FILED
SID J. WHITE
MAY 20 1996
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

WALTER GALE STEINHORST,

Appellant,

v. Case No.: 86,109

STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This factual statement is offered to supplement and clarify Steinhorst's statement of facts in pages 2 through 5 of the initial brief. That brief also contains a section entitled "Facts Relevant to this Appeal" (pages 6 through 11) that is argumentative and incomplete and omits any discussion of the evidence supporting the trial court's ruling. Contrary facts that support the order under review will be set out in this portion of the state's brief.

In Steinhorst v. State, 498 So. 2d 414 (Fla. 1986), this Court remanded for the circuit court to hold an evidentiary hearing on Steinhorst's postconviction motion, Judge Turner conducted that hearing in September 1987 and denied relief in June 1988. This Court affirmed the denial of relief. Steinhorst v. State, 574 SO. 2d 1075 (Fla. 1991).

The Volunteer Lawyers Resource Center (VLRC) and the Office of the Capital Collateral Representative (CCR) have assisted Steinhorst's volunteer counsel with his work on Steinhorst's behalf. (Initial brief at 1 n.2). In September 1991 Ann Jacobs, a VLRC lawyer, inspected the Bay County files on Steinhorst and his codefendants (R 1518)[1] and found Judge Turner's order recusing

[1] "R" refers to the record in the instant case, consisting of volumes I through X, pages 1 through 1607.

himself from trying Charlie Hughes, one of Steinhorst's codefendants. (R 1522). VLRC then sent an intern to Bay County to go through the estate files. (R 1532). The intern found that Turner filed probate for Harold Sims' estate, (R 1532). Steinhorst received a sentence of life imprisonment for killing Sims and death sentences for the murders of his three other victims. Steinhorst v. State, 412 So. 2d 332, 339 (Fla. 1982).

In October 1991 Steinhorst started the process leading to the instant proceedings by filing a motion seeking relief from Judge Turner's denial of postconviction relief under Florida Rule of Civil Procedure 1.540. Circuit Judge Don Sirmons denied relief. On appeal this Court held that rule 1.540 was not the proper vehicle and that Judge Sirmons should have considered the motion under the newly discovered evidence exception to Florida Rule of Criminal Procedure 3.850. This Court directed the holding of an evidentiary hearing "for the factual determination regarding the availability of the relevant records [Judge Turner's order of recusal] and whether Steinhorst waived the issue of recusal." Steinhorst v. State, 636 So. 2d 498, 501 (Fla. 1994).

Judge Sirmons conducted the ordered hearing in October 1994. Steinhorst testified that Ann Jacobs told him about Turner's recusal from Hughes' case several years before. (R 1464-65).

Steven Alexander, Steinhorst's current counsel, testified that he had been working on Steinhorst's case since 1982 (R 1467) and that he made several trips to Florida between 1982 and 1986 in connection with the case and outlined the efforts he made on Steinhorst's behalf including interviewing Steinhorst and his trial attorney, reviewing the record in this Court, interviewing several codefendants and their lawyers (R 1468-69), and asking CCR to send one of its paralegals to review the Bay County files after Steinhorst's death warrant was signed. (R 1472, 1484). Alexander never spoke with Charlie Hughes' attorney because 'I believe at the time I was told that he didn't want to cooperate." (R 1489).

Christian Cox, a former paralegal with CCR, testified that she went to Bay County to review the circuit court's records on Steinhorst on November 8, 1986. (R 1503). When Cox asked for the 'Walter Steinhorst/Sandy Creek file," a court clerk's office employee brought her one box of files. (R 1504). Cox testified that she "went through every page of that file. There was one box of files that she gave me and I looked through every page. I didn't read every single word on every page, but I looked through the complete file." (R 1504-05). *Cox* was told that the box contained all the files. (R 1506). She first learned about the recusal order in September 1991 while working for VLRC. (R 1507).

Cox specifically remembered seeing only the order denying the motion for postconviction relief. (R 1510). She did not recall specifically seeing materials dealing with the other defendants, except that many pleadings listed several defendants (R 1511) and did not recall if she saw any documents relating to Hughes. (R 1512).

