IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,422

JESSE JOSEPH TAFERO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

FILED
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APPEAL FROM THE CIRCUIT COURT
FOR THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The Appellant was the Defendant and the Appellee was the Prosecution in the Criminal Division of the Circuit Court for the Seventeenth Judicial Circuit, in and for Broward County, Florida. In the briefs, the parties will be referred to as they appeared in the trial court.

The following symbols will be used:

R	The record on appeal filed in the present case
T	The trial transcript, on file in this Court, Case No. 49,535
PH	The transcript of the hearing on the previous Fla.R.Crim.P. 3.850 Motion, on file in this Court, Case No. 66,156.

STATEMENT OF THE CASE AND FACTS

This case is on appeal from the trial court's summary denial of the Defendant's successive motion for post-conviction relief. The motion was filed on December 30, 1986. (R. 20-44). After reviewing a response filed by the State, in the form of a motion to dismiss (R. 49-50), the trial court denied the motion. (R. 65-66). The Court concluded the motion was an abuse of the Rule 3.850 procedure. (R. 65).[1]

The Defendant's motion attacked his 1976 convictions and death sentences for two counts of first degree murder, as well as kidnapping and robbery. These convictions were affirmed by this Court on direct appeal. Tafero v. State, 403 So.2d 355 (Fla. 1981), cert. denied 455 U.S. 983 (1982).

In 1983, this Court considered and denied a petition for writ of error coram nobis, based on a purported recantation of his testimony made by Walter Rhodes, an indicted co-defendant who pled guilty and testified for the State at the Defendant's trial. Tafero v. State, 440 So.2d 350 (Fla. 1983), cert. denied 465 U.S. 1084 (1984).

The Governor of Florida signed a death warrant for the Defendant in 1984, which prompted the filing of his first Fla.R.Crim.P. 3.850 motion. The trial court conducted

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[1] It also noted its agreement with the State's assertion that it was inappropriate to challenge the convictions in two forums simultaneously. (R. 65).

a two day evidentiary hearing and denied the motion. The denial was affirmed by this Court. Tafero v. State, 459 So.2d 1034 (Fla. 1984).

The Defendant then filed a petition for habeas corpus in the United States District Court, Southern District of Florida, which was likewise denied. The United States Court of Appeals for the Eleventh Circuit granted the Defendant a stay of execution. Utimately, the Court of Appeals affirmed the District Court's ruling Tafero v. Wainwright, 796 F.2d 1314 (11th Cir. 1986). The Defendant filed a Petition for Certiorari in the United States Supreme Court, which was denied on June 26, 1987. Tafero v. Dugger, ___ U.S. ___, 41 Cr.L. 4086 (1987).

POINT ON APPEAL

WHETHER THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S SUCCESSIVE MOTION FOR POST CONVICTION RELIEF AS AN ABUSE OF THE RULE 3.850 PROCEDURE?

SUMMARY OF THE ARGUMENT

The Defendant's conviction became final in 1981 when it was affirmed on direct appeal. Accordingly, he was bound by the January 1, 1987, deadline for filing his Fla.R.Crim.P. 3.850 motion. The pendency of the United States Supreme Court certiorari petition seeking review of the Eleventh Circuit's decision in the Defendant's habeas corpus was not a jurisdictional bar to litigation of the Rule 3.850 motion. The two proceedings were both collateral in nature and concerned different issues. Francois v. Klein, 431 So.2d 165 (Fla. 1983). The trial court therefore had the authority to rule on the motion and was not required to hold it in abeyance. The Defendant's suggestion of yet further grounds for relief is a clear abuse of the post-conviction procedure.

The motion was properly denied because it was a successive motion and thus procedurally barred. Fla.R.Crim.P. 3.850 (1985). The issue of ineffective counsel was previously litigated and the defendant did not show an adequate basis for relitigation of the matter. The assertion of newly discovered evidence of voluntary intoxication was likewise barred because it could have been raised sooner. The "new" witness was known in 1976, and the defense was legally available then. It was the decision to present a defense of blaming co-indictee Rhodes that foreclosed the voluntary intoxication defense, as the two defenses would have been inconsistent. Since this matter clearly could have been

raised at trial, it was not a cognizable claim for post conviction relief.

