

IN THE SUPREME COURT
OF FLORIDA

FILED
SID J. WHITE

SEP 8 1987

CASE NO. 70,428

CLERK, SUPREME COURT

By *JC*
Deputy Clerk

DAVID GORHAM,
Appellant,

v.

THE STATE OF FLORIDA,
Appellee.

REPLY BRIEF
OF
APPELLANT

In its Answer Brief in Response to the Initial Brief of Appellant, David Gorham, Appellee fundamentally misconstrues the concept of legal insufficiency. Appellee thereby fails to call into question Gorham's claim for relief from the trial court's improper summary denial of his 3.850 Motion.

Appellee readily admits in its Answer Brief that, since the trial court failed to hold an evidentiary hearing on Gorham's 3.850 Motion and also failed to attach portions of the record refuting the 3.850 Motion, the court's summary decision can only be upheld, if at all, if Gorham's 3.850 Motion is legally insufficient: "the presumption must be that the lower court's ruling was based on the face of the pleading. Thames v. State, 454 So.2d 1061, 1066 (Fla. 1st DCA 1984)." Appellee's Answer Brief at 12 (emphasis added). The law is clear that:

"in those instances when such denial is not predicated upon the legal insufficiency of the motion on its face, a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief shall be attached to the order.

Fla. R. Crim. P. 3.850 (emphasis added). Appellee's sole, and erroneous argument against Gorham's appeal is that his 3.850 Motion was insufficient on its face.

However, Appellee's Answer Brief misconprehends legal sufficiency. Appellee engages in examining the record at trial and in weighing the credibility of various witnesses and documents. This exercise goes beyond the face of the motion and

actually resembles the process the trial judge should have engaged in to reach a decision on Gorham's 3.850 Motion. Appellee may not do a post hoc analyses of the record to make factual findings for the judge. Thames, 1061 So.2d at 1066. Precisely because the trial court failed to analyze the record to either grant an evidentiary hearing or attach portions of the record, the lower court's summary denial of Gorham's 3.850 Motion must be reversed.

ARGUMENT

At each step of its Answer Brief Appellee engages in inappropriate weighing of evidence or analysis of the trial record.

I. APPELLEE FAILS TO DEMONSTRATE THAT GORHAM'S BRADY VIOLATION CLAIMS ARE INSUFFICIENT.

Appellee fails to show that Appellant Gorham's claims of Brady violations do not state legally cognizable claims.

A. Testimony of Loretta Forehand

In his 3.850 Motion, Appellant, Gorham claims that the State committed a Brady violation by not disclosing the testimony of Loretta Forehand. The Appellee's analysis of Gorham's claim in this regard is symptomatic of its ill-conceived approach throughout its Answer Brief.

Appellee's entire position is mistaken. Appellee states that since a deposition of Loretta Forehand is attached to

Gorham's 3.850 Motion, the trial court could have ruled on the sufficiency on Gorham's Brady violation claim without conducting an evidentiary hearing. According to Appellee, Loretta Forehand's deposition testimony that she saw two men running immediately after the shooting constitutes an "unsubstantiated allegation". Answer Brief at 13. Further, Appellee impugns Ms. Forehand's testimonial abilities by referring to her age and by making certain argumentative surmises about her memory and her ability as a witness. See Id. at 14.

Based on these points, Appellee argues that "the trial court could determine that the claim was legally insufficient on the basis of Ms. Forehand's deposition". Id. at 14. In addition, Appellee vainly attempts to contradict Gorham's factual allegations by creating "facts" where none exist. Appellee states that the fact that Loretta Forehand's name appears on the precipe of witnesses for trial "showed that the trial council was aware of Loretta Forehand". Answer Brief at 13. The leap of imagination which Appellee fails to specify is that simple awareness on the part of trial counsel was equivalent to full knowledge of Loretta Forehand's exculpatory testimony favoring Gorham. On this point, the state presents no evidence because none exist.

Appellee's exercise constitutes an undisguised infringement on the province of the finder of fact, the trial judge in the case of a 3.850 Motion. Appellee attempts to con-

vince this Court that it can substitute its judgment for that of the trial court on the issue of the testimonial qualities of Loretta Forehand on the weight of different pieces of evidence. In the same way that "it is inappropriate to have the state select portions of the record below to support the appealed order when the trial court has not previously done so", Thames, 1061 So.2d at 1066, it is equally inappropriate to substitute the state's judgment as to the credibility of witnesses for the trial judge's.

As this Court has stated the allegations of a 3.850 Motion must be treated "as true except to the extent that they are conclusively rebutted by the record." Harich v. State, 484 So.2d 1239, 1241 (Fla. 1986). Here, the trial court has failed to rebut the Brady violation claims made by Appellant Gorham with attached portions of the record. Therefore, Gorham's allegations must be treated "as though every fact alleged had been proved in [his] favor". Henry v. Wainwright, 456 So.2d at 468.

