IN THE SUPREME COURT OF FLORIDA

WALTER GALE STEINHORST,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 82,188

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL COUNTY,
IN AND FOR BAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0239161

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGES

CONSTITUTIONS AND STATUTES PAGES

OTHER SOURCES PAGES

STATEMENT OF THE CASE AND FACTS

This action comes before the Court on the issue of whether the lower court erred in denying Mr. Steinhorst's motion for relief from judgment. The Appellee accepts the chronological history of the case as set forth by the Appellant but rejects any and all other allegations of fact unless otherwise indicated herein.

On June 23, 1988, the Honorable W. Fred Turner, a judge of the Circuit Court of the Fourteenth Circuit, denied the Appellant's motion for post-conviction relief. Steinhorst v. State, 574 So.2d 1075 (Fla. 1991). These facts are not in dispute. (Appellant's Brief at pg. 5).

On October 4, 1991, the Appellant filed a motion for relief from judgment, ostensibly pursuant to Fla.R.Civ.P. 1.540 (b)(4) (R 1-29). According to the motion, Judge Turner should have disqualified himself from the Rule 3.850 proceeding because, as an attorney, he apparently probated the estate of one of the victims (R 9). In addition, the Appellant noted that in 1981, Judge Turner, on motion by the defense, recused himself from the trial of a co-defendant (in the murders), Mr. Hughes (R 9). Steinhorst also argued that the order denying Rule 3.850 relief was "void" (rather than "voidable") in an effort to avoid any procedural defenses (R 13). Finally, Steinhorst requested Rule 1.540 relief on the grounds that the original trial judge had developed second thoughts about the sentence (R 18).

The State responded and moved for dismissal of the motion (R 45, et seq.). The State objected to the use of the Rule 1.540 proceeding as a device to relitigate (or litigate) issues that

could or should have been raised in a timely Rule 3.850 proceeding (R 45). The State also argued that Steinhorst's motion was untimely under the one (1) year provision of Rule 1.540 (R 47), and that the order recusing Judge Turner in the Hughes case had been a matter of public record for ten years, while the (Sims estate) had also been a matter of record for some ten years. Thus, Steinhorst failed to exercise due diligence or otherwise justify his late action (R 47-48). The State went on to show that Judge Turner's order denying Rule 3.850 relief was not "void". (R 49, et seq.).

Mr. Steinhorst's motion was denied (R 68), but rehearing was granted at Steinhorst's request (R 108). Steinhorst offered affidavits from various "investigators" from CCR (the Capital Collateral Representative's Office) and the Volunteer Lawyer's Resource Center (VLRC) alleging that they reviewed the Hughes casefiles in 1986 and 1991, respectively. The CCR affidavit stated that no orders disqualifying Judge Turner were found (R 94), while the VLRC affidavit states that Judge Turner's order was located in the Hughes file in 1991 (R 96).

Relief was again denied (R 108). The Court held that Rule 1.540 could not be used as a substitute for proceedings authorized by Fla.R.Cr.P. 3.850 (R 108). The Court also found the Rule 1.540 motion time barred (R 109), and found that the order entered by Judge Turner was not "void" (R 109).

This appeal ensued.

SUMMARY OF ARGUMENT

The trial court did not err in denying the Appellant's motion for relief from judgment.

The motion itself was untimely, given the Appellant's failure to request relief within one year of the entry of the judgment. Florida caselaw clearly provides that this one-year period is not tolled by any appeal from the challenged final order, and that the correct procedure is to request an appellate relinquishment of jurisdiction during the one-year period.

It is evident from the record that the Appellant did not exercise due diligence in reviewing documents which were a matter of public record for over a decade. Thus, the "evidence" relied upon was not "newly discovered."

Finally, Judge Turner's order, while possibly "voidable", was not "void." Judge Turner's recusal was not mandatory under the facts of this case. Justice Adkins' alleged change of heart regarding the sentence given to Steinhorst does not combine with any other factor to compel Rule 1.540 relief.

