IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,120

ROBERT TEFFETELLER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

ARGUMENT I

THE CONFLICT CLAIM

The state argues that the "Howard Pearl claim" was addressed by this Court in Harich v. State, 573 So. 2d 303 (Fla. 1990). The state asserts that Harich is the "settled law of this State". However, this Court has already recognized that "[Howard Pearl clients] raise factually specific claims regarding Pearl's representation of them ... The trial courts should consider the appellants 3.850 claims individually ...". Teffeteller v. State, 676 So. 2d 369, 371 (1996). Therefore, the state's reliance on the Harich findings of fact is misplaced.

Likewise, the procedural posture of Mr. Harich's case is completely different than the case at bar. Mr. Harich was litigating his conflict of interest claim as a "successor". As such, different standards were used by the court to evaluate the merits of Mr. Harich's claims. Harich v. State, 573 So. 2d 303 (Fla. 1991).

Furthermore, the state argues that Mr. Teffeteller presented no evidence to challenge the settled law of Harich. The state ignores the factual distinctions of Mr. Teffeteller's "Howard Pearl claim" which adds a new dimension to the prior conflict claims. The state glosses over the fact that Mr. Pearl's conduct during Mr. Teffeteller's trial constituted "guarding" him. At the hearing, Mr. Pearl was asked about his previous deposition testimony:

> Q: ...Do you recall -- in response to the question: (Reading) Do you recall at the Harich trial whether you were armed?
>
> You stated: (Reading) Absolutely not. I was not armed. Generally, I am not, very seldom during trial.
>
> Then a paragraph passes and you state: (Reading) There was one guy a long time ago, I was armed because of information that had been given to me by deputies who were guarding him; that they very strongly suspected that an attempt would be made to hand him a gun by his wife or girlfriend, or whatever the status was. They worried about it. I armed myself because I had made up my mind that, no matter what happened, if he did wind up armed, I was not leaving the courthouse with him as a hostage and wouldn't either. In that particular single case, he wouldn't have left the courtroom.

(PC-R3. 128-129). Clearly, Mr. Teffeteller presents new facts for this Court's consideration. In fact, Mr. Teffeteller has repeatedly maintained that it is this aspect of his "Howard Pearl claim", that differs from all other claims and created the per se and actual conflict between he and Mr. Pearl. Mr. Teffeteller reiterates that the key "Howard Pearl issue" that must be decided is: whether Mr. Pearl's interests were adverse to Mr. Teffeteller's interests, or whether he chose to forego action in Mr. Teffeteller's case in deference to his own interests as those of law enforcement. The facts established at the evidentiary hearing undeniably support an affirmative finding.

The state claims that Mr. Pearl was not a Marion County Deputy Sheriff. However, this position ignores all of the documentary evidence and testimony that illustrate both Sheriff Moreland and Mr. Pearl considered Mr. Pearl to be a deputy sheriff (PC-R3. 31, 55-56, 66-67, 110-111). Mr. Pearl formally

accepted the rights duties and responsibilities of a deputy sheriff. In fact, Sheriff Moreland testified that, at the time of Mr. Teffeteller's trial, some of those duties included acting as a law enforcement officer in other Florida counties (PC-R3. 62). This is exactly what Mr. Pearl did during Mr. Teffeteller's trial.

No matter whether Mr. Pearl's special deputy sheriff status was intended to be honorary, when Mr. Pearl armed himself in court, despite the presence of armed law enforcement personnel, he became a full fledged deputy with every intention of using the full power of that assignment to shoot his client if he attempted to escape. This is the true definition of an adverse interest.

The state argues that Mr. Pearl's actions did not constitute a conflict of interest. Defense counsel is guilty of an actual conflict of interest when he has "inconsistent interests". Freund v. Butterworth, 117 F.3d 1543, 1571 11th Cir. 1997), see also, Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir.), cert. denied, 444 U.S. 833, 100 S.Ct. 63, 62 L. Ed. 2d 42 (1979). Mr. Pearl owed a duty to the Marion County Sheriff's Department which he used to its fullest extent during the course of a Volusia County trial. Mr. Pearl was informed about a possible escape attempt by his client (PC-R3. 128-129). He took no steps to confirm this information (PC-R3. 123). Mr. Pearl used the rights and duties he had accepted in Marion County to assist the Volusia County Sheriff's Department and himself in preventing Mr. Teffeteller's escape. Clearly, Mr. Pearl assumed a real duty as

a law enforcement officer because he was prepared to shoot his client. This was inconsistent with his role as Mr. Teffeteller's defense counsel.

