

IN THE
SUPREME COURT
OF FLORIDA

—
CASE NO. 70,422
—

JUL 17 1987

JESSE JOSEPH TAFERO,

CLERK, SUPREME COURT
Appellant, *JC*
Deputy Clerk

vs.

STATE OF FLORIDA,

Appellee.

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

—
APPELLANT'S INITIAL BRIEF
—

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STATEMENT OF
THE CASE
AND FACTS

This is an appeal from a Circuit Court order summarily denying, without a factual hearing, Jesse Tafero's Rule 3.850 Motion to Vacate Judgment and Sentence. (R 65-66).

Tafero had been sentenced to Death on May 17, 1976. His conviction had been affirmed on appeal. Tafero v. State, 403 So.2d 355 (Fla. 1981). A previous Rule 3.850 Motion had been denied and the denial affirmed by this Court. Tafero v. State, 459 So.2d 1034 (Fla. 1984). Federal habeas was denied and that denial affirmed by the Eleventh Circuit. Tafero v. Wainwright, 796 F.2d 1314 (11th Cir. 1986), reh'g denied, 807 F.2d 999 (11th Cir., December 5, 1986).

Tafero's second 3.850 Motion had been filed on December 30, 1986. (R 20-44). On December 10, 1986, the United States Court of Appeals for the Eleventh Circuit had stayed the mandate of its decision denying Tafero federal habeas corpus relief (R 47), conditioning the stay upon Tafero's filing a Petition for Certiorari in the Supreme Court of the United States by February 1, 1987. (Id.) The Petition was filed on January 30, 1987 (R 56), and was not denied until June 26, 1987, Justices Brennan and Marshall dissenting. Tafero v. Dugger, 55 U.S.L.W. 3872.

Tafero made clear the fact that the pre-January, 1987 filing of the 3.850 Motion was based upon a concern for the time restraints created by the amended Rule 3.850 (R 45-46;10-11) which provided, in relevant part:

No other [Rule 3.850] motion shall be filed or considered pursuant to this rule if filed more than two years after the judgment and sentence became final unless it alleges (1) the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence, or (2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively. Any person whose judgment and sentence became final prior to January 1, 1985, shall have until January 1, 1987 to file a motion in accordance with this rule.

Tafero's counsel had filed a "Motion to Hold Rule 3.850 Motion in Abeyance Pending Decision on Certiorari in Supreme Court of the United States", arguing:

[W]e would not be here on a 3.850 while the Petition for Writ of Certiorari is Pending. The Stay is intact, the petition is up there, the State has responded. The case is moving along there and in the usual course of events no one would dream of filing a 3.850 while this Petition for Writ of Certiorari is pending. This rule has just come into effect, 3.850 rule, which requires something be done by December 31st. Now its not clear whether or not that rule even applies to us because it talks about a person whose judgment and sentence have become final and with the stay intact it's not clear.

(R 11).

Nevertheless, the Circuit Judge denied the 3.850 Motion holding "that it is inappropriate for the defendant to be litigating the validity of his conviction in two forums simultaneously" and that the "Motion raises grounds which could have been and should have been raised in the prior collateral attack...." (R 65).

Among the grounds for relief alleged in the 3.850 Motion were newly discovered contentions that Tafero's trial counsel had lied in the original 3.850 hearing (R 22-23) and that Burch v. State, 478 So.2d 1050 (Fla. 1985) required reversal of the conviction because of Tafero's voluntary intoxication. (R 23-24). In addition, counsel informed the court that Tafero desired to make amendments to the Motion. (R 53).

This appeal seeks reversal of the trial court's decision which artificially, unnecessarily, and improperly foreclosed Jesse Tafero from presenting for review his cognizable 3.850 claims.

SUMMARY OF ARGUMENT

I. The trial court erred in dismissing the Rule 3.850 Motion because of the pendency of Tafero's Petition for Writ of Certiorari pending in the Supreme Court of the United States. The 3.850 Motion was filed while the certiorari petition was pending only to avoid any argument that the January 1, 1987 time restriction of the Rule applied to Tafero's claims.

We contend that the stay of mandate granted by the United States Court of Appeals for the Eleventh Circuit meant that the judgment and sentence were not final, and therefore Rule 3.850's time strictures did not require the Motion to have been filed.