ARGUMENT

THE TRIAL COURT CORRECTLY
DENIED THE DEFENDANT'S SUCCESSIVE
MOTION FOR POST CONVICTION
RELIEF AS AN ABUSE OF THE RULE
3.850 PROCEDURE.

The Defendant contends the summary denial of his second motion for post-conviction relief filed pursuant to Fla.R. Crim.P. 3.850 was improper. He challenges the trial court's ruling on two bases: first, that his motion need not have been filed by January 1, 1987, but if it did, it should have been held in abeyance; second, that the claims required an evidentiary hearing. The State maintains the Defendant was obligated to meet the January 1, 1987, deadline, and the trial court correctly denied the motion as successive.

A. The Defendant was bound to meet the January 1, 1987, deadline of Rule 3.850 and the trial court had jurisdiction to rule on the motion.

The Defendant erroneously contends his convictions became final on June 26, 1987, when the United States Supreme Court denied certiorari. Certiorari was sought to review the Eleventh Circuit's affirmance of the District Court's denial of 28 U.S.C. §2254 habeas corpus relief.

The Defendant's convictions became final on September 29, 1981, the day this Court denied rehearing after affirming the convictions on direct appeal. Tafero v. State, 403 So.2d 355 (Fla. 1981). This interpretation of finality is consistent with Joyner v. State, 158 Fla. 806, 30 So.2d

304 (1947), where it was held that when an appeal is taken from a judgment of guilty in a trial court, the conviction does not become final until the judgment of the lower court has been affirmed by the appellate court. Although 28 U.S.C. §2254 exists to provide federal habeas corpus review of constitutional claims arising from state criminal proceedings, it is not part of the direct appeal process. Rather, it is a collateral proceeding, independent of the original prosecution, as is the Fla.R.Crim.P. 3.850 post-conviction relief process. Heilmann v. State, 310 So.2d 376 (2 DCA Fla. 1975).

Therefore, upon the completion of the direct appeal, the Defendant's conviction became final for purposes of the time limitation imposed by Rule 3.850, as amended. When the rule was amended to establish a two-year time limitation, all persons whose convictions became final prior to January 1, 1985, were given until January 1, 1987, to file motions. In re: Rule 3.850 of the Florida Rules of Criminal Procedure, 481 So.2d 480 (Fla. 1985). The Defendant was thus required to, and did, meet the January 1, 1987, deadline, as his motion was filed on December 30, 1986.

The fact that the Defendant's certiorari petition was pending was no bar to litigation of the Rule 3.850 motion. In Francois v. Klein, 431 So.2d 165 (Fla. 1983), this Court held that a trial court could properly entertain a Rule 3.850 motion while a petition for habeas corpus was

pending in the appellate court. This Court distinguished its decision in State v. Meneses, 392 So.2d 905 (Fla. 1981), because there the holding was the direct appeal process must be completed before a trial court has jurisdiction to consider a motion for post conviction relief. By contrast, in Francois, the direct appeal process had concluded. The trial court motion attacked trial counsel's performance while the appellate proceeding challenged the effectiveness of counsel on the direct appeal. Thus, Meneses was distinguishable:

> Since the two judicial attacks on petitioner's convictions and sentences of death were thus separate and distinct, there was no danger, as there was in Meneses, of conflicting and confusing rulings by the different courts on the same issues ... We do not perceive so substantial a problem of confusion as to require us to hold that the pendency of one kind of proceeding deprives the other court of jurisdiction to proceed.

Francois v. Klein, supra 431 So.2d at 166.

The present case is controlled by Francois. The then-pending certiorari petition sought review of an Eleventh Circuit decision affirming the denial of habeas corpus relief. The issues in the petition were claims which had been addressed by this Court in either the Defendant's direct appeal or his first Rule 3.850 motion. The certiorari petition was thus separate and distinct from the second rule 3.850 motion, posing no danger of conflicting rulings from different courts on the same issues.