The state argues that Mr. Teffeteller mischaracterizes the testimony when he complains that Mr. Pearl was "prepared to shoot him" if he attempted to escape. Mr. Pearl testified that "[i]n that particular single case [Mr. Teffeteller] wouldn't have left the courtroom" (PC-R3. 128-129). The inference is obvious. Mr. Teffeteller would not have "left the courtroom" because Mr. Pearl was prepared to shoot him. Mr. Pearl's actions at least constituted "guarding" and at most were openly hostile to Mr. Teffeteller.

The state also argues that Mr. Teffeteller cannot now claim that the alleged escape plan caused Mr. Pearl to refrain from calling family and friends to testify despite Mr. Teffeteller's wishes to the contrary. This issue is a direct reference to the events that occurred during Mr. Teffeteller's trial and the information that has come to light since then. Furthermore, it is fully supported by the record.

The appellee has failed to examine all of the facts surrounding this issue. Mr. Teffeteller's initial trial resulted in a mistrial. It was following the mistrial and before the retrial when the court held a hearing regarding Mr. Teffeteller's complaint that Mr. Pearl declined to call a witness that Mr. Teffeteller wanted to testify. As the appellee concedes, the record does not reveal when Mr. Pearl was informed of the escape

attempt. Therefore, if Mr. Pearl learned about the possible escape attempt during the mistrial, this may have affected his decision not to call any witnesses prior to the retrial. Appellee cannot assume that the Mr. Pearl's pre-trial decision not to call any witnesses occurred before he was informed about the potential escape attempt.

At the evidentiary hearing, Mr. Pearl testified about the escape attempt:

> Q: Do you recall any other aspects of the possible escape attempt? Any of the details? Was anyone supposed to assist Mr. Teffeteller in this escape attempt, according to the information you had received?
>
> A: Someone, so I was told was going to hand Mr. Teffeteller a handgun.
> Now the only place that could possibly ever have been done would have been real quick, perhaps inside the courtroom; couldn't have been done at the jail or anywhere else.

(PC-R3. 126). Mr. Pearl was cognizant that if the escape attempt occurred, Mr. Teffeteller would have been assisted by someone in the courtroom. Had the alleged plan been brought to Mr. Pearl's attention during the mistrial, this would certainly have affected his pre-trial decision not to call witnesses during Mr. Teffeteller's trial.

The state also concedes that Rule 4-1.6(b) of the Rules Regulating the Florida Bar require an attorney to reveal confidential information to prevent a client from committing a crime or to prevent death or substantial bodily injury to another. **Rules Regulating the Florida Bar**, 4-1.6(b). By appellee's own admission Mr. Pearl was not acting as a lawyer but

rather as a law enforcement officer. Had he acted as a lawyer, he was ethically bound to inform the court of the alleged escape attempt. He had the duty to inform the court because it would have prevented his client from committing a crime. He also had the duty to inform the court because he believed that had the escape attempt occurred Mr. Teffeteller, or his accomplice would be armed and could cause death or bodily injury to another. Instead of acting as an attorney, Mr. Pearl acted as a law enforcement officer. He chose to arm himself, inform the bailiffs that he was armed and then sit silently next to Mr. Teffeteller during his trial, waiting for Mr. Teffeteller to attempt an escape.

Mr. Pearl's actions during Mr. Teffeteller's trial constituted "guarding" his client. These actions created an actual conflict of interest. Mr. Teffeteller is entitled to relief.

ARGUMENT II

THE HUFF v. STATE CLAIM

As Mr. Teffeteller indicated in his initial brief, there is an issue still pending before the circuit court regarding whether Mr. Teffeteller is entitled to an evidentiary hearing on the remaining claims in his Rule 3.850 motion.

The state argues that Mr. Teffeteller did not preserve these issues when the court requested guidance from both parties. The state is mistaken. Mr. Teffeteller, individually and through counsel, attempted to provide the court with the information it

requested. In order to refute the state's argument Mr. Teffeteller can illustrate that in the last ten years he has done nothing but request a full and fair hearing on the meritorious claims he raised in his original Rule 3.850 motion. After ten years, Mr. Teffeteller is still waiting for this hearing.

In October, 1988, after Mr. Teffeteller's death warrant had been signed, he timely filed a Rule 3.850 motion. At a November 9, 1988 hearing, Judge Foxman addressed Mr. Teffeteller's Rule 3.850 motion. Judge Foxman stated:

> THE COURT: Frankly, the allegations in claims nine and ten most likely will merit some type of evidentiary hearing down the line and I'm not saying that the other claims don't merit and evidentiary hearing, but I'm not sure about that.
>
> I am quite sure about nine and ten, and I think the State recognizes that as well, and we get caught again in the battle I guess between the Governor's office with warrants and the CCR in the filing of the 3.850 and the two year statute of limitations.
>
> I don't want to get caught in that. I would rather proceed in a more deliberate fashion accordingly.
>
> The motion to stay is granted. The CCR has 35 days to file an amended 3.850 ...
>
> * * *
>
> THE COURT: The 2nd of February, all day hearing on the 3.8 -- amended 3.850 after which I'll rule on the claims as best I can and determine what, if any evidentiary hearing is necessary.