If the Motion did have to be filed by January 1, 1987, then the trial court should have granted Tafero's motion to hold the 3.850 Motion in abeyance until the United States Supreme Court acted on the petition. The failure of the trial court to do so denied Tafero an opportunity to be heard in an orderly and timely fashion. Case law decided after the trial court's dismissal which now presents new grounds for relief for Tafero confirms that holding the matter in abeyance was the proper course. Had the Supreme Court of the United States granted certiorari the trial court's actions would have been superfluous. The denial of certiorari on June 26, 1987 would then have allowed the Rule 3.850 Motion to be amended to include the newly developed claims and to be considered free of the

procedural dilemma caused by the trial court's rush to judgment.

II. As originally presented the Motion required an evidentiary hearing. The newly discovered evidence that Tafero's trial counsel had lied at the original 3.850 hearing challenging his effectiveness and the newly discovered evidence confirming that Tafero was under the influence of drugs at the time of the homicides were new and different grounds which avoided the abuse of writ doctrine. The ineffective assistance claim turned on the credibility of trial counsel whose veracity was already undermined by his subsequent felony convictions and disbarment. The affidavit reflecting his 3.850 perjury demanded a hearing so that the trial judge could determine and review trial counsel's conduct against a truthful background. Summary dismissal of the 3.850 was improper.

ARGUMENT

I

IF A 3.850 MOTION HAD TO BE
FILED BEFORE JANUARY 1, 1987,
IT SHOULD HAVE BEEN HELD IN
ABEYANCE PENDING THE DECISION
ON CERTIORARI BY THE SUPREME
COURT OF THE UNITED STATES

A. There Was No Need To Have Filed
The 3.850 Motion While A Stay
And Certiorari Were Pending.

Tafero's December 30, 1986, 3.850 Motion was filed under the duress of the January 1, 1987 time limitation contained in the amended rule. If his judgment and sentence had become final prior to January 1, 1985, he had to file his motion by January 1, 1987. If his judgment and sentence were not yet final, he would have had two years in which to file (unless a death warrant issued, which would have triggered the 30 day time limitation of Rule 3.851).

Tafero's judgment and sentence were not final. The Eleventh Circuit's stay of mandate pending certiorari meant that finality had not yet occurred; therefore, the Rule 3.850 time constraints should not have required the filing of the motion. Compare, Loeb v. State, 387 So.2d 433,435-36 (3rd DCA 1980):

The effect of a stay pending review in a criminal appeal is preventive in nature. It preserves the status quo of the litigation pending appellate review and suspends the power of the lower court to issue execution of the judgment or sentence.

We recognize that Tafero did file his Motion, yet that does not moot the issue of whether he had to file it.

The record is clear that the filing was solely to protect Tafero from a future time bar dismissal, and that the "instant Rule 3.850 was filed to foreclose any argument" of untimeliness. (R 51). If Rule 3.850's finality of judgment and sentence time limitation was tolled by the court imposed stay of mandate, pending United States Supreme Court review, then Tafero should not have been forced to prematurely present his claims for relief, burdening the court with a proceeding which might have been rendered superfluous by subsequent Supreme Court action.

B. If The Motion Had To Be Filed By
January 1, 1987, It Should Have Been
Held In Abeyance Pending The Decision
On Certiorari, And It Certainly Should
Not Have Been Dismissed Because
Certiorari Was Pending.

Assuming arguendo that the stay of mandate pending certiorari did not negate the Rule's January 1, 1987 time limitation for Tafero, the trial court should have held the matter in abeyance pending the outcome of the certiorari petition. Had the Supreme Court of the United States granted certiorari, and reversed the sentence and conviction, the 3.850 Motion would have been moot. Judicial economy counseled in favor of granting Tafero's request to hold his 3.850 Motion in abeyance until the Supreme Court acted on the certiorari petition.^{1/}

^{1/} This Court approved that approach when it granted an extension of time for briefing. The extension motion was based upon the argument that since a decision on certiorari would be forthcoming by late June or early July, the original due date of Tafero's Brief should be extended so the United States Supreme Court's action could inform the Court, the State, and Tafero whether there was any need to proceed post-haste.

