IN THE SUPREME COURT OF FLORIDA

WILLIAM EUTZY,

Appellant,

CASE NO. 73894

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

William Eutzy was the defendant and petitioner in the circuit court and will be referred to as Appellant for the purposes of this appeal. The State was the prosecuting authority in the circuit court and will be referred to as appellee on appeal. Citations to the record on appeal, the trial transcript and the evidentiary hearing transcript will be made by the use of the symbol "R", "TR and "EH," respectively followed by the appropriate page number(s) in parenthesis.

STATEMENT OF THE CASE AND FACTS

The procedural progress and facts of the case are adequately set forth in this Court's opinion in Eutzy v. State, 458 So.2d 755 (Fla. 1984) and Eutzy v. State, 536 So.2d 1014 (Fla. 1988).

Governor Martinez signed a death warrant on January 31, 1989 providing for Mr. Eutzy's execution during the week of April 4-11, 1989. Florida State Prison has scheduled April 5, 1989 for the date for Mr. Eutzy's execution. As a consequence of the death warrant, the current motion for post-conviction relief on appeal to this Court was filed by Mr. Eutzy on March 1, 1989. On the same date Mr. Eutzy also filed a petition for writ of habeas corpus with this Court.

SUMMARY OF ARGUMENT

The trial court did not err by summarily denying Mr. Eutzy's motion since his claims all could have or should have been raised on direct appeal or in his first motion to vacate. Christopher v. State, 489 So.2d 22 (Fla. 1986); Witt v. State, 465 So.2d 510, 512 (Fla. 1985). Furthermore, none of Mr. Eutzy's claims are based upon a change of law which would excuse his abuse of the writ by his successive motion. Witt v. State, 387 So.2d 922 (Fla. 1980); Aikens v. State, 488 So.2d 543 (Fla. 1st DCA 1986); Card v. Dugger, 512 So.2d 829, 830-831 (Fla. 1987).

This Court should deny all relief with a plain statement that it does so because state law precludes Mr. Eutzy from raising these claims in a successive 3.850 motion. Harris v. Reed, 3 F.L.W. Fed. S75 (February 24, 1989).

ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT DID NOT ERR BY SUMMARILY DENYING APPELLANT'S RULE 3.850 MOTION TO VACATE.

Mr. Eutzy is before the Court appealing the denial of his second 3.850 motion to vacate his judgment and sentence. In his first motion for post-conviction relief he set forth 11 claims for relief. These claims are adequately outlined by this Court's decision affirming the trial court's denial thereof in Eutzy v. State, 536 So.2d 1014 (Fla. 1988).

Also pending before this Court is Mr. Eutzy's petition for writ of habeas corpus. Mr. Eutzy's petition for writ of habeas corpus contains an issue which should have been raised in the trial court by a motion to vacate pursuant to Rule 3.850, Fla.R.Crim.P. Consequently, this Court should summarily deny the petition in conjunction with this appeal.

The trial court correctly dismissed Mr. Eutzy's motion since it was a successive motion which constituted an abuse of procedure. Mr. Eutzy's motion to vacate contained five claims for relief:

> (1) The involvement of the victim's family in pretrial plea negotiations denied Mr. Eutzy his constitutionally guaranteed right to be free from the arbitrary and capricious imposition of the death sentence contrary to the United States Supreme Court's decision in Booth v. Maryland, 107 S.Ct. 2529 (1987).

(2) Mr. Eutzy's death sentence must be vacated as an unconstitutional deprivation of his Sixth Amendment right to a jury trial on the elements of capital murder in accord with the decision in Adamson v. Ricketts, Case No. 84-2069 (9th Cir. December 22, 1988).

(3) The Florida death penalty statute is unconstitutional because it imposes an unlawful presumption that death is the appropriate penalty contrary to the decision in Adamson v. Ricketts, supra.

(4) Mr. Eutzy's 1958 Nebraska conviction was secured in violation of his constitutional rights and cannot serve as a basis for his death sentence contrary to the United States Supreme Court's decision in Johnson v. Mississippi, 108 S.Ct. 1981 (1988).

(5) Mr. Eutzy was denied his constitutionally guaranteed right to a competent psychiatric evaluation of his sanity.

None of Mr. Eutzy's claims are congnizable in his successive 3.850 motion. Rule 3.850, Fla.R.Crim.P. provides in part:

> . . . no other motions 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.

Thus, the criminal defendant who is tardy with his motion for post-conviction relief can still be heard if he can fit a claim into one or the other of the two exceptions. Failure to demonstrate or establish one of the exceptions is thus fatal, making the motion subject to summary dismissal. Delap v. State, 513 So.2d 1050 (Fla. 1987).

