IN THE SUPREME COURT OF FLORIDA

75,562

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO.

DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT,

Respondent.

FILED
SID J. WHITE
FEB 19 1990
CLERK, SUPREME COURT
By
Deputy Clerk

PETITION FOR WRIT OF PROHIBITION

Pursuant to Fla.R.App.P. 9.100, the State of Florida respectfully petitions the Court for a writ of prohibition restraining respondent First District Court of Appeal from hearing under its original jurisdiction petitions for writ of habeas corpus seeking untimely appeals grounded on alleged ineffective assistance of trial counsel.

I.

BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to issue a writ of prohibition under Art. V, §3(b)(7) Fla. Const., and Fla.R.App.P. 9.030(a)(3). Prohibition is the proper remedy to prevent an inferior court from usurping the jurisdiction of another court or acting in excess of its own jurisdiction. Harrison v. Murphy, 132 Fla. 579, 181 So. 386 (1938); Crill v. State Road Department, 96 Fla. 110, 117 So. 795 (1928); State ex rel. Rheinauer v. Malone, 40 Fla. 129, 23 So. 575 (1898).

II.

FACTS UPON WHICH THE PETITIONER RELIES

Respondent First District Court of Appeal entertains and rules on petitions for writ of habeas corpus from state prisoners who allege that their trial counsel was constitutionally ineffective for failure to timely file notices of appeal from criminal convictions.

Appendices A-C contain documents from cases now pending before respondent court. In appendix A William Navarre seeks appointment of appellate counsel and a so-called "belated appeal". In support, Navarre alleges that he was convicted of second-degree murder in July 1989, that he informed his privately retained counsel to file a notice of appeal, and that counsel failed to do so, thereby proving himself ineffective. (A 1) Based on Navarre's unsupported and unproven allegations concerning privileged communications with his privately retained counsel, respondent court ordered the State of Florida, petitioner here, to show cause why the petition for writ of habeas corpus should not be issued. (A 3) The state responded by pointing out that claims of ineffective trial counsel were cognizable only under Florida Rule of Criminal Procedure 3.850 in the trial court where the alleged error occurred and that the petition for writ of habeas corpus should be dismissed without prejudice to Navarre's right to raise the claim under rule 3.850 before the trial court. (A 4-5) Respondent court construed the state's response as a motion to dismiss, denied the motion to

dismiss, and ordered the state to file a response within ten days addressing the "substantive issue of entitlement to belated appeal." (A 6-7) The state has responded to this order to show cause. (A 8) Appendix B contains a similar petition from Norman B. Williams, Jr., (B 1-2), an order to show cause (B 3), a response to the order to show cause (B 4-5), and an order granting the belated appeal. (B 6)

Appendix C contains a similar petition from Walter William Graham (C 1-5) and an order to show cause (C 6). The state has responded to the order to show cause. (C 7-8)

111.

THE NATURE OF THE RELIEF SOUGHT

The nature of the relief sought by this petition is a writ prohibiting respondent from entertaining the petitions from Navarre, Williams, and Graham alleging ineffective assistance of trial counsel without prejudice to the rights of Navarre, Williams, and Graham to plead and prove ineffective assistance of trial counsel under rule 3.850.

IV.

ARGUMENT

Respondent district court relies on Hollingshead v. Wainwright, 194 So.2d 577 (Fla. 1967), cert. denied, 391 U.S. 968 (1968), Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969) and State v. Meyer, 430 So.2d 440 (Fla. 1983) for the proposition

that it has original jurisdiction to hear petitions seeking a belated appeal where trial counsel is alleged to have failed to file a timely notice of appeal, thereby rendering ineffective assistance. See Navarre v. State, No. 89-3262 (Fla. 1st DCA Feb. 8, 1990) (A 5-6). This Court "may review by prohibition any case pending in the district court if the relator shows us that on the face of the matter it appears that the district court is about to act in excess of its jurisdiction." State ex rel. Sarasota County v. Boyer, 360 So.2d 388, 392 (Fla. 1978). For the following reasons, respondent appellate court does not have jurisdiction over petitions for belated appeals grounded on ineffective assistance of trial counsel.