Neither judicial economy, law, or logic counseled in favor of denying the Rule 3.850 Motion because Tafero also had his certiorari petition pending. The trial court, citing State v. Meneses, 392 So.2d 905 (Fla. 1981), concluded that the dual proceedings required dismissal of the 3.850 because "it is inappropriate for the defendant to be litigating the validity of his conviction in two forums simultaneously." (R 65).

Tafero's request to hold the 3.850 Motion in abeyance, and his objection to being compelled to prematurely file it, acknowledged the inappropriateness of litigating his claims in two forums. But the proper remedy was to follow Tafero's suggested course. State v. Meneses, offered by the State, and accepted by the trial judge, does not support a contrary view.

Meneses involved a voluntary 3.850 motion filed in the trial court by a defendant who, at the same time, was seeking certiorari review in this Court. The District Court of Appeal found no fault with the parallel proceedings. This Court differed and reversed, adopting Judge Hubbard's dissent which said:

By the court's decision herein, a busy trial judge is required to hold an evidentiary hearing on a motion to vacate which, if denied, will be a complete waste of time and effort should the Florida Supreme Court later grant certiorari in the cause, quash our decision and reverse the defendant's conviction.

State v. Meneses, 392 So.2d 905,906 (Fla. 1981).

Meneses supports Tafero's position, not the State's. The defendant in Meneses was not forced to file his 3.850 or risk losing his claim for collateral relief. He chose to burden two courts with his contentions at a time when this Court's pending proceeding may have obviated his need to pursue 3.850 relief in the trial court.

In this case Tafero had a Hobson's choice. If he did not file a pre-January 1, 1987, 3.850 he might have been time barred from asserting his claims. When he did file it the trial court told him the price for seeking United States Supreme Court review was denial of his time-compelled 3.850 Motion.

Meneses does not countenance that result. A proper reading of Meneses is that Tafero's suggestion of abeyance as a matter of judicial economy and efficiency was correct. There should have been no attempt to consider the 3.850 because the United States Supreme Court might have rendered that trial court consideration "a complete waste of time." Id., at 906. In the context of a time-compelled 3.850, Meneses buttresses Tafero's argument, and compels reversal of the trial court's denial insofar as it was based on the pendency of the certiorari petition in the Supreme Court of the United States.^{2/}

^{2/} A pending case in this Court, Ford v. State, No. 70,467, involves Meneses issues in the context of a 3.850 dismissal because of the pendency of a federal habeas proceeding. The similarity of the issues suggests consolidation for argument purposes.

In addition, Meneses involved a lack of jurisdiction in the trial court occasioned by the pendency of the certiorari review sought in this Court.

Accordingly we hold that during the pendency of a certiorari proceeding before us, the trial court is without jurisdiction to rule on a motion to vacate filed after review is sought in this Court.

Id., 392 So.2d, at 907.

The United States Supreme Court certiorari sought by Tafero from the denial of his federal habeas petition does not have similar jurisdictional implications upon the state trial court. On that ground alone Meneses is inapposite. See, Francois v. State, 431 So.2d 165 (Fla. 1983).

If Meneses is controlling and dismissal, not abeyance, was proper, then Meneses' jurisdictional barrier voids the balance of the trial court's order. Bryan v. State, 470 So.2d 864,865 (2nd DCA 1985); Davis v. State, 491 So.2d 1232 (2nd DCA 1986). Therefore, Tafero should be free to refile his 3.850 Motion now that the United States Supreme Court has denied certiorari. Meneses, 392 So.2d at 907. The specter of the 3.850 time bar casts the only shadow over that analysis, underscoring why the December 31, 1983 filing of the 3.850 and the request to abate it pending the decision of the United States Supreme Court was the proper course for this case.

C. The Failure To Hold The Rule 3.850
Motion In Abeyance If It Did Have
To Be Filed By January 1, 1987
Denied Tafero Due Process of Law

We argue infra that as it was presented, the 3.850 Motion was not subject to a summary dismissal. Here we contend that by coercing the premature consideration of the 3.850, either under the aegis of applying the Rule's January 1, 1987 date to this case, or the trial court's refusal to await disposition of the certiorari petition, Tafero was denied due process of law.

The essential element of due process is the right to be heard. Grannis v. Ordean, 234 U.S. 385,394 (1914). That opportunity "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545,552 (1965). Forcing a hearing on a 3.850 Motion which is neither ripe nor complete is not consistent with due process of law, nor with the sensible and efficient administration of justice.