(PC-R1. 98-99). Even the state, in that hearing conceded that Mr. Teffeteller was entitled to an evidentiary hearing (PC-R1. 103).

Following this hearing, Judge Foxman summarily denied all of

Mr. Teffeteller's claims (PC-R1. 595-596). Thereafter the "Howard Pearl issue" came to light. He agreed that Mr. Teffeteller could amend his Rule 3.850 motion to include the "Howard Pearl claim". In February of 1991, Judge Foxman summarily denied Mr. Teffeteller relief based on Harich (PC-R1 721-722).

On March 3, 1992, Mr. Teffeteller filed a brief in this Court raising all of his issues. The next month, Justice Shaw ordered a consolidated "Howard Pearl" hearing. Assistant State Attorney Sean Daly then filed a motion to relinquish jurisdiction to the circuit court. This Court granted that motion. Thereafter, Mr. Teffeteller filed several pro se pleadings regarding the status of his case.

At the consolidated hearing, held before Judge Driver, Mr. Teffeteller sought to be heard on those pleadings. When Mr. Teffeteller attempted to clarify the status of his case, Judge Driver stated:

> THE COURT: Well, unfortunately, Mr. Teffeteller that doesn't go to the issue that the Supreme Court told me to resolve, that is whether or not there was a conflict with Mr. Pearl. You may have good grounds for a further hearing on the motion and I will be glad to let you preserve that ground and consider it at another hearing. ...

(PC-R2. 153). After this hearing, Judge Driver denied relief on the "Howard Pearl claim". Judge Driver never readdressed Mr. Teffeteller's remaining claims.

Mr. Teffeteller filed an appeal with this Court. This Court remanded Mr. Teffeteller's case back to the circuit court for

another evidentiary hearing. This Court held:

> [w]e vacate the trial court's orders denying appellants rule 3.850 relief and remand for new proceedings. Furthermore, we find that appellants' 3.850 claims should be considered on an individual basis before the judges who would normally be assigned to hear the several appellants' 3.850 claims, rather than in a consolidated hearing. The appellants raise factually specific claims regarding Pearl's representation of them as well as other individual claims regarding their convictions and sentences. The trial courts should consider the appellants 3.850 claims individually and should conclude these matters within six months of this opinion.
>
> Moreover, as to the claims which raise ineffective assistance of counsel claims that "are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudice the defendant," Roberts v. State, 568 So.2d 1255, 1259 (Fla. 1990), the appellants are entitled to an evidentiary hearing. In light of our disposition of Teffeteller's 3.850 appeal, we do not address his habeas claims at this time.

676 So. 2d at 371. As this Court ordered, the circuit court held another "Howard Pearl" hearing in Mr. Teffeteller's case.

Mr. Teffeteller's case was remanded to the circuit court for a Faretta hearing, prior to commencement of the "Howard Pearl" hearing. The Faretta hearing was conducted on August 27, 1996. During this hearing, Mr. Teffeteller was compelled to accept reassignment of Assistant CCR Stephen Kissinger as his counsel (PC-R3. 32). At the conclusion of the Faretta hearing Mr. Teffeteller requested clarification on the scope of the "Howard Pearl" hearing:

> MR. KISSINGER: Your honor, just for the purposes of clarification, the Court's order said Howard Pearl hearing alone, only the

Howard Pearl issue?

THE COURT: Yes.

MR. KISSINGER: That's what the Court's order -- I know that we have a differing opinion on what course --

THE COURT: I'm not exactly sure either where we stand on that and that we'll set aside for another day. But let's do the Howard Pearl hearing at least and see how we come out on that.

CCR you're reappointed. Get yourself prepared.

(PC-R3. 33-34).

On September 3, 1996, Mr. Teffeteller again sought to clarify the scope of the hearing by filing a motion for clarification (PC-R3. 36). That same day, Judge Foxman issued an order confining the scope of the hearing to the "Howard Pearl claim" (PC-R3. 38).

On September 9, 1996, the "Howard Pearl" hearing commenced with Mr. Teffeteller again seeking to clarify the scope of the hearing. Judge Foxman again stated that the hearing would be confined to the "Howard Pearl issue" (PC-R3. 39).

