IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JAN 6 1997
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

ANTONIO MICHAEL CARTER,

Appellant,

CASE NO. 88,368

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL CIRCUIT, IN AND
FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The State is aware that cases in which a sentence of death has been imposed are set for oral argument as a matter of course. However, given the clear lack of merit to Carter's claim (which has been decided adversely to him, anyway), which is presented in an interlocutory appeal (which does not seem to be provided for within the ***Rules of Appellate Procedure),*** the State submits that it would be appropriate to dispense with oral argument in this case.

STATEMENT OF THE CASE AND FACTS

The State does not accept the argumentative and largely irrelevant statement of the case and facts contained in Carter's brief. Virtually all of the statement of the case and facts contained in Carter's brief is a factual recitation of matters that have nothing to do with the issue before this Court.

On November 2, 1992, Carter filed his motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. **(TR1 *et seq)*** The matter proceeded through various stages, and, on April 2, 1996, Circuit Judge S. James Foxman entered an order setting a hearing for the purpose of determining "the standard of competency to proceed with Defendant's Motion for Post-Conviction Relief pursuant to Rule 3.850." (TR2025) The Court further ordered that counsel for the parties were to

submit briefs on this issue no later than ten (10) days prior to the scheduled hearing. (TR2025)

After hearing the arguments of counsel and considering the briefs, the court determined that the "standard of competency to proceed in postconviction is whether the defendant has the present ability to consult and communicate with postconviction counsel regarding factual matters at issue in his postconviction proceedings." (TR2090) The court determined that "[t]he Defendant need not have any rational or factual understanding of the pending postconviction proceedings." ***Id.*** Finally, the court determined that, if Carter is incompetent under the criteria set out above, then a guardian would be appointed to act on his behalf during the period of incompetency. (TR2091) Notice of appeal was given on June 21, 1996. (TR2104-5) The record was certified on September 13, 1996. (TR2111)

SUMMARY OF THE ARGUMENT

Carter's claim that there is a right to "competence" at the collateral attack stage has been decided adversely to him by this Court. The validity of that decision has not been called into question by subsequent developments in the law. Moreover,, the law is clear that there is no right to collateral review in the first place, nor is there any right to counsel at that stage. Because

there is no right to counsel, it is internally inconsistent and legally impossible for any competency issue to exist at the collateral stage.

The guardianship issue fails because there is no competence issue in the first place. Because that is the case, there is no need for the appointment of a guardian.

ARGUMENT

I. THERE IS NO "RIGHT TO COMPETENCY" DURING COLLATERAL ATTACK PROCEEDINGS

On pp.10-20 of his brief, Carter argues that the ***Dusky v. United*** States, 362 U.S. 402 (1960), standard of competence to proceed applies in the context of a state collateral attack proceeding.[1] Carter cites no authority supporting that proposition. For the reasons set out below, this Court should not adopt the "standard" of post-conviction competence urged by Carter.

It is a settled proposition of law that a defendant must be "competent" at 'any material stage of a criminal proceeding." Rule 3.210, ***Fla. R. Crim. P.; see also, Dusky, sup-a.*** However, a motion for post-conviction relief under Rule 3.850 of the ***Rules of Criminal Procedure*** does not fall within the definition of a

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[1]Carter's "issue" is based solely on Federal Constitutional grounds.

"material stage" as that term is defined in the Rules, and, in fact, such a proceeding is not a criminal proceeding in the first place. *Jackson v. State, 452* So.2d 533, 536-7 (Fla. 1984).

A death-sentenced inmate is not required to seek collateral review of his conviction and sentence, and has no constitutional right to such review. No "right to counsel" attaches after the conclusion of the direct appeal proceedings, and there is no constitutional right to effective assistance of counsel on collateral review. *Lambrix v. State,* 21 Fla. L. Weekly S365 (Fla., Sept. 12, *1996); see also,* Coleman *v. Thompson, 501* U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640(1991); *Murray v. Giarratano, 492* U.S. 1, 109 S.Ct. 2765, 106 L.Ed. 1 *(1989); Pennsylvania v. Finley,* 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987).[2] Because there is no State or Federal right to counsel at the collateral attack stage, it is logically inconsistent to argue, as Carter does, that there is a Federal constitutional "right" to competency. Because Carter has no constitutional right to collateral review or to counsel during such review, his competence is simply not at issue.