ARGUMENT

ISSUES I AND III

THE TRIAL COURT DID NOT ERR IN ITS PROCEDURAL RULINGS REGARDING THE DENIAL OF RULE 1.540 RELIEF

The Appellant, Mr. Steinhorst, moved for reconsideration of his motion for post-conviction relief under the ostensible authority of Fla.R.Civ.P. 1.540(b)(4). As we will demonstrate, the motion was procedurally barred as well as being devoid of merit. Since the procedural posture of Mr. Steinhorst's motion dictated the result sub judice, it shall be addressed at the outset.

The lower court unequivocally held:

> "The Court also finds that should Rule 1.540 be a valid ground to seek collateral attack, the judgment is not void because the Defendant's claim is barred by time, and is based upon Defendant's imagined bias of Judge Fred W. Turner without any showing under F.S. 38.01 that Judge Fred W. Turner appeared as a party of record in this case" (R 109) (emphasis added).

This singular finding is sufficient to defeat Mr. Steinhorst's appeal.

Actions filed under the auspices of Fla.R.Civ.P. 1.540(b) must be initiated within one year of the judgment. In this case, the filing deadline was June 23, 1989. Steinhorst, however, did not bring this action until October, 1991, over two years after the deadline.

Apparently, Mr. Steinhorst mistakenly believed that the direct appeal from the order denying Rule 3.850 relief tolled the time for bringing the Rule 1.540 motion. The law is well settled, however, that the time for filing is not extended by the

existence of an appeal. Seven-Up Bottling Co. of Miami v. George Construction Co., 153 So.2d 11 (Fla. 3rd DCA 1963); Marco Technology Corp. v. Reynolds, 520 So.2d 63 (Fla. 4th DCA 1988); Legler v. Kwitny, Kroop and Scheinberg P.A., 520 So.2d 95 (Fla. 4th DCA 1988); Glatstein v. Miami, 391 So.2d 297 (Fla. 3rd DCA 1980). In this regard, we would specifically note an on-point finding in Paulino v. Hardister, 306 So.2d 125, 130 (Fla. 2nd DCA 1975) by [then] Judge Grimes; to wit:

> "We are left with having to decide to what extent, if any, these rules should apply in the instant case. Even if the response to the Appellee's motion for contempt be construed as a motion for relief under Rule 1.540(b)(1), these motions would be untimely because of not being made within a year of the entry of the final judgment. The pending appeal from the judgment would not toll the time for making the motion." (emphasis added).

It is apparent from the caselaw that Mr. Steinhorst should, within one year of the judgment, have filed a motion in the Florida Supreme Court seeking the relinquishment of jurisdiction to the trial court. Then, a Rule 1.540 motion should have been filed. Pruitt v. Brock, 437 So.2d 768 (Fla. 1st DCA 1983). This was not done, and Steinhorst's excuse is that his investigators and attorneys erred in not finding Judge Turner's order. Such unilateral error does not provide an excuse.

(A) Unilateral Error

It is undisputed that Judge Turner entered a disqualification order in 1981, and that this order had been a matter of public record for a decade when allegedly "discovered" by Steinhorst's counsel.

Even if we accept Steinhorst's allegation of error (i.e., his attorneys never noticed the order in prior examinations of the Hughes file), it is equally beyond dispute that the order was in the file, was a matter of public record, and was fully available to Steinhorst at all times. Thus, the failure to spot the order constituted unilateral error, and the filing deadline established by Rule 1.540 cannot be extended due to unilateral error. Crescent, Inc. v. Schwartz, 382 So.2d 383 (Fla. 4th DCA 1980); Gregory v. Connor, 591 So.2d 974 (Fla. 5th DCA 1992); Skinner v. Skinner, 579 So.2d 358 (Fla. 4th DCA 1991). Indeed, in Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981), a "new evidence" argument was specifically rejected when the so-called evidence was available (if not possessed) by the moving party but was allegedly "undiscovered."

A critical feature of Mr. Steinhorst's argument is the timing of his discovery. The Appellant's affidavits show that, for reasons unknown, counsel waited until seven months after the decision in Steinhorst v. State, 574 So.2d 1075 (Fla. 1991) to suddenly begin reexamining available files. This belated investigation is most curious, since Steinhorst had no right to file any successive Rule 3.850 petition. Bundy v. State, 538 So.2d 445 (Fla. 1989) (no successive petition allowed on basis of evidence that was always available); Francis v. Barton, 581 So.2d 583 (Fla. 1991) (improper to reargue issues in a successive Rule 3.850 petition on the basis of available evidence.)