Death cases are subject to review under the law as developed. Compare, Proffitt v. State, ___So.2d___ (Fla. July 9, 1987) in which this Court vacated Proffitt's 1974 death sentence saying:

The death sentence law as it now exists, however, controls our review of this resentencing. There have been multiple restrictions and refinements in the death sentencing process by both the United States Supreme Court and this Court since this matter was first tried in 1974 and affirmed in 1975 and we are bound to fairly apply those decisions.

Id., slip opinion at 2.

On April 22, 1987, the United States Supreme Court reversed a death sentence based upon a sentencing judge's assumption that nonstatutory mitigating circumstances were not relevant. The Court, speaking of the same time period in which Tafero was sentenced, said:

We do note, however, that other Florida judges conducting sentencing proceedings during roughly the same period believed that Florida law precluded consideration of nonstatutory mitigating circumstances.

Hitchcock v. Dugger,
U.S., 107 S.Ct.
1821,1823 (1987).

Undersigned counsel, after reviewing the record in Tafero's trial, believes Hitchcock would now present an additional 3.850 ground for Tafero.^{3/}

The United States Supreme Court decision in Pennsylvania v. Ritchie, U.S., 107 S.Ct. 989 (1987), as applied to a death case in Miller v. Dugger, F.2d slip opinions at 3413 (11th Cir., June 12, 1987), lends new credence and a new argument to the already asserted 3.850 ground that the testimony of co-defendant Walter Rhodes, who

^{3/} The trial judge read to the jury the statutory mitigating factors, telling the jury they were the ones to be considered:

The mitigating circumstances which you may consider, if established by the evidence, are these: [listing only the statutory mitigating circumstances].

Supplemental Record on Appeal, Tafero v. State, No. 49,535, Florida Supreme Court, pp. 56-57.

had at least twice recanted under oath his trial testimony (R 26) requires reconsideration of a conviction based upon his testimony. Ritchie and Miller would now be used in a 3.850 Motion to obtain the due process mandated review of Rhode's grand jury testimony.

The Eleventh Circuit's May 14, 1987 and April 23, 1987 decisions in Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987) and Adams v. Dugger, 804 F.2d 1526, revised on rehearing, 816 F.2d 1493 (11th Cir. 1987), breathing life into Caldwell v. Mississippi, 472 U.S. 320 (1985) constitutional claims which had not been raised by trial counsel, provide an additional ground for Rule 3.850 relief based upon the trial court's instructions diminishing the jury's sense of responsibility for its death penalty decision.^{4/}

We set forth these changes in the case law to demonstrate the dangers of requiring the premature filing of a Rule 3.850 Motion, and the folly of dismissing such a Motion when the movant has legitimately asked to have his request held in abeyance. Had that request been granted

^{4/} The trial court told the Tafero jury:

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge.

Supplemental Record on Appeal, Tafero v. State, No. 49,535, Florida Supreme Court, p. 54.

In Mann the Eleventh Circuit condemned almost the exact same language as violative of Caldwell. 817 F.2d at 1482.

Tafero could have now amended his Motion and placed before the trial court all his newly cognizable claims.^{5/} Due process, and the efficient administration of justice would be served by this Court, and the trial court, providing Tafero with a reasonable opportunity to be heard on all his cognizable claims and not forcing piecemeal and premature litigation of important constitutional issues.

^{5/} A factual claim based upon the newly discovered testimony of a witness rebutting a critical state witness, Marlowe Haskew, is also now available to Tafero. Since that claim, unlike the others mentioned above, is not based upon reported decisions or a record on appeal which has been before this Court, we do nothing more than note it so no one may complain of its later appearance.

II

THE 3.850 MOTION WAS NOT
SUBJECT TO SUMMARY DISMISSAL
WITHOUT AN EVIDENTIARY HEARING

The trial court denied the 3.850 Motion without an evidentiary hearing because "the Court herein is of the opinion that the present Motion raises grounds which could have and should have been raised in the prior collateral attack or at the evidentiary hearing." (R 65).

The applicable standard is that

[A] movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief.

O'Callaghan v. State, 461
So.2d 1354,1355 (Fla. 1984)
(citations omitted).