Not only was the defendant obligated to file the motion by January 1, 1987, but the trial court had jurisdiction to entertain it. In arguing that the trial court should have held the motion in abeyance until the United States Supreme Court ruled on the certiorari petition, the Defendant overlooks the very purpose of Rule 3.850, as amended. The time limitation serves the important interests of finality in judgments and preservation of the State's ability to defend claims and/or reprosecute the movant if the judgment and sentence is vacated. Finality is an extremely important concern of the criminal justice system, for litigants and courts alike must be able to determine with certainty a time when a dispute has come to an end. Rolle v. State, 475 So.2d 210 (Fla. 1985). The trial court was under no obligation to delay ruling on the motion; just as the Defendant was required to file it by January 1, there was no impediment to the trial court's proceeding to rule, and the Defendant was not deprived of due process thereby.[2]

The Defendant miscontrues Proffit v. State, 12 FLW 373 (Fla. July 9, 1987), to imply that he is entitled even now to amend his motion and add new claims. Proffit

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[2] See, United States ex rel Caruso v. Zelinsky, 689 F.2d 435, 441-443 (3rd Cir. 1982), upholding a state's time limitation for seeking collateral relief.

was an appeal from a resentencing, i.e., a new direct appeal. Consequently, this Court observed it must apply capital case law as it presently existed in its review. By contrast, this Court has, in capital collateral cases, strictly construed the procedural bars of Rule 3.850. Christopher v. State, 489 So.2d 22 (Fla. 1986); Stewart v. State, 484 So.2d 1216 (Fla. 1986). The present case concerns not a new direct appeal from a resentencing, as in Proffitt, but rather, a successive collateral attack on convictions entered in 1976, eleven years ago. Any new claims advanced at this point are clearly an abuse of procedure and thus barred.

The Defendant suggests that he now has a claim based on the decision in Hitchcock v. Dugger, 481 ___ U.S. ____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Any such claim is clearly procedurally barred. Tafero v. State, 459 So.2d 1036 (Fla. 1984); Aldridge v. State, 503 So.2d 1257 (Fla. 1987); Martin v. Wainwright, 497 So.2d 871 (Fla. 1986). Moreover, it is lacking in merit. Tafero v. Wainwright, 796 F.2d 1314, 1321-1322 (11th Cir. 1986); Elledge v. Dugger, ___ F.2d ___, No. 86-5120 (11th Cir., July 20, 1987).

The decision in Pennsylvania v. Ritchie, ___ U.S. ___, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), does not create new law that would justify overlooking the procedural bar to any further challenge to Rhodes' credibility.[3]

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[3] i.e., the decision was not a fundamental change in the law, given retroactive effect. Witt v. State, 387 So.2d 922 (Fla. 1980).

This matter was fully considered in the coram nobis proceedings, Tafero v. State, 440 So.2d 350 (Fla. 1983), cert. denied 465 U.S. 1084. Additionally, in the 1984 post conviction relief proceedings, Rhodes reaffirmed his trial testimony. He stated he had recanted as a way of striking back at the system, but he couldn't go through with it. (P.H. 117-119). No issue was raised as to this testimony in the prior collateral appeal. See, Appellant's brief in Tafero v. State, FSC No. 66,156. The trial court's ruling that this claim was successive and procedurally barred was clearly correct.

The defendant's assertion that he now has a claim, not previously filed, based on the decision in Caldwell v. Mississippi, 472 U.S. 320 (1985), is likewise an abuse of the post-conviction procedure. In Aldridge v. State, 503 So.2d 1257 (Fla. 1987), and Copeland v. State, 505 So.2d 425 (Fla. 1987), this Court held that Caldwell is not a fundamental change in the law so as to avoid application of the procedural bar because Florida has long recognized the importance of the jury's role in capital sentencing. Moreover, the claim has no merit because the trial judge did no more than accurately advise the jury of its advisory responsibility. Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), cert. denied, ___ U.S. ___, 94 L.Ed.2d 801 (1987).