An analogy can be drawn between Steinhorst's conduct and that of the petitioners in Demps v. State, 515 So.2d 196 (Fla. 1987) and Agan v. State, 560 So.2d 222 (Fla. 1990). In those

cases, the petitioners attempted to justify improper Rule 3.850 petitions on the basis of "newly discovered evidence" uncovered following the filing of public record demands under Chapter 119, Fla. Stat.. Since Chapter 119 had previously been available to Demps and to Agan, but had not been used, this Court rejected the claims of "newly discovered evidence." Here, rather than Chapter 119, we simply have a curious decision to conduct a post-appellate survey of a co-defendant's files. Assuming there was a reason for this search, it is logical to assume it was a search for novel issues to support some new collateral attack. No matter the reason, the evidence allegedly discovered in October of 1991 was not "newly discovered" (due to its availability and Steinhorst's lack of due diligence)[1] and cannot (could not) support a motion filed pursuant to Fla.R.Civ.P. 1.540. Bothwell v. State, 450 So.2d 1150 (Fla. 2nd DCA 1984); Winter Haven v. Tuttle/White Constructors, 370 So.2d 829 (Fla. 4th DCA 1989); Smiles v. Young, 271 So.2d 798 (Fla. 3rd DCA 1973).

(B) Successive Petition

This brings us to the second procedural ruling by the lower court. The court held that a motion for relief from judgment filed pursuant to Fla.R.Civ.P. 1.540 cannot be used as a basis for a successive collateral attack upon a judgment and sentence. Mr. Steinhorst agrees with this statement of law, but insists that the Rule 1.540 motion at bar was not intended to serve as a

---

[1] See also Jones v. State, 591 So.2d 911 (Fla. 1991), "new evidence" does not include evidence that could have been discovered by due diligence.

successive petition, thus rendering that portion of the lower court's procedural ruling erroneous.[2]

If Steinhorst's motion merely argued the issue of Judge Turner's recusal his appellate position would be stronger. Unfortunately for Steinhorst, his petition also raised some novel claim regarding Judge Adkins, "new factors", and an alleged "change of heart" regarding Steinhorst's sentence by the original sentencer. This novel claim clearly did not fall within Rule 1.540 (mistake, inadvertence, fraud or excusable neglect). In fact, it was simply a novel Rule 3.850 claim inserted into a motion for rehearing. Motions under Rule 1.540 cannot be used for that purpose. Fiber Crete Homes v. Division of Administration, Fla. D.O.T., 315 So.2d 492 (Fla. 4th DCA 1982); In re Estate of Beeman, 391 So.2d 276 (Fla. 4th DCA 1980). As such, the claim was properly denied.

ISSUE II

THE APPELLANT IS NOT ENTITLED TO RELIEF ON THE ISSUE OF ALLEGED "JUDICIAL BIAS"

The Appellant's motion for rehearing was properly denied on procedural grounds and, accordingly, the trial court should be affirmed on that basis. Ylst v. Nunnemaker, 501 U.S. ___, 115 L.Ed.2d 706 (1991); Harris v. Reed, 489 U.S. 255 (1989). Since Appellant cannot overcome his procedural problem, he relies upon

---

2 Mr. Steinhorst's position regarding "intent" is supported by the fact that, arguably, a second Rule 3.850 petition could have been filed on the basis of "newly discovered evidence" per Jones v. State, 591 So.2d 911 (Fla. 1991), if the evidence qualified. By not relying upon Jones, Steinhorst tacitly concedes that the order of recusal is not "newly discovered evidence". Unfortunately, this fact supports the denial of his Rule 1.540 motion as having been untimely.

a strident claim of "blatant" judicial bias, mandatory recusal and, finally, a contention that the order denying Rule 3.850 relief was (is) "void." None of these contentions have merit.

(A) No Basis For Disqualification Exists In This Record

The case at bar is unique in that the Appellant never filed any motion for the disqualification of Judge Turner while said judge was involved in the case. Indeed, the claim of not only "bias", but blatant bias, only surfaced after the alleged discovery of the order (of disqualification) in the Hughes file, seven months after the prior appeal in this case.

If Steinhorst had discovered (and elected to use) the disqualification order while the Rule 3.850 proceeding was pending it is quite obvious that the motion would have been subject to denial as facially deficient.

