IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,199

FRANK LEE SMITH

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This supplemental brief follows this Court's order relinquishing jurisdiction to the Circuit Court for the Seventeenth Judicial Circuit for the purpose of getting the facts concerning the claim raised by Mr. Smith that there was an ex parte communication between the state and the trial judge. The circuit court held a hearing pursuant to this Court's order on August 7-8, 1996. This matter follows.

The following symbols will be used to designate references to the record in this instant cause:

"R. " -- record on direct appeal to this Court;

"PC-R. " -- record on first 3.850 appeal to this Court;

"PC-R2" -- record on second 3.850 appeal to this Court

"PC-R3" -- supplemental record following relinquishment by this Court.

All other citations will be self-explanatory or will be otherwise explained.

REOUEST FOR ORAL ARGUMENT

Mr. Smith renews his request for an oral argument in this matter. Mr. Smith has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Smith, through counsel, accordingly urges that the Court permit oral argument.

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REPLY TO APPELLEE'S STATEMENT OF THE CASE

To the extent that it is inconsistent with the Statement of the Case contained in Mr. Smith's initial Supplemental Brief, is unsupported by the record, and/or contains superfluous or irrelevant material, Appellant objects to the Statement of the Case and Facts contained in Appellee's Answer Brief. Mr. Smith expressly adopts the Statement of the Case contained in his initial Supplemental Brief.

SUMMARY OF ARGUMENT

Appellee's interpretation of the facts presented below is not supported by any competent evidence. Mr. Smith's counsel did not give the State and the Court permission to engage in ex parte communication for the purpose of preparing an order denying Mr. Smith's postconviction motion. There is no justification for departing from this Court's ruling in Rose v. State, 601 So. 2d 1181 (Fla. 1992). Mr. Smith is entitled to a new evidentiary hearing before an impartial judge.

SUPPLEMENTAL ARGUMENT I

THE CIRCUIT COURT DENIED MR. SMITH HIS RIGHT TO BE HEARD BY AN IMPARTIAL TRIBUNAL WHEN IT ENGAGED IN EX PARTE COMMUNICATIONS WITH THE STATE. (INITIAL BRIEF ARGUMENT I, A.)

After conceding that three separate ex parte communications occurred between, Paul Zacks, counsel for the State, and the Honorable Robert Tyson, Jr., the presiding circuit judge following Mr. Smith's 1991 evidentiary hearing, Appellee argues that the evidence presented below shows that Mr. Martin McClain, Mr. Smith's attorney, agreed to the first two communications and that the third communication should not entitle Mr. Smith to relief because the subject of that communication was not the preparation of the order denying relief, only the merits of whether Judge Tyson should disqualify himself from presiding over Mr. Smith's case before entering the order denying relief. Appellee's Answer Brief, at 27.

Appellee's argument that the evidence presented upon relinquishment would support a finding that Mr. McClain had consented to the ex parte communication is not supported by the record. Mr. Zacks, the State's own witness, expressly denied that it was Mr. McClain who had consented to the ex parte contact (PC-R3. 34-36, Defense Exhibit 2) and maintained that it was Thomas Dunn, Mr. Smith's attorney during an earlier proceeding in 1985, who had consented to this contact (PC-R3. 35). Judge Tyson, who did state that the agreement was reached prior to the 1991 hearing, but was unable to recall the name of the attorney who had allegedly agreed to this contact. He, however, described the attorney making the agreement as 5 foot 10 inches tall (PC-R3. 18). He also testified that he had complimented the attorney on the quality of the Rule 3.850 motion (PC-R3. 11). Mr. McClain, who has appeared before this Court on many occasions, testified that he was, and is, 6 feet 2 inches tall (PC-R3. 64). Moreover, Mr. Dunn testified that it was he who Judge Tyson complimented the Rule 3.850 motion, but that this was in the courtroom and on the record, as indeed it is (PC-R. 101).

In fact, the only testimony to which Appellee directs this Court's attention (Appellee's Answer Brief, at 27) is that of Mr. McClain, who said that the subject did indeed arise before the 1991 hearing, but that he expressly objected to any ex parte contact between the State and the trial judge (PC-R3. 71-72). Contrary to Appellee's argument, the record does not "support" the conclusion that Mr. McClain consented to the ex parte contact which clearly occurred. It only refutes it.

The argument that the third admitted ex parte contact would not entitle Mr. Smith to relief is also unpersuasive. Not only is it impossible to meaningfully distinguish ex parte communication regarding the preparation of an order from ex parte communication regarding whether the court should in fact enter that order, the considerations which were determinative in Rose v. State, 601 So. 2d 1181 (Fla. 1992), apply with equal force to the third communication between Mr. Zacks and Judge Tyson. Mr. Zacks' discussion with Judge Tyson over their respective recollection of the facts underlying Mr. Smith's motion to disqualify, in and of itself,' entitles Mr. Smith to a new evidentiary hearing. See, generally, Wav v. Tharpe, Case No. 88,901, Florida Supreme Court (May 9, 1997)(Writ of Prohibition issued requiring circuit court to hold new evidentiary hearing to be held after presiding judge disqualified prior to entry of order denying relief).

The State also asks this Court to retroactively retreat from it holding in Rose, Cannon 3A(4) of Florida's Code of Judicial Conduct, Rule 2.160 of the Florida Rules of Judicial Administration (formerly, Rule 3.230, Florida Rules of Criminal Procedure) and almost sixty years of Florida jurisprudence and impose an actual prejudice prong on the disqualification of judges in cases of ex parte contact. The supposed "prejudice" to the State in Mr. Smith's case does not justify such an unprecedented and radical departure from established law. In fact, it is no different than those faced

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'The circumstances of third, ex parte discussion, which Appellee concedes occurred without Mr. Smith's consent, is also circumstantial evidence of, if not a pattern, at least the willingness of Mr. Zacks and Judge Tyson to engage in such discussions.

by the advantaged party any time a judge is removed. In every instance, new findings of fact must be made, the credibility of witnesses must be determined, evidence must be reweighed. It is a price this State has been willing to pay for the integrity of its judicial system. Perhaps this Court explained this principle as well as possible in Rose:

> We are not here concerned with whether an ex parte communication actually prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question. In the words of Chief Justice Terrell:
>
> > This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. . . . The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.
> >
> > . . . The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.
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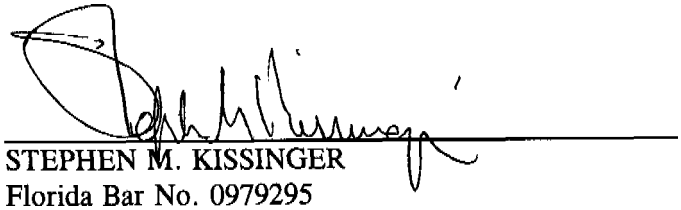
> State ex rel. Davis v. Parks, 141 Fla. 516, 519-20, 194 So. 613, 615 (1939).

Rose v. State, 601 So. 2d at 1183.

Appellee would have this Court sacrifice the integrity of the judicial system for no other reason than to preserve a "win"[2] for the State. The price is simply too high, the benefit too small. Mr. Smith is entitled to a new evidentiary hearing before an impartial tribunal.

[2]Mr. Smith would submit an undeserved "win". See, Appellant's Initial Brief, at 29-60.

I HEREBY CERTIFY that a true copy of the foregoing Supplemental Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 30, 1997.



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