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[2]To the extent that Carter argues that *Spalding v. Dugger, 526* So.2d 71 (Fla. 1986), and *Spaziano* v. State, 660 So.2d 1363 (Fla. 1995), are to the contrary, that argument fails. *Lambrix* is the final word from this Court on this issue, and correctly states the law.

carter's claim is based upon a fundamental misconception of the nature of collateral attack proceedings, which are wholly different from trial **and direct** appeal, The issue contained in Carter's brief is illusory, **and** this Court should so **hold.**[3]

To the extent that Carter asserts that this is an issue of "first impression" in this State, that claim is incorrect. In *Jackson,* this Court specifically held that **a** collateral petitioner 'Is not entitled to a judicial determination of his competency to assist counsel in either preparing a 3.850 motion or a petition for writ of habeas corpus." *Jackson,* 452 **So.2d at** 537. That is the law in this State, and, to the extent that the lower court purported to adopt the special concurrence **as** controlling, that decision was error. *Jackson* is consistent with the law as it **has** developed since that case was decided, and any claim that that case is no longer controlling because it predates the creation of the Office of the Collateral Representative is meritless. ***Jackson*** is wholly consistent with the decisions of this Court and the United States

[3]Carter's claim that the "right to competence" component of the lower court's order is not before this Court on appeal is incorrect. The correctness of that court's order is the issue that this Court has been asked to decide through Carter's interlocutory appeal (which is unauthorized by the *Rules of Appellate Procedure).* Especially given the posture of this appeal, this Court should address the issues and decline to adopt Carter's restricted concept of what is and is not presented for review.

Supreme Court, which are clear that there is no right to collateral counsel, and that there is no such thing as 'ineffective assistance of collateral counsel ." *See, Lambrix, infra.*

On pp.13-15 of his brief, Carter argues that "the approach undertaken by the Supreme Court of Wisconsin" in *State v. Debra A. E.*, 188 Wis. 111, 523 N.W.2d 727 (1994), should be adopted by this Court. Despite Carter's claims to the contrary, that case does not support the proposition that the *Dusky* competence standard applies at the collateral attack stage. Footnote 2 to that opinion makes clear that the "postconviction relief" motion at issue in that case is in no way similar to a motion to vacate under Rule 3.850. The 'postconviction relief" proceeding at issue in the Wisconsin case is a part of the direct appeal, and has nothing to do with collateral challenges to a conviction and sentence. See, *Debra A.E., supra*, at 119 n. 2. That decision has nothing to do with the issue before this Court, and reliance upon it is disingenuous.[4]

To the extent that Carter attempts to equate the issue before

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[4]Wisconsin law refers to collateral attack proceedings as "postconviction review", while referring to the direct appeal matters as "postconviction relief" proceedings. "Postconviction relief" proceedings are in no way analogous to Rule 3.850 proceedings. *Debra A.E.* has not been interpreted by the Wisconsin court as applying to collateral attack proceedings. Carter's assertion to the contrary is wrong.

this Court with the situation that presents itself when a defendant wishes to waive his post-conviction remedies, that comparison is likewise invalid, The situation before this Court is not "a Durocher-type scenario", and Carter's attempt to argue by analogy fails. The "standard" that applies in the case of a waiver of further review is the ***Faretta*** standard which has a constitutional basis. However, the issue in this case is not whether Carter wishes to forego collateral counsel -- the issue is whether the ***Dusky*** standard of competence applies to collateral litigation. Competence is not implicated at the post-conviction stage, and, whatever the "standard" for competence to waive counsel may be, it does not create a competence issue at the collateral stage because there is no constitutional right to post-conviction review.

In Rule ***3.211*** of the ***Florida Rules of Criminal Procedure,*** various factors relevant to competence to proceed with a "material stage" of the proceedings are set out. Among the factors set out in the rule are the defendant's capacity to appreciate the charges against him and the range and nature of the possible penalties; his capacity to appreciate the adversary nature of the legal process, disclose pertinent facts to counsel, and testify relevantly; and his ability to manifest appropriate courtroom behavior. In the context of a Rule 3.850 proceeding, the applicability of the

various factors is virtually non-existent.

The ability of the defendant to appreciate the charges against him and the possible penalties for those offenses has no application at all in the post-conviction context because there are no "charges" against the defendant, nor is there any possible penalty that may be imposed on the defendant. The defendant's ability to understand the adversary nature of the legal process has little or no bearing on the prosecution of a post-conviction motion. Likewise, the ability of the defendant to disclose relevant facts to counsel, manifest appropriate courtroom behavior and testify relevantly have minimal applicability to a motion for relief under Rule 3.850. At the collateral attack stage, the "relevant facts" within the defendant's knowledge are sharply limited because legal rather than factual issues are the principal focus of collateral proceedings.

