

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC92496

RICKEY BERNARD ROBERTS,
Appellant/Cross-Appellee,

vs.

THE STATE OF FLORIDA,
Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY,
CRIMINAL DIVISION

REPLY BRIEF OF CROSS-APPELLANT

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STATEMENT OF THE CASE AND FACTS

The State will rely upon the Statement of the Case and Facts contained in its Answer Brief of Appellee/Initial Brief of Cross-Appellant.

SUMMARY OF THE ARGUMENT

The lower court erred in granting the third motion for post conviction relief. The State did not waive the issue of due diligence by objecting to an irrelevant question. Moreover, Defendant did not act diligently in investigating and presenting his claim.

ARGUMENT

VI. THE LOWER COURT ERRED IN GRANTING RELIEF ON THE THIRD MOTION FOR POST CONVICTION RELIEF WHERE THE CLAIM COULD HAVE BEEN ASSERTED EARLIER THROUGH AN EXERCISE OF DUE DILIGENCE.

In response to the State's argument that the lower court erred in finding that Defendant had exercised due diligence in presenting his claim that the State wrote the sentencing order, Defendant asserts that the State waived this issue and that he did act with diligence. Defendant asserts that the State waived the issue by objecting to a question to former Assistant Attorney General Fariba Komeily regarding her knowledge of the records. He also contends that he did act with diligence by seeking to disqualify Judge Solomon to determine the authorship of the sentencing order.

During the evidentiary hearing on the third motion for post conviction relief, the State called former Assistant Attorney General Fariba Komeily to testify regarding which assistant state attorneys were involved in the prosecution of Defendant based upon her review of the appellate records in the case. (PCR3-SR. 449-51) On cross, Defendant sought to inquire of Ms. Komeily if she had seen anything in the record prior to April 2000 to show that the State may have written the sentencing order. (PCR3-SR. 453) The State objected to the question on the grounds that Ms. Komeily review of the record was not relevant to Defendant's due diligence. (PCR3-SR. 453) The post conviction court sustained the State's objection. (PCR3-SR. 453)

Defendant now asserts that this objection waived the State's claim that he failed to act with due diligence. However, this is not true. Defendant does not explain how objecting to an irrelevant question waives an issue that was before the Court by pleading and evidence. Moreover, the question was irrelevant. "Relevant evidence is evidence tending to prove or disprove a material fact." §90.401, Fla. Stat. Here, the material fact at issue was whether Defendant acted with diligence in discovering the facts underlying his claim regarding the authorship of the sentencing order and in presenting that claim within one year of the time that the facts could have been discovered through the exercise of due diligence. Whether Ms. Komeily had seen the document in the record, the fact remains that the document had been provided to Defendant during a deposition and was in the record on appeal. The record speaks for itself. Further, whether Ms. Komeily believed that this document was sufficient to raise the claim, Defendant's counsel had already admitted that he was aware that this claim had been successfully raised in other cases based on the fact that the State had an unsigned copy of the sentencing order in its possession. (PCR3-SR. 421-22) As such, Ms. Komeily's testimony would not have proved or disproved the material facts at issue: Defendant had received the document that he admitted would have given rise to the claim more than one year before he filed the claim. Thus, the objection that the testimony was irrelevant was

proper and did not waive the issue of whether Defendant acted with due diligence.

Moreover, while Defendant asserts that the fact that the State objected to the question to Komeily prevented him from questioning Howell about the record to show that he acted with diligence, it must be remembered that Defendant did not call Howell; the State did. (PCR3-SR. 453) As Defendant had the burden of showing that he acted with due diligence¹ and had already presented his case, the objection could not be said to have prevented Defendant from presenting his case. Further, Howell's knowledge of what was in the record is no more relevant than Komeily's knowledge. As such, this claim is meritless.

Defendant also appears to assert that consideration of the fact that he had received of an unsigned copy of the sentencing order that had been in the possession of the State in 1996 is improper because it was not presented at the evidentiary hearing. However, this Court has expressly held that a lower court must consider all of the evidence presented at trial and at prior post conviction proceedings in evaluating a post conviction claim. See *Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999); see also *Kight v. State*, 784 So. 2d 396, 402 (Fla. 2001); *Sims v. State*, 754 So. 2d 657, 662 (Fla. 2000). Here, the fact that Defendant had possession

¹ *McGuffey v. State*, 515 So. 2d 1057, 1058 (Fla. 4th DCA 1987).

of this order was shown by the fact that it was contained in the record of the prior proceedings in this case. As the lower court was required to consider this record in resolving these claims, the lower court improperly ignore this fact in finding that Defendant had been diligent in presenting this claim. Thus, the lower court erred in granting sentencing relief.