The Defendant also alleges he has a factual claim based on newly discovered testimony of a witness who

can rebut the State's witness, Ellis Marlowe Haskew. This claim is not further detailed, so the State would merely point out that it is cognizable in Rule 3.850 proceedings only if the Defendant can demonstrate that the facts upon which it is predicated were unknown prior to the January 1, 1987, deadline and could not have been ascertained by due diligence. Fla.R.Crim.P. 3.850.

Therefore, in sum, it is the State's position that the defendant's motion had to be filed by January 1, 1987, the trial court had jurisdiction to rule, and there was no requirement that the trial court hold the motion in abeyance pending the outcome of the certiorari proceedings.

B. The trial court correctly denied the Defendant's successive post-conviction relief motion on procedural grounds.

The trial court summarily denied the Defendant's motion for post conviction relief on the basis that the issues either were or could have been raised in the first such motion. (R. 65).[4] This was a proper application

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[4] The trial court alternatively noted that the Defendant should not be litigating in two forums simultaneously. As the State has discussed in Section A, supra, pursuant to Francois v. Klien, 431 So.2d 165 (Fla. 1983), the decision in State v. Meneses, 392 So.2d 905 (Fla. 1981), does not operate to bar simultaneous collateral litigation after the direct appeal process is completed. However, since this statement in the order was separate and apart from the correct procedural bar holding, the order should be affirmed. Stuart v. State, 360 So.2d 406, 408 (Fla. 1978).

of the procedural bar of Fla.R.Crim.P. 3.850 (1985), governing successive motions. It provides, in pertinent part:

> A second or successive motion may be dismissed if the judge finds that it fails or allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

The Defendant ackowledges his ineffective assistance of trial counsel claim was litigated in the prior 3.850 motion. A hearing was held at which trial counsel, Mr. Robert McCain, testified and was subject to cross examination. Thus, pursuant to the successive motion portion of Rule 3.850, the Defendant was barred from raising the ineffective counsel ground which had been previously addressed on its merits. Darden v. Wainwright, 495 So.2d 179 (Fla. 1986); Christopher v. State, 489 So.2d 22 (Fla. 1986); Straight v. State, 488 So.2d 530 (Fla. 1986).

Nevertheless, the Defendant asserts the issue should be re-opened, based on an affidavit signed by his present attorney's investigator which states he spoke to Donn Pearce, the investigator who worked with Mr. McCain preparing Tafero's case for trial. According to the affidavit:

> I [the present attorney's investigator] asked Mr. Pearce if he and Mr. McCain had, in the course of trial preparation, walked for miles and miles on both sides of a road looking for a weapon. Mr. Pearce denied ever having done that with Mr. McCain.

This affidavit is based on hearsay which was unsworn and no explanation was given as to why there was not an affidavit submitted by Mr. Pearce himself. It concerns a very minor aspect of Mr. McCain's testimony. (P.H. 96). The State maintains this was not a sufficient showing to warrant relitigation of the ineffective counsel issue. Certainly, it does not, as the Defendant claims, refute Mr. McCain's prior testimony that the closing argument at the sentencing was agreed to by the Defendant. At the 1984 hearing, Mr. McCain's testimony on this point was corroborated by his contemporaneous note in his trial case file, which he produced at the hearing. (P.H. 68). The note, which was shown to Tafero's counsel in 1984, stated, "Discussed with my client, feels he did not receive a fair trial nor a fair consideration by the jury. Consideration by the jury of sentence is a charade and will not crawl or beg for his life." (P.H. 70).

The present case is distinguishable from State v. Crews, 477 So.2d 984 (Fla. 1985), cited by the Defendant, because there this Court held it was not an abuse of discretion for a trial court to decide to entertain a successive motion where it determined the testimony at the prior hearing was false and constituted a fraud in the court. By contrast, the trial court here determined the Defendant had not made a showing that the prior testimony was fraudulent, so it acted properly in declining to rehear the issue.