Cox executed an affidavit on November 10, 1986, two days after her visit to Bay County. (R **1599-1601).** The affidavit states that on her request a clerk's office employee brought her "a large box" of files (R 1599), containing "approximately eight manilla file folders ... with pleadings, letters and documents, with some loose papers." **(R 1600).** According to the affidavit, Cox "read much of the material, and, while time did not allow me to read each and every page, I did more than a cursory reading." (R 1600). Cox also 'made copies of the docket sheets for Mr. Steinhorst's case and the Capo/John Doe cases which preceded Mr. Steinhorst's case." (R 1601).

Ian Haigler, a VLRC paralegal, went to Bay County with Ann Jacobs in September 1991. (R 1518-19, 1528-29). They were initially given five boxes and numerous loose files (R **1519,** 1529), with additional files brought out later in the day. (R 1520-21, 1530). Haigler and Jacobs found the recusal order in the last

files brought to them. (R 1522-23, 1530).

After Steinhorst rested (R 1534), the state called Gloria Tharpe, an assistant clerk of court. (R 1535). Tharpe was assigned to Judge Turner's division from 1985 to 1989. (R 1535, 1566). She testified that all pleadings and other papers pertaining to the Sandy Creek.murders were put into a single box (R 1550) and that one would have to go through the entire box to separate any defendant's case from another's. (R 1551). In preparing the record for appeal of Judge Turner's 1988 denial of relief it was decided to separate out each defendant's files because only Steinhorst's and Goodwin's cases were active. (R 1551-53). After the files were divided, a request for a particular defendant's files would produce only files for that defendant. (R 1553).

Reena Baker, supervisor of the criminal division in the clerk of court's office, also testified for the state. (R 1574). Baker, who has worked in the clerk's office since 1985 (R 1574), testified that in 1986 files were kept in three places (R 1578) and that all of the Sandy Creek files were moved to the basement vault in 1993. (R 1579). Prior to 1988 a request for the Sandy Creek files would have produced all of the pleadings for all of the defendants. (R 1585). Although Baker admitted that it was possible that Hughes'

files were in the basement vault in 1986 (R 1585), she explained that pleadings were kept together in the clerk's office (R 1587, 1581) and that depositions were kept together in another location and that physical evidence was kept together in yet another place. (R 1587-88). By pleadings, Baker meant "[m]otions, orders, anything signed by the judge, notices of hearings." (R 1588). Baker also stated that Judge Turner's order of recusal from Hughes' case should have been with the pleadings and not in the vault. (R 1589-90).

Both the state and Steinhorst filed briefs supporting their respective positions with the trial court. (R 1422-27, 1429-38). Judge Sirmons denied relief on June 16, 1995. Judge Sirmons stated the issue as "if the fact of Judge Turner's recusal could have been ascertained by the exercise of due diligence of the movant or movant's counsel." (R 1440-41). After discussing the evidence (R 1441-42), the order states:

> The Court therefore finds that through due diligence, the Judge's potential conflict, by virtue of his recusal order of July 9, 1981, was reasonably available to defense counsel at the time the 3.850 motion was filed and heard in 1987 and was **not** misplaced by the Clerk's office. The Court further finds the records of the recusal were ascertainable by the exercise of due diligence prior to the two year time ban of Rule 3.850(b) and is not new evidence. Finally, the Court finds that the

> information concerning the conflict was reasonably available prior to July 5, 1988, when the defendant filed his Notice of Appeal of the 3.850 judgment and therefore the defendant has waived his right to recuse Judge Turner under F.S. 38.02.

(R 1442).

E

The trial court correctly held that Judge Turner's recusal order was reasonably available and could have been ascertained through the exercise of due diligence. Thus, the recusal order does not constitute newly discovered evidence, and Steinhorst waived recusal of Judge Turner.

ARGUMENT

Issue

WHETHER THE TRIAL COURT PR PERLY **DENIED** RELIEF.

Steinhorst argues that the trial court erred in imposing a greater burden on him than that set forth **by** this Court and that the court made incorrect findings **of** fact. As the state will demonstrate, there is no merit to these arguments. The trial court's finding that Judge Turner's order of recusal could have been found through the exercise **of** due diligence **is** supported by competent substantial evidence and should be affirmed.