It has long been established by this Court that the purpose of a 3.850 motion is to provide a means of addressing alleged constitutional infirmities of a judgment or sentence. A motion may not be used to review ordinary trial errors which should have been raised in a direct appeal. Ratliff v. State, 256 So.2d 262 (Fla. 1st DCA 1972); McCray v. State, 437 So.2d 1388 (Fla. 1983); Smith v. State, 457 So.2d 1380 (Fla. 1984). Thus, an offender's failure to raise a claim on direct appeal precludes his later participation in a 3.850 proceeding. This rule applies to both an initial and a successive motion for post-conviction relief. Smith v. State, supra; Christopher v. State, 489 So.2d 22 (Fla. 1986).

Again, as in the case of a belatedly filed motion, a criminal offender may avoid summary dismissal if he justifies his failure to raise an issue by establishing that the facts giving rise to his claim were unknown to him at the time of appeal or the filing of his previous motion. Witt v. State, 465 So.2d 510, 512 (Fla. 1985). He may also justify this failure by establishing that his claim is based

upon a change in law. Aikens v. State, 488 So.2d 543 (Fla. 1st DCA 1986); Witt v. State, 387 So.2d 922 (Fla. 1980).

An examination of Mr. Eutzy's motion reveals that all five claims presented constitute an abuse of the procedure. Mr. Eutzy has failed to demonstrate that the claims were not known or could not have been known to him at trial or at the time of his initial motion for post-conviction relief was filed. Witt v. State, supra; Francois v. State, 470 So.2d 685 (Fla. 1985); Clark v. State, 533 So.2d 1144 (Fla. 1988).

The facts giving rise to Mr. Eutzy's first claim certainly were known to him and his attorney prior to his trial in 1983. No objection was made at trial, on direct appeal or in Eutzy's initial 3.850 motion. This is a claim which could have or should have been raised on direct appeal or in the first motion, therefore it is procedurally barred from consideration by this Court. Clark, supra.

In issues II and II of Eutzy's motion, he attacked his death sentence as an unconstitutional deprivation of his Sixth Amendment right to a jury trial on the elements of capital murder and that the death sentence is unconstitutional because it imposes an unlawful presumption that death is the appropriate penalty. Mr. Eutzy attempts to justify his procedural abuse by alleging that these claims are based upon a change in the law derived from the decision in Adamson v. Ricketts, Case No. 84-2069 (9th Cir. December 22, 1988). Mr. Eutzy's attempt at justification

falls short of the mark. In rejecting the argument that a federal circuit court of appeals' decision constitutes a change in the law, the Florida Supreme Court in Witt v. State, supra, stated:

> The United States Supreme Court recently rejected this argument in Sullivan v. Wainwright, 464 U.S. 109, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983), and this court has also specifically rejected this argument. Carruthers v. State, 65 So.2d 496 (Fla. 1985); Copeland v. State, 457 So.2d 1012 (1984); Gafford v. State, 387 So.2d 333 (Fla. 1980). Further it is important to recognize that only this court and the United States Supreme Court can adopt a change of law sufficient to support a post-conviction challenge. Witt v. State, 397 So.2d 922 (Fla. 1980). An alleged change in law eminating from an intermediate federal court does not constitute a change which must be considered in a 3.850 proceeding.

Consequently, since Mr. Eutzy has failed to establish a change in law the trial court's summary dismissal of issues II and III based upon the abuse of procedures doctrine was justified.

As to Eutzy's fourth claim, certainly the facts surrounding his 1958 conviction were known to him, his original trial counsel, his original appellate counsel and also known to Mr. Eutzy's present counsel at the time he filed his first motion for post-conviction relief. At trial Eutzy objected to the introduction of the 1958 conviction and in his first motion for post-conviction relief he attacked the competence of his trial counsel for failing to

challenge the introduction of the prior conviction based upon a Miranda argument. Mr. Eutzy, through any one of these counsel or any attorney which he could have hired between 1958 and 1988, could have undertaken post-conviction proceedings in Nebraska to set aside his conviction. Mr. Eutzy's claim is similar to the one made by Theodore Bundy in his last-ditch effort to avoid his rendevous with Florida's electric chair. Mr. Bundy's abusive and successive 3.850 motion contained a claim which related to the validity of a prior conviction used to establish an aggravating circumstance. This Court ruled that Mr. Bundy's claim was procedurally barred for failure to raise it on direct appeal or in his first motion for post-conviction relief. Bundy v. State, 14 F.L.W. 43 (January 27, 1989).