Likewise, the claim of newly discovered evidence that Tafero was voluntarily intoxicated at the time of the crimes in 1976 was procedurally barred. It was obviously a defense which could have been raised at trial and on direct appeal.[5] Zeigler v. State, 452 So.2d 537, 539 (Fla. 1984). However, such a defense would have been inconsistent with the strategy that was used, which was to blame co-indictee Rhodes for the shooting. (P.H. 93-94). Although he didn't testify at his own trial, Tafero did testify for his co-defendant at her subsequent trial and stated that Rhodes did the shooting. See, Jacobs v. State, 396 So.2d 713 (Fla. 1981). There was never any suggestion that Tafero did it but didn't intend to due to voluntary intoxication; when Tafero personally testified at the 1984 post-conviction hearing, he stated that Rhodes was responsible for the deaths of the officers. (P.H. 156).

To now, eleven years later, assert a defense completely inconsistent with the defense urged at trial and repeated in 1984 is abusive on its face and the trial court was correct in finding that it should have been raised in the prior litigation. Christopher v. State, 489 So.2d 22 (Fla. 1986). The Defendant claims the evidence was newly discovered. He relies on an affidavit from his attorney who alleges he spoke to one Marian Mulcahy on December 12, 1985, and she told

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[5] In fact, cocaine was found on Tafero's person when he was apprehended following the murders. (T. 573, 623-624).

him her son had given LSD to Tafero the night before the shootings. (R. 42). This cannot be newly discovered evidence, for the name Marian Mulcahy has surfaced in the prior litigation. During the 1976 trial, at one point Mr. McCain moved to recall Rhodes to the stand for further impeachment because he had a witness, Marian Mulcahy, who would testify that she saw Rhodes and Tafero in the week before the shooting and Rhodes had the attache case [in which the slain trooper's gun was recovered]. (T. vol. 8, p. 358). In the 1984 post-conviction hearing, Tafero testified that he had asked Mr. McCain to call Marian Mulcahy to testify that Rhodes had been possession of firearms in the days before the shooting and that he, Tafero, was a credible person. (P.H. 177). Therefore, on hearing the name "Marian Mulcahy" again in connection with an unsworn statement regarding yet a third potential topic of testimony, the trial court correctly concluded this matter could have been dealt with in the prior litigation.

The Defendant alternatively implies that until this court decided Burch v. State, 478 So.2d 1050 (Fla. 1985), the voluntary intoxication defense was unavailable. Not so. Burch cites to Cirack v. State, 201 So.2d 706 (Fla. 1967), a case decided well before the Defendant's trial, for the proposition that voluntary intoxication is available as a defense to negate specific intent. There is no question that the defense was available, but a different theory of defense was used at the trial as the result of a strategic

choice. The trial court correctly refused to reconsider the matter eleven years later. Christopher v. State, 489 So.2d 22 (Fla. 1986).[6]

Therefore, the trial court's summary denial of the Defendant's successive motion for post conviction relief was correct. The motion was a clear abuse of the Rule 3.850 procedure, so that any further proceedings were unnecessary.

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[6]Furthermore, a claim of newly discovered evidence must be presented via a writ of error coram nobis, and not a motion for post conviction relief. Hallman v. State, 371 So.2d 482 (Fla. 1979). If the instant appeal is treated as such, for the reasons discussed above, relief should be denied.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities, the Appellee, the State of Florida, respectfully requests that the order entered by the lower court which summarily denied the Appellant, Jesse Joseph Tafero's motion for post-conviction relief be affirmed.

Respectfully submitted,

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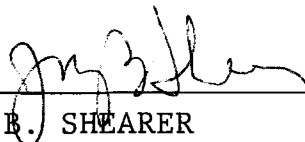

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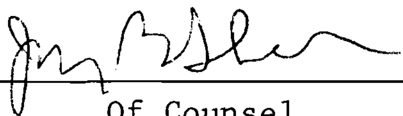
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished by United States mail to BRUCE ROGOW, Nova University Law Center, 3100 S.W. Ninth Avenue, Ft. Lauderdale, FL 33315 and MICHAEL TARRE, Suite 1109, 2655 Lejeune Road, Coral Gables, FL 33134 this ~~17th~~ 7th per Joy Shearer day of August, 1987.



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