On pp.17-18 of his brief, Carter purports to explain how a collateral petitioner's "participation is essential in order to properly investigate the case and determine what issue [sic] may be present." That argument is internally inconsistent with the Rule 3.850 motion filed in this case--that motion consisted of 219 pages containing 21 claims. At no point in that motion does it appear that Carter's attorney complained that he could not plead a claim

due to Carter's claimed incompetence, even though counsel did claim that he could not plead a number of issues due to claims of non-compliance with his public records requests. Moreover, and perhaps most interestingly, a large component of that motion presents what are claimed to be facts about Carter's background and early life. **(TR198-243)** The claims contained in the motion were apparently not adversely affected in any way by Carter's professed "incompetence", and, in any event, underscore the disingenuous nature of Carter's argument.

Of course, a presumption of finality attaches with the conclusion of direct appeal review, with the result that, at the collateral attack stage, the defendant is challenging a presumptively valid conviction and sentence. Rule 3.850 does not exist to allow the defendant to relitigate his capital trial, nor does the Rule exist to allow the relitigation of issues that were raised on direct appeal (or could have been so raised) in the guise of a claim of ineffective assistance of counsel. See, ***e.g.***, ***Kight v. Dugger,*** 574 So.2d 1066 (Fla. 1990). Carter's attempt to create a competency claim by reliance upon standards that apply to the trial of a criminal case (which is the main event, anyway) is an attempt to put a square peg in a round hole.

The comparison of pre-trial proceedings to collateral attack

proceedings is invalid because of the fundamental difference between them--this Court recognized that basic difference in 1984 when ***Jackson*** was decided, and that difference has not changed. Rule 3.850 does not exist for the purpose of allowing defendants to relitigate their capital trials--the rule exists to provide a means for addressing claims of constitutional error in a judgment or sentence.[5] *McCrae* v. ***State,*** 437 So.2d 1388 (Fla. 1983). The position taken by Carter is incorrect because it is legally inconsistent as well as being inconsistent with Carter's own prior filings--this Court should not adopt the argument advanced in Carter's interlocutory appeal.

II. THE GUARDIANSHIP ISSUE FAILS BECAUSE THE COMPETENCY ISSUE IS MERITLESS

On pp.20-22 of his brief, Carter argues that it was error for the trial court to determine that, if Carter is incompetent, then it would "appoint a guardian to act on behalf of the defendant during his incompetency in a manner to the extent recognized by the United States Supreme Court in ***Whitmore v. Arkansas,*** 495 U.S. ___, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)." This is a non-issue

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[5] Carter's claim that his mental state makes it impossible for him to comply with the verification requirement of Rule 3.850 is a ***non sequitur*** because it attempts to equate a "rational understanding" of the proceedings with the ability to verify the claims contained in the motion. That comparison is not a valid one.

because, as set out above, there is no competency issue at the collateral attack stage. Because there is no competency issue, there is no "guardianship" issue, nor is there a next friend issue. Because this issue is predicated upon the erroneous premise discussed in claim one, above, this claim fails for the same **reasons.** As discussed in claim one, ***Jackson*** correctly states the law, and Carter has offered no valid argument to the contrary. There is no need for a guardian in this case.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the State submits that this Court should hold that the Jackson decision correctly states the law as to **a** claim of "incompetence" at the post-conviction stage of litigation.

Respectfully submitted,

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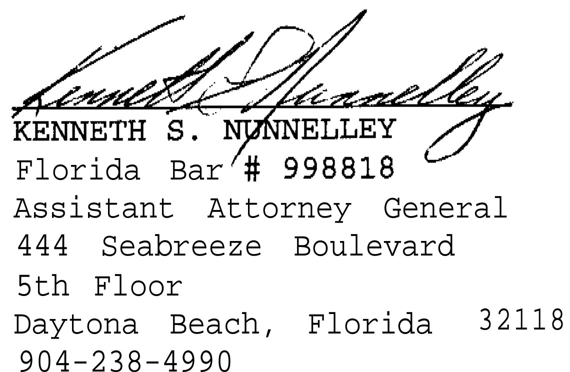

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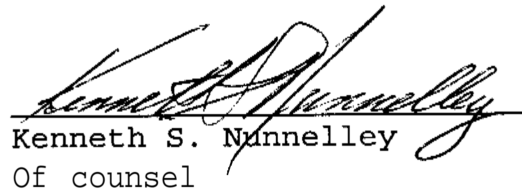
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to: Todd G. Scher, Chief Assistant CCR, Office of the Capital Collateral Representative, 1444 Biscayne Boulevard, Suite 202, Miami, Florida 33132, this 3d day of January, 1997



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