This failure to act for over 30 years is the type of abuse of procedure which the provisions of Rule 3.850 are intended to prevent. Mr. Eutzy's Nebraska conviction is valid until determined otherwise and the State of Florida is not required to suspend execution of its judgment pending litigation in another state. The trial court's summary dismissal of this claim should be affirmed.

As to Mr. Eutzy's fifth claim, he knew of the psychiatric evaluations prior to trial and failed to assert any objection to them or to request the court to appoint additional psychiatrists for further evaluations. The reason for this failure to pursue this issue is based upon

the appellant's own actions and instructions to his attorney. During the evidentiary hearing conducted by the trial court on May 27, 1987, the gist of Mr. Lang's testimony was that Mr. Eutzy felt that there was nothing wrong with him and he didn't want to pursue any sanity defense. (EH. 18-25). It is interesting to note that in the initial Rule 3.850 motion Eutzy claimed his trial counsel was ineffective for not introducing into mitigation the two psychiatric reports which he challenged in his second motion. Eutzy v. State, 536 So.2d at 1015-1016. In support of his first motion to vacate Eutzy attached a report from Dr. Allen B. Zients, a clinical psychiatrist. This psychiatrist's report which Mr. Eutzy so heavily relied upon in his first motion is inconsistent with and conflicts with the psychiatric report he now relies upon to establish that he has organic brain damage. On pages one and two of Dr. Zients' report, he indicates that "There was no evidence of any psychiatric condition that might be attributed to organic etiology or any evidence of a psychiatric illness of psychotic dimensions." (Exhibit N-584, Appendix to Appellant's first 3.850 motion; also attached to the State's response as Appendix B).

The existence of this report dated November 24 and November 25, 1986, which gives Mr. Eutzy a clean bill of health as to organic brain damage, supports the State's position that this issue was known and could have been raised in Mr. Eutzy's first motion to vacate filed one month

after the evaluation. (Could have been raised except that the report indicated no organic brain damage.)

In denying relief, this Court should act in harmony with the United States Supreme Court's decision in Harris v. Reed, 3 F.L.W. Fed. S75 (February 24, 1989), and by a plain statement in its decision affirming the trial court's summary denial of Eutzy's successive motion, deny relief to Mr. Eutzy because his claims are procedurally barred. Clark, supra; Card, supra; Christopher, supra; Delap, supra. In Harris v. Reed, the United States Supreme Court determined that its long-standing rule that a federal court should not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on state law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision also applies to review of state court judgments on federal habeas corpus. The Court pointed out that it determined in Michigan v. Long, 463 U.S. 1032 (1983) that before the rule could be applied the state court opinion must contain a "plain statement" that its decision rested upon an adequate and independent state ground. This confusion over whether federal courts have the power to review certain state court judgments arises when those state court judgments are ambiguous as to whether the federal claims were decided primarily on federal law or the decision was based upon an adequate and independent state ground. This same difficulty arises in federal habeas corpus review

pursuant to Title 28 U.S.C. §2254. If the state court opinion concerning a post-conviction claim is ambiguous as to whether it was decided on the merits or dismissed because of state procedural bar then the federal claim can be considered on either direct or habeas corpus review. In Harris, the Supreme Court adopted a solution for this common problem by stating:

> A procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar. Thus this court should affirm the lower court's summary dismissal of the movant's claims by a plain statement that those claims are procedurally barred.

The State urges this Court to refuse to address the merits of Eutzy's claims and deny relief because of procedural bar. The State also respectfully requests that this Court, in accord with Harris, deny that relief with a plain statement that it does so on state procedural grounds.

In summary, Mr. Eutzy has failed to timely file his motion or he has raised claims which should have been or could have been raised on direct appeal or in his initial 3.850 motion. Mr. Eutzy also did not establish justification for his failure to timely file his claims. (See Rule 3.850, two-year time bar). Unlike some litigants who stand before this Court with two strikes against them,

Mr. Eutzy has had his third strike and now demands the privilege of a fourth out in the ninth inning as the teams head to the dugout. This Court should deny him that privilege with a plain statement that it affirms the trial court's finding that Mr. Eutzy does not get another turn at bat because of state procedural bar.

CONCLUSION

Based upon the foregoing arguments and citations of authority, the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Timothy C. Hester, Esquire, Covington & Burling, 1201 Pennsylvania Avenue, N.W., Post Office Box 7566, Washington, D.C. 20044, this 23rd day of March, 1989.

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