Starting with the facts, the Appellant offers nothing more than the following:

> (1) Judge Turner, as an attorney, filed probate papers for the Sims estate.
>
> (2) In 1981, Judge Turner disqualified himself in the Hughes case on motion by the defense.

It is well settled that a party seeking disqualification of a judge carries the burden of establishing facts supporting some well reasoned fear of judicial bias. Muina v. Hood, 516 So.2d 1117 (Fla. 1st DCA 1987); Zerby v. Edwards, 579 So.2d 914 (Fla. 5th DCA 1991); Fisher v. Knuck, 497 So.2d 240 (Fla. 1986); Walton v. State, 481 So.2d 1197 (Fla. 1985); Jackson v. State, 599 So.2d 103 (Fla. 1992). While a judge cannot rule on the truth of any accusation of bias, a judge may deny a motion for

recusal when said motion fails to set forth any legitimate basis for recusal.

Returning to the case at bar, Judge Turner "probated" the Sims estate. Steinhorst has failed to produce any probate files, so the extent of (attorney) Turner's efforts and any fee arrangements attending said probate are completely unknown. This deficiency is critical, since:

> (1) There is no evidence of any "wrongful death" or similar tort action by the Sims estate against either Steinhorst or Hughes.
>
> (2) The mere filing of estate papers, payment of last expenses, etc. common to any probate would not, absent litigation against Hughes or Steinhorst, be affected in any way by the conviction or acquittal of Steinhorst.
>
> (3) Absent some contingent fee agreement, Judge Turner could not have a financial interest in Steinhorst's conviction or acquittal.
>
> (4) Even if potential lawsuits for wrongful death could have been filed against Hughes, as a fugitive, in 1981 (see §95.051, Fla. Stat.). The statute of limitations (for any tort action had expired as to Steinhorst by 1986, if not 1981.[3]
>
> (5) There are no judgments (civil) in evidence against Steinhorst or Hughes, so, again, no pecuniary interests have been established for either Judge Turner or the estate of Mr. Sims.

A survey of the relevant caselaw clearly shows that Judge Turner's mere exposure to the Sims probate would not suffice to disqualify him from the Rule 3.850 proceeding.

---

[3] We can speculate that recusal from the Hughes case in 1981 was predicated upon potential litigation by the estate. That situation did not exist in this case. There is no evidence that suits were ever filed against Steinhorst or Hughes.

In Dowda v. Salfi, 455 So.2d 604 (Fla. 5th DCA 1984), the trial judge was not disqualified despite being the defendant in certain civil rights cases filed against him by the defendant. Despite the adversary relationship between the judge and the defendant, the appellate court deemed the civil rights litigation tactical (designed to remove the judge by creating conflict) and thus refused to compel the judge's recusal.

In Lowe v. State, 468 So.2d 259 (Fla. 2nd DCA 1985), the court refused to disqualify a judge despite the fact that the judge had initiated contempt proceedings against counsel for the petitioner. At the other end of the spectrum, a trial judge who praised the efforts of a defense attorney was not thereafter disqualified from considering a post-conviction challenge to the competence of counsel in Jones v. State, 446 So.2d 1059 (Fla. 1984).

In Jackson v. State, 599 So.2d 103 (Fla. 1992), this Court held that the trial judge was not disqualified despite the fact that this was Jackson's fourth trial and that in all prior trials, the trial judge had sentenced Jackson to death. The mere prior exposure of the judge to the evidence, even when combined with his judgments, did not create a legally sufficient claim of bias. See, Gilliam v. State, 582 So.2d 610 (Fla. 1991); Dragovich v. State, 492 So.2d 350 (Fla. 1986).

In Walton v. State, 481 So.2d 1197 (Fla. 1985), the trial judge was not disqualified despite his having presided over the trial of a co-defendant whose theory of defense implicated Walton.

If disqualification was not required in the presence of asserted "direct conflict", it was even less likely to be compelled where the judge's alleged "bias" was even less "direct." For example, in Muina v. Hood, 516 So.2d 1117 (Fla. 1st DCA 1987), the court found no basis for disqualification of a judge who had ruled against the appellant in an earlier case and was allegedly racially biased.