A.

Rule 3.850 "is intended to provide a complete and efficacious post-conviction remedy to correct convictions on any grounds which subject them to collateral attack." Roy v. Wainwright, 151 So.2d 825, 828 (Fla. 1963). It is settled law that claims of ineffective assistant of trial counsel, with rare exceptions not relevant here, are cognizable by rule 3.850 only and may not be raised by petition for habeas corpus before an appellate court. Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987).

Rule 3.850 provides in pertinent part:

> An application for writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule, shall not be

> entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Thus, by its terms, rule 3.850 prohibits any or all courts from entertaining habeas petitions raising any issue cognizable under rule 3.850.

This court has repeatedly emphasized the exclusivity and comprehensiveness of rule 3.850 remedies. In White v. Dugger, 511 So.2d 554, 555 (Fla. 1987), White attempted to raise issues cognizable under rule 3.850 by habeas petition. This Court rejected the petition with this admonition:

> We note that although the petition is labelled as a petition for writ of habeas corpus, the issues raised are of the type which should properly by raised under Florida Rule of Criminal Procedure 3.850, which by its terms procedurally bars an application for writ of habeas corpus., We note also that by its terms, rule 3.850 procedurally bars motions for relief where the judgment and sentence, as here, have been final for more than two years or were final prior to 1 January 1985. Moreover, the primary issue raised here is the application of Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), to White's case. This issue was previously raised in post-conviction proceedings and disposed of in State v. White. Again, the issue raised is procedurally barred by the terms of rule 3.850.
>
> It is clear from the above that this eleventh hour petition is an abuse of process. We point out again . . . that habeas corpus is not a vehicle for

> obtaining additional appeals of issues . . . which could have, should have, or have been raised in rule 3.850 proceedings.) [cites omitted].

Id.

In State v. Bolyea, 520 So.2d 562 (Fla. 1988), the issue was whether a claim by a probationer of ineffective assistance of trial counsel, admittedly cognizable under habeas, was cognizable under rule 3.850. This Court emphasized that rule 3.850 was a "procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus," (Bolyea at 563) and "since respondent [Bolyea] clearly is entitled to relief by habeas corpus, Rule 3.850 is an appropriate vehicle for him to challenge his conviction or sentence." Bolyea at 564.

Even more recently, in Richardson v. State, 546 So.2d 1037 (Fla. 1989), this Court reiterated the comprehensiveness and exclusivity of rule 3.850 as a remedy for alleged trial court errors. In Richardson, the issue was whether rule 3.850 had supplanted coram nobis as a device for raising claims of newly discovered evidence. "Coram nobis is a cumbersome process where the petitioner first applies to the appellate court for leave to file in the trial court" the newly discovered evidence. Richardson at 1038. This Court held "that all newly discovered evidence claims must be brought in a motion pursuant to Florida Rule of Criminal Procedure 3.850, and will not be cognizable in an application for a writ of error coram nobis . . . ." Richardson at 1039.

The Richardson opinion reaffirms the principle that rule 3.850 is the exclusive remedy for alleged trial court errors and, consequently, that trial courts have exclusive original jurisdiction over post-conviction claims involving alleged trial court errors.

B.

The remedial procedures of Hollingshead and Baggett were grounded on the proposition that the alleged failure of a trial judge to appoint appellate counsel constituted state action which violated due process. This theory of state action was later extended to include the alleged failure of court appointed counsel to timely file a notice of appeal. Costello v. State, 246 So.2d 752 (Fla. 1971). This theory of state action and due process was later revisited in State v. Meyer, 436 So.2d 440 (Fla. 1983) in light of the holding in Polk County v. Dodson, 454 U.S. 312 (1981) that the actions of a public defender did not constitute state action. A fair reading of Meyer is that failure of an attorney, whether appointed or privately retained, does not constitute state action. However, the abandonment of Costello's imputation of state action to court appointed counsel does "not foreclose appellate review for the client whose attorney has failed to file a notice of appeal" (Meyer, 430 So.2d at 443), because:

> A collateral attack raising the issue of ineffective assistance of counsel is open to indigent and the non-indigent on the same terms. The ends of justice will be better served when all who seek justice may seek it by the same paths.

