

IN THE SUPREME COURT OF FLORIDA

CHARLES LEWIS BURR,

Appellant,

vs.

STATE OF FLORIDA

Appellee.

CASE NO. 71234

FILED

SEP 27 1977

OCT 9 1977

CLERK, SUPREME COURT

By SC
Deputy Clerk

ON APPEAL FROM THE CIRCUIT COURT,
SECOND JUDICIAL CIRCUIT, IN AND FOR
LEON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The record of the initial trial and appellate proceedings is before this Court. Burr v. State, 466 So.2d 1051 (Fla. 1985). The substantive information subsequent to this is found in the following documents:

- (1) motion for post-conviction relief;*
 - (2) the State's answer and Motion for Summary Dismissal;*
 - (3) the Appellant's Memorandum of Law filed with the trial court;*
 - (4) the Order on Motion for Post-Conviction Relief;
- and
- (5) the transcript of the hearing held on October 1, 1987 on the motion and the state's response.

* These three items have attachments and are part of the record on appeal.

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

A. Nature of the Case. This is a direct appeal from the summary denial, without an evidentiary hearing, of appellant's motion for post-conviction relief. As such, this appeal is governed by Rule 9.140, Florida Rules of Appellate Procedure.

B. Course of the Proceedings. Mr. Burr was indicted by a Leon County grand jury for the first-degree murder and robbery with a firearm of Steve Harty. On June 11, 1982, Burr was convicted as charged. Three days later, the trial jury recommended a life sentence for the first-degree murder proceeding.

On June 21, 1982, the trial court overrode the jury recommendation of life, and sentenced Burr to death. Burr also received a 99-year sentence for the robbery conviction.

The convictions and sentences were appealed to this Court, Burr v. State, 466 So.2d 1051 (Fla. 1985), and affirmed. Rehearing was denied on April 26, 1985 and this Court issued its mandate on June 3, 1985.

A timely petition for writ of certiorari was filed in the United States Supreme Court and ultimately denied. Burr v. Florida, ___ U.S. ___, 106 S.Ct. 201 (1985).

Mr. Burr's case was considered by the Governor for

executive clemency. The Governor denied this by signing a death warrant and scheduling an execution date for the week of October 22-29, 1987. The actual execution date is set for October 23, 1987.

Mr. Burr then filed a motion for post-conviction relief, pursuant to Rule 3,850, Florida Rules of Criminal Procedure. The trial court denied this motion and this timely appeal follows.

C. Disposition in the Lower Tribunal. The trial court summarily dismissed the motion for post-conviction relief. Its primary reason focused on the untimely filing of the motion. Secondly, the trial court addressed each of the issues raised in the motion and either found the issue not cognizable in this proceeding or dismissed it on the merits.

II. STATEMENT OF THE FACTS

The facts of this case are set out in this Court's opinion, Burr v. State, 466 So.2d 1051 (Fla. 1985), and the appellate briefs filed as part of that appeal and which are a part of the record in this case.

For purposes of this brief, the relevant facts are contained in Mr. Burr's motion for post-conviction relief

and subsequent memorandum of law, and the State's response.

ARGUMENT

THE TRIAL COURT ERRED IN
CONCLUDING APPELLANT'S MOTION
TO VACATE HIS SENTENCE AND
JUDGMENT WAS UNTIMELY FILED

The critical issue in this case devolves from the trial court's determination that Mr. Burr's motion for post-conviction relief was untimely filed. In so doing, the trial court essentially ruled that it was without jurisdiction to consider Mr. Burr's claims.*

The facts as to this claim are not in dispute. The mandate from this Court issued on June 3, 1985. A timely petition for writ of certiorari was filed in the United States Supreme Court. There was no request of either this Court or the United States Supreme Court to stay the mandate. The United States Supreme Court denied certiorari on October 7, 1985. Mr. Burr then filed his motion for post-conviction relief on September 23, 1987.

* Therefore, the rest of the opinion is dicta. However, Mr. Burr has addressed in detail each issue raised in his previously filed memorandum of law. He specifically adopts the argument contained in the memorandum and does not waive any point advocated in the motion.

The rule at issue reads in pertinent part, as follows:

A motion to vacate a sentence which exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than two years after the judgment and sentence becomes final

Therefore, the question to be answered in this case (and others similarly situated) is when a "judgment and sentence becomes final". The State argued, and the trial court agreed, that the sentence and judgment became final in this case when the mandate issued from this Court. This determination is in error.

Rule 3.850, Florida Rules of Criminal Procedure, was amended on November 30, 1984, effective January 1, 1985, to include the two-year time limitation. The Florida Bar, 460 So.2d 907 (Fla. 1984). The amendment was designed to remedy the perceived failure of death-sentenced individuals to pursue post-conviction claims in a timely manner. However, the rule deals with all criminal convictions and sentences.

In this respect, there have been two appellate decisions interpreting the rule in non-death circumstances. McCuiston v. State, 507 So.2d 1185 (Fla. 2nd DCA 1987), cert. granted, 12 FLW i (September 25, 1987); Ward v. Duggar, 508 So.2d 778 (Fla. 1st DCA 1987).

McCuiston seems to support the trial judge's interpretation of the rule. "The appellate process is completed on the date the mandate is issued. [citation omitted]." McCuiston, at page 1186. Ward does not.

Relying on State v. Meneses, 392 So.2d 905 (Fla. 1981), the Ward court determined that "the judgment and sentence 'become final' for purposes of Rule 3,850 when any such direct review proceedings have concluded and jurisdiction to entertain a motion for post-conviction relief returns to the sentencing court." Ward, at page 779.

The Ward court began calculating the two-year time limitation from the date the original trial court regains jurisdiction to consider a post-conviction motion. This starting date can be different from the date of the issuance of the mandate.

In State v. Meneses, 392 So.3d 905 (Fla. 1981), this Court held that a trial court is without subject matter jurisdiction to consider a post-conviction motion "while appeal proceedings or certiorari proceedings are pending in an appellate court" The essential facts of this case are that Meneses was convicted, took a direct appeal which affirmed his conviction. The district court of appeal issued its mandate and then Meneses took a cert petition to the Florida Supreme Court. While the cert petition was pending, Meneses filed a motion back in the trial court pursuant to Rule 3.850.

The trial court dismissed the motion and this Court ultimately agreed, stating that a motion for post-conviction relief could not be considered simultaneously while review via discretionary writ was being sought.

In computing the date of finality of the judgment and sentence for purposes of Rule 3.850, it would be improper to count any time during which a trial court did not have jurisdiction to consider the motion. Put another way, the time should be tolled while any discretionary review is sought, regardless of the issuance of the mandate.

In this case, such discretionary review was sought in the United States Supreme Court and denied on October 7, 1985. The motion in this case was filed timely within the following two-year time period.

CONCLUSION

Based on the foregoing analysis, this Court should reverse the trial court, with instructions to reinstate the motion. This Court should also reverse the trial court on the merits and remand with instructions to grant the motion and vacate the judgment and sentence of death. Finally, this Court should grant a stay of execution.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was delivered by hand to Mr. Raymond L. Marky, Assistant State Attorney, 500 First Florida Bank Bldg., Tallahassee, Florida 32301 this 12th day of October, 1987.



STEVEN L. SELIGER