ORIGINAL

IN THE
SUPREME COURT
OF FLORIDA

CASE NO. 70,422

SEP 2 1987
CLERK, SUPREME COURT
By ________
Deputy Clerk

JESSE JOSEPH TAFERO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

APPELLANT'S REPLY BRIEF

BRUCE ROGOW
Nova University Law Center
3100 S.W. Ninth Avenue
Ft. Lauderdale, FL 33315
(305) 522-2300
and
MICHAEL TARRE
Suite 1109
2655 Lejeune Road
Coral Gables, FL 33134

Counsel for Appellant

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Rule 3.851, Fla.R.Crim.P. 2

THE REASON FOR A REPLY

The State maintains that the Defendant was obligated to file his 3.850 Motion by January 1, 1987; that it should not have been held in abeyance pending disposition of his petition for writ of certiorari in the Supreme Court of the United States; and that the trial court correctly denied the motion as successive.

The State's arguments do not survive analysis. We address them *seriatim*.

I

TAFERO'S JUDGMENT
AND SENTENCE WERE
NOT FINAL, THEREFORE
RULE 3.850'S
JANUARY 1, 1987
DEADLINE DID NOT APPLY.

The State's brief asserts that the Defendant's "convictions became final on September 29, 1981, the day this Court denied rehearing after affirming the convictions on direct appeal." State's Brief at 7. The State's repeated references to "convictions" (6 times on pages 7-8) fails to respond to the Defendant's argument and the Rule's mandate.

Rule 3.850, Fla.R.Crim.P. states:

> 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.
> (emphasis supplied)[1/]

Tafero's judgment and sentence had not yet become final when he filed his 3.850. The stay of his sentence was firmly in place when he cautiously filed his 3.850 Motion on December 30, 1986. Therefore, his sentence was not yet final and the Rule's time constraints were not applicable.

Had the Rule been written to say "convictions" the State would have been right. But the Rule's specific language

1/ If a judgment and sentence had not become final prior to January 1, 1985, a defendant would have two years within which to file his or her 3.850 Motion. If a death warrant is signed a defendant will have only 30 days to seek post conviction or collateral relief. Fla.R.Crim.P. 3.851.

belies the State's arguments. As long as a stay of a judgment and sentence are in place that judgment and sentence have not become "final."

This plain reading of the Rule's language makes plain sense. Why should a defendant be required to file a 3.850 Motion before his judgment and sentence become final? Neither judicial economy nor the desire for speedy justice is served by prematurely litigating issues which may be mooted by a reviewing court's decision, especially when the reviewing court has stayed the execution of the sentence which is the subject of the proceedings.

II

FRANCOIS V. KLEIN DOES NOT ADVERSELY CONTROL THIS CASE, IT MERELY CONFIRMS THE DEFENDANT'S POSITION

Tafero's Motion was a model of sensitivity to time problems. Although he contended he did not have to file by January 1, 1987, he did so and asked the Court to simply hold the Motion in abeyance pending the outcome of his United States Supreme Court certiorari petition.

The trial judge relied on State v. Meneses, 392 So.2d 905 (Fla. 1981) and held that the certiorari petition 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). The State now agrees that the trial judge was wrong, offering

Francois v. Klein, 431 So.2d 165 (Fla. 1983) for the proposition that a trial judge should not have dismissed this case. That was just our point. All the Defendant sought was temporary abeyance of the matter to permit orderly consideration if his certiorari petition was denied. Francois v. Klein's statement that a trial court Rule 3.850 and a Florida Supreme Court habeas corpus petition do not create

> so substantial a problem of confusion as to require us to hold that the pendency of one kind of proceeding deprives [the trial court] of jurisdiction to proceed

is in accord with the Defendant's position. Id., 431 So.2d at 166. Had the trial court adhered to Francois, a Meneses dismissal would not have occurred and the wisdom of holding the matter in abeyance could have been considered.