After the hearing, on September 12, 1996, Judge Foxman directed the parties to file memoranda on the status of Mr. Teffeteller's other claims (PC-R3. 46). This occurred at a time when Mr. Teffeteller's counsel, Stephen Kissinger and George Couture, had just been assigned to represent John Earl Bush. Mr. Bush was scheduled to be executed on October 17, 1996. Because no one at CCR had previously represented Mr. Bush, Mr. Kissinger was compelled to learn the entire case under warrant. Mr.

Kissinger was forced by state action to request an extension of time for filing the memorandum (PC-R3. 53-55). At the same time, Mr. Kissinger realized that he must file a notice of appeal by October 18, 1996, on the circuit court's denial of relief on the "Howard Pearl claim". Mr. Kissinger prepared the Notice of Appeal and filed it on October 7, 1996 (PC-R3. 303-304). Only after doing so did Mr. Kissinger become aware of the court's denial of his request for an extension of time (PC-R3. 68). Mr. Kissinger then filed a Motion for Appointment of Conflict Free Counsel or In the Alternative, To Reconsider Denying Defendant's Motion for Extension of Time (PC-R3. 309-314).

The state incorrectly claims, and misleads the court when it avers that "Teffeteller fails to mention that while the trial court solicited his input regarding proper disposition of these [remaining] claims, he did not avail himself of that opportunity." The state attempts to use the untenable position of Mr. Teffeteller's counsel, in being unable to file a memorandum, as a basis for this claim. However, the state fails to mention that while Mr. Teffeteller's counsel may have been unable to file the memorandum regarding the status of his other claims, on September 23, 1996, Mr. Teffeteller filed a pro se motion regarding the status of his remaining claims (PC-R3. 56-66). Four days later the court ordered the state to respond to the motion (PC-R3. 68). The state responded on October 7, 1996 (PC-R3. 69-97). Mr. Teffeteller replied on October 15, 1996 (PC-R3. 375-377). Mr. Teffeteller's initial motion and his reply

were before the circuit court before the date the court had established. The motion was considered by the court on its merits and the state replied on the merits. The state cannot now argue that the memorandum was not properly before the lower court. No contemporaneous objection was made by the state.

The state misleads this Court when it argues that no basis exists for any consideration of the remaining claims. Mr. Teffeteller's pro se motion provides the proper basis for such consideration.

In a January 28, 1997 Order, the circuit court ruled that it did not have jurisdiction to rule on Mr. Teffeteller's pro se motions because a notice of appeal had been filed on October 8, 1996. However, Judge Foxman had already ruled on a pro se motion following the notice of appeal. On January 8, 1997, Judge Foxman denied Mr. Teffeteller's pro se Motion for Rehearing (PC-R3. 378). Clearly Judge Foxman took jurisdiction regardless of the notice of appeal.

Mr. Teffeteller would contend that the state is attempting to convince this court that Mr. Teffeteller's Rule 3.850 claims were summarily denied after "an extensive hearing during which the parties were afforded the opportunity to argue each claim". This is wrong. The record conclusively shows that no such hearing existed. Mr. Teffeteller was not afforded a Huff hearing on his Rule 3.850 claims. See Huff v. State, 622 So. 2d 982 (Fla. 1993). The support cited by the state comes from the hearing wherein the court made clear that the only issue it would

consider was the "Howard Pearl claim" (PC-R3. 39). Certainly, a hearing on one issue - the "Howard Pearl issue" does not afford the parties with an opportunity to argue all of the claims in Mr. Teffeteller's Rule 3.850 motion.

Mr. Teffeteller has never received a full and fair hearing on claims which Judge Foxman and Judge Driver had previously found worthy of an evidentiary hearing (PC-R1. 98-99; PC-R2. 153). At least, Mr. Teffeteller was entitled to a Huff hearing on those claims.

Mr. Teffeteller has consistently requested the opportunity to be heard on claims that circuit court judges and assistant state attorneys have conceded require an evidentiary hearing. Judge Foxman and Assistant State Attorney Sean Daly conceded that Mr. Teffeteller presented meritorious claims that required an evidentiary hearing in 1988 (PC-R1. 98-99; 103). Judge Driver also granted Mr. Teffeteller a hearing to consider his other claims (PC-R2. 153).

Mr. Teffeteller is entitled to a Huff hearing under the law. He did not receive the opportunity to address the court on the merits of issues that the state conceded were worthy of an evidentiary hearing. Therefore, Mr. Teffeteller is entitled to an evidentiary hearing on the remaining Rule 3.850 claims and a new trial with conflict free counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing reply brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on November 19, 1997.

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