In Zerby v. Edwards, 579 So.2d 914 (Fla. 5th DCA 1991) the appellant, Zerby, was involved in a divorce action before Judge Edwards. Zerby, a chiropractor, moved for disqualification because Zerby had been called as an expert (chiropractic) witness in other cases before Judge Edwards and had offered "thermographic evidence" which Judge Edwards excluded. This litigation history did not establish any bias against Zerby or prove that Judge Edwards would not find Zerby credible.

In Kitti v. Dept. of H.R.S., 527 So.2d 230 (Fla. 1st DCA 1988), the mere fact that the trial judge had conducted other dependency proceedings involving the same child did not compel his disqualification.

By any measure of common sense, if a judge cannot be compelled to disqualify himself under the circumstances described in these cases, the facts at bar cannot possibly compel recusal. Judge Turner had never presided over any other case involving Steinhorst. Judge Turner had never before addressed, or even seen, evidence implicating Steinhorst. Judge Turner never held Steinhorst or his various lawyers in contempt or expressed any conceivably "biased" opinions. All Judge Turner ever did was, as a lawyer, a decade earlier, probate an estate. Any claim of bias is clearly insufficient on its face.

(B) The Order Denying Rule 3.850 Relief Is Not "Void"

Steinhorst's argument that Judge Turner's order is "void" is based upon the claim of "blatant" judicial bias. Adjectives and invectives are not evidence and, no matter how Mr. Steinhorst characterizes the court, the fact remains that Steinhorst's overstated claim is not supported by any evidence whatsoever. This deficiency renders the "void-voidable order" issue moot, but for the record this issue will be discussed.

Orders entered by a "disqualified" judge may be either "void" or "voidable" depending upon such factors as the basis for the disqualification and whether the disqualification was waived. Chapter 38, Fla. Stat. Steinhorst's brief on this issue is generally irrelevant, focusing upon several very ancient cases while ignoring the statute and recent caselaw.

The order denying relief to Steinhorst was entered on April 26, 1993 (R 67-68), rehearing was granted and a second order was entered on June 1, 1993 (R 108-9). Florida Rule of Judicial Administration 2.160, which superceded former Fla.R.Civ.P. 3.230 took effect in January 1, 1993. The Fla. Bar Re: Amendments To Fla. Rules, 609 So.2d 465 (Fla. 1992). Rule 2.160(h) states:

> (h) Prior Rulings. Prior factual or legal rulings by a disqualified judge may be reconsidered and vacated or amended by a successor judge based upon a motion for reconsideration, which must be filed within 20 days of the order of disqualification, unless good cause is shown for a delay in moving for reconsideration or other grounds for reconsideration exist (emphasis added).

The operative phrase "may be reconsidered" clearly means that reconsideration is not mandatory and, of course, that orders

entered by the disqualified judge are not "void" but are merely "voidable."

In Barber v. Mackenzie, 562 So.2d 755 (Fla. 3rd DCA 1990) the court, citing to Dickinson v. Raichl, 120 Fla. 907, 163 So.2d 217 (1935), noted that common law rules governing recusal are followed in Florida unless specifically amended by statute. Thus, while some orders entered by a judge who is disqualified (by consanguinity, financial interest or status as a party, see §38.01, 02, Fla. Stat.) may be "void", it is clear that all other orders are merely "voidable" and, in fact, remain in force unless specifically challenged in a timely manner. §38.07, 08, 10, Fla. Stat.; Whack v. Seminole Memorial Hospital, 456 So.2d 561 (Fla. 5th DCA 1984).

Judge Turner was not a party, not related to a party, and had no financial interest in the case. He was challenged on nebulous assertions of "blatant bias" unsupported by any facts. Steinhorst has failed to allege or show any basis for the disqualification of Judge Turner or the granting of his untimely Rule 1.540 motion.

CONCLUSION

The Appellant has failed to establish grounds for reversal of the lower court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
Assistant Attorney General
Florida Bar No. 239161

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL. 32399-1050
(904)488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Stephen D. Alexander, Anthony G. Graham, Esq., Fried, Frank, Harris Shriver & Jacobson, 725 South Figueroa Street, Suite 3890, Los Angeles, California 90017, this 10th day of December, 1993.

MARK C. MENSER
Assistant Attorney General