III

THE WISDOM OF ABEYANCE IS DEMONSTRATED BY THE PRESENCE OF GROUNDS FOR RELIEF WHICH HAVE ARISEN SINCE DISMISSAL OF THE 3.850

The Defendant-Appellant's Initial Brief set forth the Hitchcock v. Dugger, ____U.S.___, 107 S.Ct. 1821 (April 22, 1987) claim which now very clearly exists in this case. See Appellant's Brief at p.12. The State's attempt to dismiss the claim as procedurally barred or without merit is patently wrong. Due process demands a full opportunity for Tafero to develop this claim. Late breaking cases confirm

the importance and strength of Tafero's argument that the trial judge believed and instructed the jury that only statutory mitigating circumstances were to be considered.

This Court has already acknowledged that "The trial judge held the mistaken belief that he could not consider non-statutory mitigating circumstances." Jacobs v. State, 396 So.2d 713,718 (Fla. 1981). Tafero had been tried months before Sonia Jacobs by that judge. Tafero testified at Jacob's later trial. Id., at 716.[2/] On June 18, 1987 this Court applied Hitchcock v. Dugger to another judge and remanded an oft-challenged death sentence for resentencing because "we find that the trial judge who sentenced appellant to death did not believe he was obliged to receive and consider evidence pertaining to non-statutory mitigating factors." McRae v. State, ___So.2d___, 12 FLW 310,313 (Fla. June 18, 1987).

On July 20, 1987 the Eleventh Circuit rejected a Hitchcock argument directed at the same trial judge who presided over Tafero's case because, inter alia, the defendant's trial came after Jacobs' trial. Elledge v. Dugger, ____F.2d____, slip opinions 3972,3984 (11th Cir.

2/ One of the non-statutory mitigating circumstances which this Court sua sponte considered in reversing Jacobs' death sentence was her motherhood. 396 So.2d at 718. Tafero was the father of Jacobs' young child. It is an odd and cruel irony to disregard that fact while regarding Jacobs' maternal needs despite the fact that this Court in Jacobs' case was not asked to do so. It found the mitigating factor "although this Court is not favored with any help from either counsel on the issue of the imposition of the death penalty...." Id., at 717.

1987). Thus the Court of Appeals, while "concern[ed] about the trial judge's perceptions," was not persuaded that the record clearly showed a Hitchcock violation. This record does. Not only did Tafero's trial precede Jacobs', this Court has found the trial judge to have been unaware of his duty to look beyond the statutory mitigating factors. And, the Eleventh Circuit relied heavily in Elledge upon the fact that unlike Hitchcock, the Elledge trial judge did not indicate an "improperly narrow focus...." Here the trial judge clearly indicated that narrow focus: "This Court makes the additional finding that pursuant to F.S. 921.141(6) there are no mitigating circumstances present in this case." Trial R. Vol. II, Appeal No. 49,535, p.175.

Had the trial judge held the Rule 3.850 in abeyance until the June 26, 1987 denial of certiorari (55 U.S.L.W. 3872), these issues would now be litigated in the circuit court.[3/]

3/ Other claims arose post-3.850 dismissal by virtue of subsequent decisions in the Supreme Court of the United States or the Eleventh Circuit. See Appellant's Brief at 12-13. The Initial Brief was not designed to argue the merits of those matters, but simply to point out the folly of not holding the Motion in abeyance. The State seems to respond to these matters as if they were issues in this appeal; but they are not. Any attempt to decide here the merits of these claims would deprive the Defendant of an opportunity to be heard on their merits. The Hitchcock v. Dugger issue is discussed above to exemplify the importance of the claims, not to persuade the Court to rule on their merits. The Defendant intends to present his viable claims in a Rule 3.850 Motion. To do so now would only exacerbate the State's cry for dismissal because of the pendency of this proceeding, underscoring the need for the court below to have restrained itself from its urge for summary dismissal so that one case could have covered the applicable issues.