In conclusion the face of Gorham's 3.850 Motion contains facts describing a cognizable Brady violation claim concerning the state's suppression of the testimony of Loretta Forehand. Therefore, the trial court erred in similarly denying Appellant's 3.850 Motion on this ground.

B. The Undisclosed Promises to Ada Johnson

Appellant alleges that the state committed a Brady violation when it failed to disclose that its key witness, Ada

Johnson, had received lenient treatment in return for her testimony against Gorham. Appellee attempts to suggest conclusions of fact in a manner inappropriate to the scope of this Court's review of a summary denial of 3.850 Motion.

Appellant attached to his 3.850 Motion a copy of Ada Johnson's Motion for Mitigation and Reduction of Sentence. Appellee described this sworn public motion as "Johnson's unverified statement in her pro se Motion". Once again, Appellee attempts to cast doubt on the believability of Appellee's factual allegations. As indicated above, the weighing of the probative value of testimony and documents is the province of the fact finder; the Appellee cannot now perform that function. Therefore, this Court must ignore Appellee's improper argument.

Further, Appellee argues that Ada Johnson's Motion for Mitigation was ultimately denied, and therefore that no deal for lenient treatment was struck between her and the prosecutor in Gorham's case. Of course, the eventual disposition of Johnson's Motion for Mitigation was determined by a judge not constrained by the prosecutor's recommendation of leniency. The ultimate ruling on Johnson's motion had little to do with her motivation for testifying as she did. Appellee's ill-reasoned argument does not contradict Gorham's claim.

In short, Appellant's 3.850 Motion raises a cognizable claim which the trial court improperly denied in summary fashion.

C. The Suppression of Bloody Footprints

Appellee twists the facts surrounding the suppression of the bloody footprints to attempt to portray Gorham's Brady violation claim as legally insufficient. Once again, Appellee uses the facts loosely and draws unsupported conclusions from them.

For example, Appellee states that trial counsel had access to a photograph of the bloody footprints because a photograph of those footprints was attached to Appellant's 3.850 Motion. In fact, the photograph of the bloody footprints attached to Appellant's 3.850 Motion did not originate with Gorham's trial counsel but was discovered by Gorham's current counsel after they entered the case long after Gorham's trial.

In addition, Appellee labels as "sheer speculation" Appellant's view that the bloody footprints would have aided him in his trial. Appellant directs this Court's attention to his Initial Brief at pages 30-32 for a detailed discussion of the favorable purposes which the footprints would have served him at trial.

Without reiterating that detailed discussion, it is important to note that a facial allegation of the favorability of the destroyed evidence raises an issue of fact which must be determined by the trial court. For example, where tape recordings of an accused were lost by the State, the accused's contention that the tapes would have been favorable to him in that they

contained evidence that he was not given Miranda warnings constituting a colorable claim to relief under Rule 3.850 which could not be denied in summary fashion. Gentry v. State, 464 So.2d 659 (Fla. 4th D.C.A. 1985). Here, as in Gentry, Gorham's facial claim of State suppression of physical evidence merited more than summary denial by the trial court.

II. APPELLEE FAILS TO DEMONSTRATE THAT GORHAM'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ARE INSUFFICIENT.

Appellee fails to show that Appellant GORHAM's claims of ineffective assistance of counsel do not state legally cognizable claims. Appellee erred in examining GORHAM's claims, "in light of the entire trial record", Answer Brief at 19, when no portions of the record were attached to the trial court's summary denial.

A. Testimony of Loretta Forehand

Here, again, Appellee engages in improper weighing of evidence. While citing Gelety's statement concerning his contact with Loretta Forehand, Appellee completely ignores Forehand's own deposition testimony that she was never contacted by trial counsel. 3.850 Motion at Exhibit E. Because there is conflicting evidence regarding this fact, the trial judge ought to have held an evidentiary hearing to decide the 3.850 claim. Since none was held, the trial judge committed reversible error.

B. The Undisclosed Promises to Ada Johnson

Contrary to Appellee's argument, Ada Johnson's "unsubstantiated statement" that the prosecutor and the detective on the GORHAM case had promised a recommendation of leniency for her testimony does constitute extrinsic evidence of a leniency deal. Appellee argues that GORHAM does not establish ineffective assistance of counsel because he does not establish a promise of leniency to Ada Johnson which trial counsel failed to investigate. However, GORHAM is not required to prove at this stage that there was a promise of leniency to Ada Johnson, he is instead required only to allege sufficient facts to raise a claim that such a leniency deal existed. For example, where a defendant allege that his trial counsel had failed to investigate the reliability of a confidential informant and failed to challenge the informant reliability "even though [the Defendant] knew that the [confidential] informant had deliberately 'set the Defendant up'", such allegation constituted a legally sufficient claim of a deprivation of the right to counsel. Rita v. State, 470 So.2d 80, 84 (Fla. 1st DCA 1985). Even less detail was required to find a legally sufficient claim in Allen v. State, 42 So.2d 529 (Fla. 1st DCA 1986). There defendant merely alleged that "his court appointed attorney failed to conduct an adequate pre-trial investigation". Id. at 529. That allegation sufficed in Allen.