Defendant next asserts that he acted with due diligence in attempting to determine the authorship of the sentencing order by moving to disqualify Judge Solomon in October and November 1996 so that he could be deposed. Defendant asserts that other than moving to depose Judge Solomon, there was nothing further he could have done. However, a review of the motions to disqualify filed in October and November of 1996 shows that Defendant did not move to disqualify Judge Solomon to depose him regarding the authorship of the sentencing order in this case. In the October 16, 1996 motion to disqualify, Defendant asserted that Judge Solomon had engaged in an *ex parte* communication with the director of the Patuxent Institution in Maryland at the time of sentencing in 1985. (PCR3. 37-44) Defendant then recited the facts regarding Judge Solomon's testimony at the evidentiary hearing in *State v. Riechmann*, which he claimed to have recently discovered. Based on this information, Defendant asserted:

Judge Solomon has admitted to ex parte contact with the State. Judge Solomon has admitted that he is unfamiliar with Gardner v. Florida, the very case Judge Solomon violated in Mr. Roberts' case. Finally, Judge Solomon

was a witness for the State in Riechmann. Obviously, Judge Solomon had ex parte contact with the State in preparing for the Riechmann evidentiary hearing in July of 1996. The State had to meet with Judge Solomon to inquire if he had information to rebut Mr. Riechmann's claims. Neither Mr. Roberts or his counsel were privy to the ex parte communications which occurred when Judge Solomon acted as a State's witness. Compare State v. Lewis, 656 So. 2d 1248 (Fla. 1994) (wherein CCR sought deposition of a judge who was a witness and was presiding over other cases in order to avoid appearance of impropriety that would result from CCR contacting judge extra-judicially). The relationship between Judge Solomon and the State developed in Riechmann places Mr. Roberts in fear that he will not receive a fair hearing from Judge Solomon.

(PCR3. 41) In the motion, the authorship of the sentencing order was not mentioned. (PCR3. 37-44)

On November 12, 1996, Defendant amended this motion to disqualify to append a copy of Judge Gold's order on Riechmann's motion for post conviction relief. (PCR3. 109-14) However, Defendant again did not mention the authorship of the sentencing order in this case. (PCR3. 109-14) Given that Defendant did not mention any need to depose Judge Solomon regarding the authorship of the sentencing order in either his October 1996 motion or November 1996 motion, he did not do everything he could have to investigate and present this claim in a timely fashion. As such, the lower court erred in finding that Defendant exercised due diligence in presenting this claim. Fla. R. Crim. P. 3.850(b) & (f); *Mills v. State*, 684 So. 2d 801, 804-05 (Fla. 1996) (Defendant's second 3.850 must show "that the motion was filed within one year of the discovery of evidence upon which avoidance of the time limit

was based."); *Bolender v. State*, 658 So. 2d 82 (Fla. 1995) (same).

Moreover, it must be remembered that Defendant was given access to the State Attorney's files in 1989. (PCR3-SR. 412-13) At that point, he made no attempt to depose the assistant state attorneys who prosecuted him. In 1996, he was again given access to the State Attorney's file and was given permission to depose the prosecutors. (PCR3-SR. 413-14) Despite the fact that he received an unsigned copy of the sentencing order, Defendant did not question its origin or raise any claim based on it. Defendant admitted that he knew that the claim could have been raised based upon such an unsigned draft of a sentencing order. (PCR3-SR. 421-22)

Had Defendant used due diligence in seeking public records in 1989, he could have received the unsigned sentencing order at that time. Had Defendant used due diligence after he received the unsigned order in 1996, he could have moved to disqualify Judge Solomon to depose him regarding the authorship of the sentencing order at that time. Instead, Defendant did not seek the records diligently, did not move to disqualify Judge Solomon on this basis and waited until 2000 to file this claim. Under these circumstances, the lower court erred in finding that Defendant acted with due diligence. See *Buenoano v. State*, 708 So. 2d 941, 952-52 (Fla. 1998); *Zeigler v. State*, 632 So. 2d 48 (Fla. 1993) (claim barred where information could have been discovered

through earlier public records litigation), *cert. denied*, 513 U.S. 830 (1994); *Agan v. State*, 560 So. 2d 222 (Fla. 1990) (same); *Demps v. State*, 515 So. 2d 196 (Fla. 1987) (same). The order granting post conviction relief regarding sentencing should be reversed.

CONCLUSION

For the foregoing reasons, the denial of the second motion for post conviction relief should be affirmed and the granting of the third motion for post conviction relief should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Martin J. McClain, 9701 Shore Rd., Apt. 1-D, Brooklyn, New York 11209 and CCRC-South, 101 N.E. 3rd Street, Suite 400, Fort Lauderdale, Florida 33301, this day of ____ of December, 2001.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

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