IV

THE 3.850 MOTION SHOULD NOT HAVE BEEN SUMMARILY DENIED AS A SUCCESSIVE MOTION

A. McCain's Lying

The State maintains that McCain's lie was not big enough to warrant a hearing. The State's suggestion that the trial court determined that to be so (State's Brief at 15) is not supported by the record, for the trial judge made no such finding.

The notion that McCain, who has been disbarred after his convictions for conspiracy and obstruction of justice, should be allowed to escape unquestioned because his lie was minor misconceives the nature of liars.

In a work on ethical theory, Sissella Bok has examined the philosophical and psychological underpinnings of deceit. Bok, Lying, Moral Choice in Public and Private Life, Vintage Books, New York (1979). She says:

> ...lying so often accompanies every other form of wrongdoing, from murder and bribery to tax fraud and theft.
>
> * * *
>
> It is easy a wit observed, to tell a lie, but hard to tell only one. The first lie "must be thatched with another or it will rain through."
>
> Id. at 24,26 (emphasis in original).

Every conscientious lawyer would question McCain's 30 second final argument in the sentencing phase of this case.[4/] Tafero should have been permitted an opportunity to confront McCain with his lie so the trial court could, with the example of McCain's prior perfidy, determine the veracity of McCain's claim that Tafero agreed to the antagonistic jury argument.[5/]

B. The Intoxication Defense

The State maintains that intoxication and innocence are inconsistent, saying "such a defense would have been inconsistent with the strategy that was used, which was to blame co-indictee Rhodes for the shooting." State's Brief at 16. The Court must remember that Tafero did not have to do the shooting to be convicted of murder, therefore it is

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4/ He said:

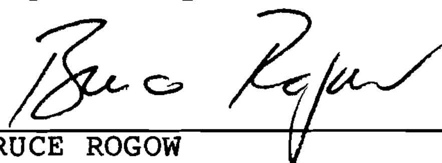
> "MAY IT PLEASE THE COURT, AND THE LADIES AND GENTLEMEN OF THE JURY. I WILL BE VERY BRIEF HERE TODAY, IN THAT I HAVE CONSULTED WITH JESSE TAFERO, AND HE FEELS VERY STRONGLY THAT HE DID NOT RECEIVE A FAIR TRAIL. HE FEELS VERY STRONGLY THAT THIS VERDICT WAS NOT FAIR AND HE FEELS THAT TO PARTICIPATE IN THE SENTENCING ARGUMENT IN ANY WAY WOULD BE A CHARADE.
>
> HE WILL NOT BEG FOR HIS LIFE, NOR MERCY. THANK YOU."

5/ The State's claim that McCain's file note indicated Tafero felt he did not get a fair trial and would not "crawl or beg for his life" (State's Brief at 15) does not support the proposition that Tafero told him to say that to the jury. Even if it did, what kind of lawyer would follow his client's direction to make an argument asking to be electrocuted?

not inconsistent to claim that because of intoxication he lacked the requisite specific intent for felony murder and that Rhodes did the shooting.

The fact that McCain never presented that defense explains why McCain never utilized Marian Mulcahy for the facts which her testimony now would adduce. Her testimony, and the affidavits setting forth the potential testimony of a nurse and a former friend regarding Tafero's drug abuse status should have been accorded an opportunity to be heard. If that testimony and defense are to be procedurally barred because McCain did not pursue them, then McCain's effectiveness once again will become an issue in this case. It would have been far better to test the truth of the claims rather than dismissing the 3.850 Motion. O'Callaghan v. State, 461 So.2d 1354,1355 (Fla. 1984) required the granting of that opportunity.

Respectfully submitted,



BRUCE ROGOW
Nova University Law Center
3100 S.W. Ninth Avenue
Ft. Lauderdale, FL 33315
(305) 522-2300
and
MICHAEL TARRE
Suite 1109
2655 Lejeune Road
Coral Gables, FL 33134
(305) 442-8255

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Appellant's Reply 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 1 day of September, 1987.

BRUCE ROGOW

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