In remanding this case, this Court stated that "if the relevant records were not reasonably available to Steinhorst and the conflict could not **be** ascertained **by** the exercise of due diligence, then the prior recusal would constitute newly-discovered evidence properly cognizable in a 3.850 motion." Steinhorst, *636 So.* 2d at 500. There is no merit to Steinhorst's claim that Judge Sirmons imposed a stricter standard than due diligence. (Initial brief at 12). Steinhorst argues that the judge gave undue weight to the assistant clerks **of court's** intentions and that the record "unequivocally" demonstrates that Steinhorst was not given access

to all of the relevant files. (Initial brief at 12-13). There is, however, little support for this claim.

Besides Steinhorst and Charlie Hughes, the Sandy Creek records included files on David Goodwin, David Capo, Peter Van Estrup, and an unknown number of John Does. (R 1553). Prior to 1988, all of the various defendants' files were kept in one box (R 1550), and a lot of people went through that box. (R 1561). This box was not divided into files on the separate defendants until 1988. (R 1551-53). That the files were not in pristine condition or precise order, were in fact "messy," should surprise no one. Cox admitted both in her affidavit (R 1660) and in her testimony (R 1504-05) that she did not read each and every page of the records contained in the box given her. Judge Turner's recusal order is titled simply 'Order." (R 1596). 'To know what this order is about, one must read it, which, as Cox admitted, she may not have done. Moreover, although Alexander has worked on Steinhorst's case since 1982, apparently, he never looked through the Ray County records even though they were available at the clerk's office and in the courtroom during the evidentiary hearing on Steinhorst's postconviction motion.

Steinhorst also claims that the files were kept in three separate places and that the clerk who assisted Cox did not have

access to all those places. (Initial brief at 13). The first part of this argument is refuted by Baker's testimony that the pleadings were kept in the clerk's office (R 1587-88) and that physical evidence was kept elsewhere. (R 1584, 1587-88). The second part comes from Jacobs' testimony that, when given the Hughes' files in 1991, "I think they said they found them downstairs." (R 1531). That Hughes' files may have been found in the basement vault in 1991 does not prove that those files were in that vault in 1986 in light of the testimony that all of the Sandy Creek files were kept together until being separated by defendant in 1988. Moreover, it should also be noted that, although *Cox* copied the docket sheets for several of the Sandy Creek defendants, she did not copy the docket sheets for Hughes, according to her affidavit of November 10, 1986. (R 1601).

Thus, it is readily apparent that the record does not 'unequivocally" support Steinhorst's contentions. Instead, the record provides competent substantial evidence supporting the fact-finder's observations that "defense counsel or staff was never denied access to" the records containing Judge Turner's recusal order (R 1441) and "that the defense counsel and/or his staff simply overlooked the recusal order contained in the court file during their review." Steinhorst produced no evidence that

contradicts Judge Sirmons' finding that "[t]he recusal order was also in the file when it was brought to the evidentiary hearing before Judge Turner in September, 1987. There is no showing that defense counsel re-examined the files immediately prior to the evidentiary hearing." (R 1442). Likewise, the record supports Judge Sirmons' finding that Judge Turner's potential conflict was reasonably available through due diligence. Judge Sirmons applied the due diligence standard set out in Steinhorst and other cases such as Bolender v. State, 658 So. 2d 82 (Fla. 1995), Johnson v. State, 536 So. 2d 1009, 1011 (Fla. 1988), and Walker v. State, 661 So. 2d 945 (Fla. 4th DCA 1995). Judge Turner's recusal order has been in existence since 1981. It could have been discovered through the exercise of due diligence.

Judge Sirmons' observation that 'defense counsel sought no relief from the Court to make sure that all records were available to it or to correct any perceived problems of access to court records during the course of their review in 1986" (R 1442) is simply that - an observation. It is not, as Steinhorst claims (initial brief at 16), the imposition of a higher standard of due diligence. Instead, the statement is a recognition that, if anyone who examined the files in 1986 was concerned about the completeness

of the files, a remedy was available. That such remedy was not sought indicates that it was not felt to be needed.

Among the observations made by Judge Sirmons leading up to his findings is the statement:

> Defense counsel talked to certain members of the local bar about Judge Turner. In this regard, it is important that at no time did defense counsel seek to talk directly by letter, phone or personally to the defense counsel who handled the Hughes case as to what had happened in that case. Instead, the evidence on this is point is that they 'heard" that Hughes defense counsel said he didn't want to cooperate. If contacted defense counsel in the co-defendant's case could have easily advised them of Judge Turner's status in that case.

