State, \_\_\_ So. 2d \_\_\_, Case No. 83-2357 Fla. 4th DCA, opinion filed May 2, 1984 [9 FLW 999] (rehearing pending). Compare, State ex rel Hancock v. Love, 143 Fla. 883, 197 So. 534 (1940); State v. Higgins, 437 So. 2d 180 (Fla. 4th DCA 1983); State v. Holder, 400 So. 2d 162 (Fla. 3d DCA 1981); State v. Kling, 335 So. 2d 614 (Fla. 2d DCA 1976).

1011; State v. Martin, supra, 422 So. 2d at 13; State v. Bethea, 409 So. 2d 1139, 1140 (Fla. 2d DCA 1982); State v. Upton, supra, 392 So. 2d at 1016. Thus because the reasons for requiring the oath for motions to dismiss are identical to that for a motion for post-conviction relief, compare State v. Upton, supra with Monroe v. State, supra, the requirements for the sufficiency of the oath should be the same.

Finally, Appellee would submit that such a requirement would not be unduly harsh or burdensome on a defendant, who like Appellant, is confined in prison. There is no impediment which prevents a defendant from reviewing the information which has resulted from his counsel's investigations. He would thus be in the same position of his counsel. Furthermore, a defendant can support his motion with affidavits by counsel. See, e.g., Costello v. State, 260 So. 2d 198, 200 (Fla. 1972).

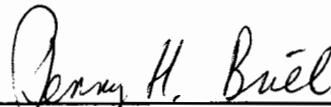
The trial court in the instant case did not place form over substance. Allowing a "qualified" oath would effectively abrogate the purpose of the oath, that is, to discourage perjurious allegations. The oath was not in substantial compliance with the rule and thus the trial court did not err in dismissing Appellant's motion to vacate his judgment and sentence without prejudice.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State respectfully submits that the order dismissing the motion for post-conviction relief without prejudice should clearly be affirmed.

Respectfully submitted,

JIM SMITH  
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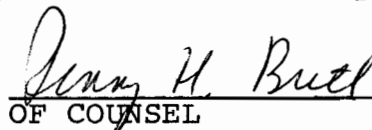


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished to PAUL MORRIS, ESQUIRE, Attorney For Appellant, 2000 South Dixie Highway, Suite 212, Miami, Florida 33113 by U.S. Mail delivery this 21st day of June, 1984.



OF COUNSEL