Id. The state submits that the latter exhortation for all to seek justice by the same paths, particularly in light of White, Bolyea, and Richardson, is a command that all claims of ineffective assistance of trial counsel be submitted under rule 3.850.

C.

Finally, reasons A and B are supported by the sheer inefficiency of the Hollingshead, Baggett and Costello procedures and the needless waste of judicial and state resources resulting therefrom.

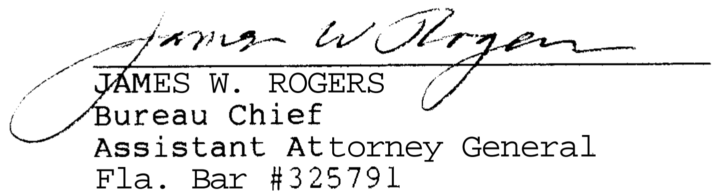
The remedial procedures of Hollingshead, Baggett, and Costello are even more cumbersome that those of the writ of error coram nobis. The Hollingshead petitioner must first petition the appellate court, which, like the coram nobis appellate court, has no record or other knowledge of the case, by alleging facts which, if proven, would show that the state through appointed counsel's failure to timely file a notice of appeal denied the petitioner's due process right to direct appeal. Assuming that the petitioner alleges a prima facie case, the appellate court must then appoint a special master "to resolve petitioner's allegation and thereafter with all convenient speed report the same, together with his findings and recommendations, to this Court.'' Baggett, 229 So.2d at 244. The appellate court then reviews the report of the special master to determine if the petitioner was unconstitutionally denied his right to appeal through state action. Two points are pertinent. First, this

Rube Goldberg contrivance, like the writ of error coram nobis, should be, and was, swept away by the straight-forward rule 3.850 procedures which efficiently produce the same results without marching up-the-hill in order to march down-the-hill. This point is greatly strengthened when it is remembered that the special master may not be familiar with the case, the defendant/petitioner or the trial counsel, whereas the trial court under rule 3.850 has the record and may well have been the actual trial judge. Second, allegations are not evidence and do not shift the burden of proof. The petitioner asserting the right to an untimely appeal must prove that right, the state does not have to disprove unsupported allegations. On all three of the cases here, see appendix, the respondent district court erred in prematurely ordering the state to show cause. The unfair prejudice to the state is particularly egregious when the factual issues concern the content and timing of privileged communications between a defendant and counsel.

For the above reasons, petitioner State of Florida submits that respondent district court has no jurisdiction to entertain petitions for belated appeal grounded on alleged ineffective assistance of trial counsel. Because the respondent district court continues to exercise authority over these cases unlawfully, this Court should issue a writ of prohibition.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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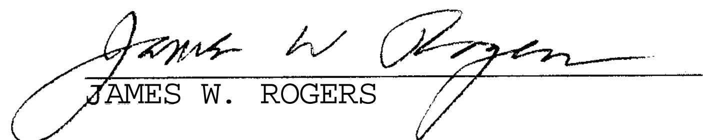
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to District Court of Appeal, First District, 300 Martin L. King, Jr. Boulevard, Tallahassee, Florida 32399-1850; William Navarre, #208921, Dade Correctional Institution, 19000 S.W. 377 Street, Florida City, Florida 33034; Norman B. Williams, c/o Walter B. Smith, Assistant Public Defender, Post Office Box 962, Apalachicola, Florida 32320; and Walter William Graham, #009909, Apalachee Correctional Institution, Post Office Box 699-W, Sneads, Florida 32460, this 19th day of February, 1990.



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