Tafero's initial 3.850 ground challenged the veracity of his trial counsel's original 3.850 testimony. That challenge was based upon an attached affidavit of an investigator who had obtained information contradicting a portion of trial counsel's testimony. (R 22). Trial counsel's credibility was a critical issue in the 3.850. He claimed Tafero had agreed to putting on no sentencing evidence and to this thirty second argument upon which Tafero's life depended:

May it please the Court and the ladies and gentlemen of the jury, I will be very brief here today in that I have consulted with Jessie Tafero and he feels very strongly that he did not receive a fair trial.

He feels very strongly that this verdict was not fair, and he feels that to participate in the sentencing argument in any way would be a charade.

He will not beg for his life, nor mercy. Thank you.

(R 21-22).

Tafero had denied his acquiescence in that argument. Trial counsel, who was later convicted of narcotics conspiracy and obstruction of justice and disbarred (R 22) was fair game for impeachment with the newly discovered evidence of his untruthfulness. If he did lie at the original 3.850 hearing the trial judge might have changed his view of counsel's conduct. The importance of accurate information before the trial court is underscored by the Supreme Court's language in a recent ineffective assistance of counsel case:

The District Judge, who presumably is familiar with the legal talents and character of the lawyers who practice at the local bar and who saw and heard the witness testify, is in a far better position than we are to evaluate a charge of [ineffective assistance of counsel.]

Burger v. Kemp, ___ U.S. ___,
55 U.S.L.W. 5131, 5134
(June 26, 1987).

Trial counsel's lies at the original 3.850 were, if proven, a fraud upon the court. They could not have been known at the time of the hearing, thus the verified allegations of deceit meet Rule 3.850's criteria for considering a successive motion. Their fraudulent nature permits a trial court to re-open the matter. State v.

Burton, 314 So.2d 136 (Fla. 1975); State v. Crews, No. 67,699 (Fla. 1985) (see attached unpublished order denying State's attempt to prohibit a trial judge from granting an evidentiary hearing in a successive 3.850 which involved false testimony at initial 3.850).

Tafero's voluntary intoxication ground for 3.850 relief (R 23-24) also met the newly discovered facts standard for renewed 3.850 motions.

Burch v. State, 478 So.2d 1050 (Fla. 1985) recognized "that the defense of voluntary intoxication [is] available to negate specific intent" in a first degree murder case. Tafero's 3.850 Motion set forth his claim to that defense, including newly obtained affidavits reflecting evidence that he had taken LSD the evening before the homicides, that he was "drug crazy", and that a nurse, who could have testified about his immediate post-arrest drug condition refused to speak without being subpoenaed. (R 23-24, 42-43).

The Burch recognition of the involuntary intoxication defense did not present a change in the law giving rise to a defense on the merits or at sentencing, but its importance here is based upon the factual allegations supporting its application to Tafero's case. Therefore it is cognizable in a renewed Rule 3.850 Motion.

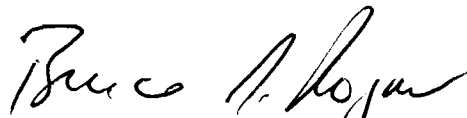
The trial court should not have summarily dismissed the 3.850 Motion. It alleged facts and law which, if proven and applied, may have entitled Tafero to relief. Certainly

the motion, files and records did not "conclusively show the movant was entitled to no relief" O'Callaghan v. State, supra or that the second motion was an abuse of the 3.850 procedure.

CONCLUSION

The trial court's decision should be reversed and the case remanded to allow Mr. Tafero to present any cognizable claims which he may have, with directions to the trial court to provide an evidentiary hearing on any claims which present newly discovered facts or newly developed law which may entitle Tafero to relief.

Respectfully submitted,



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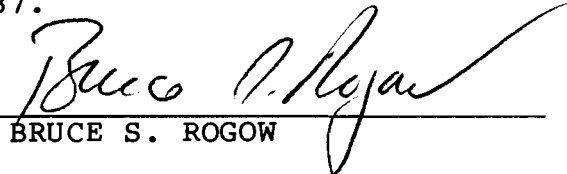
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Appellant's Initial Brief" has been furnished by U.S. Mail to JOY B. SHEARER, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 17th day of July, 1987.



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