In the present case, GORHAM specifically alleges that Ada Johnson was promised leniency in her prosecution for testimony in the GORHAM case. GORHAM further specifies the improper uses to which Johnson's testimony was put at trial. See Initial Brief at 22-28. Further, GORHAM presents extrinsic written evidence of the leniency promised which he alleges was given to Ada Johnson, in the form of a motion sworn to by Johnson herself. This level of factual allegation, bolstered by supporting extrinsic evidence, far exceeds what was required to find a legally cognizable claim in Alan and Rita. Therefore, Appellee is incorrect in arguing that GORHAM failed to sufficiently allege and underlying leniency deal which his trial counsel should have investigated.

C. Evidence of Other Suspects

Appellee takes a scatter-shot approach in attempting to argue that GORHAM fails to raise a legally sufficient claim that trial counsel was ineffective in not investigating other individuals suspected of the crime for which GORHAM was accused. Appellee states variously that:

1. GORHAM presents no independent evidence that he told his trial counsel of other suspects;
2. that trial counsel did not mention that GORHAM informed him of other suspects; or
3. that GORHAM cites no facts supporting the claim that his counsel failed to investigate other suspects.

GORHAM is not required to prove the propositions Appellee would require of him. As pointed out above, Rita stands for the proposition that an allegation by the Defendant that he informed trial counsel of a witness who should be investigated, and that trial counsel failed to investigate that witness, constitutes a legally sufficient claim of ineffective assistance of counsel. The same principle has been reiterated with regard to alibi witnesses. Where a defendant alleged that he provided the identities of alibi witnesses to his defense counsel, and alleged that his lawyer failed to contact those witnesses, the prima facia claim to require an evidentiary hearing was established. Evans v. State, 464 So.2d 619, 620 (Fla. 4th DCA 1985). GORHAM's allegations concerning his trial counsel's failure to investigate other suspects is equivalent to the allegations in Evans and Rita that trial counsel failed to investigate witnesses. Therefore, GORHAM's claim on this ground must stand as did the claims in Evans.

D. Inadequate Representation at Sentencing

In an unconvincing attempt to correct the trial court's error in failing to attach portions of the record to its summary denial of GORHAM's 3.850 Motion, Appellee makes various references to the record concerning the factual allegations of GORHAM's claim of ineffective representation of counsel at sentencing. See Answer Brief at 22-23. The rule is clear:

It is inappropriate to have the state select portions of the record below to support the appealed order when the trial court has not previously done so.

Thames, 454 So.2d at 1066. This Court must therefore ignore the Appellee's references to the underlying record.

Further, Appellee again engages in weighing potential evidence. Appellee labels as "pure speculation" the idea that witnesses appearing on behalf of GORHAM at his sentencing hearing would have presented evidence to outweigh aggravating circumstances. The question of weight and credibility of sentencing witnesses is a classic issue for the trial of fact. On this point, the trial court erred in not holding an evidentiary hearing to observe the testimony of the witness' favorable to GORHAM. The Appellee cannot now attempt to weigh the testimonial qualities of those witnesses in advance and decide for the trial court that that testimony would have no influence.

E. Failure to Object to Critical Trial Error

Appellant alleges that trial counsel's failure to object to constitutionally deficient instructions constituted ineffective assistance of counsel. Appellee seeks to rebut GORHAM's claim which citations to the trial record. As noted repeatedly above, it is improper for the state to make reference to the record on appeal of a summary denial of a 3.850 motion when the trial court did not do so in its decision. Therefore, the state's argument has no merit.

CONCLUSION

In summary, the discussion above demonstrates that Appellee has presented no valid arguments to show that Appellant GORHAM's claims are legally insufficient. Rather, throughout its Answer Brief, Appellee has engaged in an examination of the underlying trial record and a weighing of the credibility of witnesses and evidence. As is apparent from the case law, such post hoc fact-finding by Appellee is completely inappropriate in the appeal of a summary denial of a 3.850 motion. That Appellee engaged in fact-finding clearly illustrates that the trial judge ought to have made fact finding both through an examination of the trial record and in an evidentiary hearing where he could observe the testimonial qualities of witnesses and compare their testimony's value to the probative value of various documents. It is too late, however, for the state to correct the trial court's error. Since GORHAM's 3.850 Motion stated prima facie claims to post-trial relief, the trial court erred by neither attaching rebutting portions of the record nor holding an evidentiary hearing. This Court must therefore remand to the

trial court instructing the lower court on the proper procedure for examining GORHAM's 3.850 Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to Robert Tietler, Esq., 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401 and Paul Zacks, Esq., Suite 600, Broward County Courthouse, 201 S. E. 6th Street, Ft. Lauderdale, Florida 33301, this 4th day of September 1987.

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