(R 1441). Steinhorst now argues that the second sentence quoted above is an incorrect finding because Alexander was unable to speak with Hughes' trial counsel and was told by a colleague that Hughes' counsel would not cooperate. (Initial brief at 17). Alexander testified that he thought Jacobs spoke with Hughes' counsel and told him that Hughes' counsel would not cooperate. (R 1489). Jacobs, however, only started working on Steinhorst's case after she joined VLRC in April 1991. (R 1528). Alexander offered no explanation of why Hughes' counsel was not contacted before 1991. As Judge Sirmons noted, Hughes' counsel could have easily explained Judge Turner's status in Hughes' case. Alexander, himself, never

spoke with Hughes' counsel and, therefore, does not know if counsel would have conferred with him or what he would have said. Relying on hearsay from 1991 does not demonstrate due diligence, given counsel's apprehensions about Judge Turner, which began in 1986. (R 1483).

Steinhorst also argues that Judge Sirmons erred in stating: "Prior to 1988, all of the co-defendant's pleadings, etc., were kept in one filing system chronogically without reference to an individual defendant's name." (R 1441). (Initial brief at 19). "Chronological" might be a stretch given the number of documents and the number of people who went through the files. As set out earlier, however, both Tharpe and Baker testified that, prior to 1988, all Sandy Creek pleadings were put in one box. (R 1550; 1585, 1587-88). Steinhorst ignores this testimony as well as Baker's testimony that the Sandy Creek pleadings were kept in the clerk's office, while depositions and physical evidence were kept elsewhere. (R 1587-88). Even if, as Steinhorst claims (initial brief at 20), the files in the Sandy Creek box were disorganized when Cox reviewed them, mere disorganization does not prove that the recusal order was not there; it merely supports Judge Sirmons' observation that the order was overlooked. (R 1442). The testimony of Tharpe, the clerk who rearranged the files

chronologically by defendant in 1988 (R 1551-53) supports the judge's conclusion that "[t]he reorganization in 1988 consisted simply of rearranging the pleadings chronologically but also by defendant's individual names. Nothing was added or removed." (R 1442).

Steinhorst also complains that Judge Sirmons erred in stating that defense counsel and/or his staff overlooked the recusal order. As explained earlier, the record supports this statement. Cox admitted that she did not read each and every page of the documents in the box of Sandy Creek files. Also, apparently, Alexander never looked through the Sandy Creek files, even though they were available for his review. Moreover, again, that Hughes' files might have been found in the basement in 1991 does not prove that they were in the basement rather than the box of Sandy Creek files in 1986. The testimony from the state's witnesses also supports Judge Sirmons' observation that "there is no basis to find that the relevant records had been misplaced by the Clerk's office in 1986 or thereafter." (R 1441).

Judge Sirmons listened to the witnesses and made his decision based on the testimony. He obviously found the state's witnesses to be more credible than Steinhorst's. Steinhorst disagrees with

the judge's findings, but those findings are supported by competent substantial evidence and should be affirmed.

As the evidence permitted him to do, Judge Sirmons found that Steinhorst's counsel had not exercised due diligence, Therefore, he held that the two-year time limit in Florida Rule of Criminal Procedure 3.850 applied because Steinhorst reasonably could have learned of Turner's recusal order prior, to July 5, 1988. Bringing this claim in 1991 violated the two-year rule and waived recusal of Judge Turner under section 38.02, Florida Statutes. Steinhorst has demonstrated no reversible error in Judge Sirmons' findings.

CONCLUSION

Therefore, the State of Florida asks this Court to affirm the denial of relief.

Respectfully submitted
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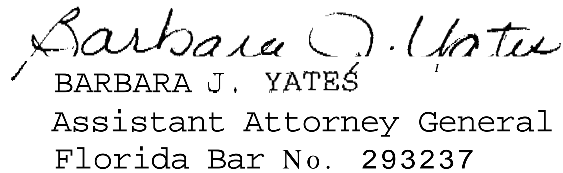

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Steven D. Alexander, Esq., Fried, Frank, Harris, Shriver & Jacobson, 725 S. Figueroa Street, Suite 3890, Los Angeles, California 90017-5438, this 20th day of May, 1996.

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