ORIGINAL

IN THE SUPREME COURT
OF FLORIDA

CASE NO. 92,928

ROBERT H. WELLS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

APPEAL FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

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I. THE STATE FAILS TO RECOGNIZE THAT THE THIRD DISTRICT'S OPINION IS CONTRARY TO ALL PRECEDENT.

The State ignores the multitude of decisions from both federal and state courts, including the United States Supreme Court and three Florida District Courts of Appeal, in which courts have held that claims of ineffective assistance of counsel may be raised by way of writ of error *coram nobis*. Further, the State even fails to address the rationale of these decisions that persons no longer in custody should have a vehicle by which to petition the court for correction of a fundamental defect such as ineffective assistance of counsel.

Instead of confronting the numerous decisions holding that Sixth Amendment claims are properly raised in a writ of error *coram nobis*, the State decides to restrict all *coram nobis* relief to the four areas which it creates. Significantly, however, two of the areas that the State creates actually do cover Sixth Amendment claims. To illustrate, ineffective assistance of counsel can be considered a "defect of process" in that a person cannot receive due process in a criminal proceeding without it and, in this case, it is also an "error not apparent from the record" because the trial court held that neither it nor the defendant knew of the actual conflict of interest at the time the guilty plea was entered.

II. A WRIT OF ERROR *CORAM NOBIS* IS THE PROPER VEHICLE AND IT IS PETITIONER'S EXCLUSIVE REMEDY.

The State erroneously contends that because Petitioner did not file a Rule 3.850 motion during the few months that he was actually in custody he is now precluded from arguing that his conviction is unconstitutional. Petitioner has not slept on his rights in that he filed the writ within the two-year time period applicable to Rule 3.850 motions. The reason that he is not filing a Rule 3.850 is not that he is out of time for a Rule 3.850 motion but that he is no longer in custody and thus cannot file a Rule 3.850 motion. Not only is Petitioner not out of time, he is utilizing the only remedy available to him.

The State incorrectly states that the Florida Supreme Court held in Snell v. State, 28 So.2d 863 (Fla. 1947), that claims of ineffective assistance of counsel cannot be raised by way of writ of error *coram nobis* and instead should be raised in a Rule 3.850 motion or habeas. Respondent's Brief at 23. Clearly, the Court could not have held this in 1947 when Rule 3.850 was adopted in 1967. Further, the defendant in Snell was in custody and thus could have filed a habeas. Thus, a writ was not his only remedy. This appears to be the reason that the Court held that: "[t]he ground that the appellant was not properly represented by counsel would not justify the issuance of the writ of error coram nobis . . . ." Id. at 867. The Court may have also concluded that defendant's claim had no merit. Frankly, it is difficult to determine from the single sentence in the opinion addressing this issue what the reason was behind the Court's holding.

In any event, in the instant case, the writ is Petitioner's exclusive remedy because he is not in custody and thus cannot file either a habeas or a Rule 3.850 motion. Moreover, there are numerous federal and state decisions which have addressed this issue in depth and have concluded that Sixth Amendment claims may be raised by way of writ of error *coram nobis*.

In addition, the State relies on State v. White, 470 So.2d 1377 (Fla. 1985), for the proposition that it can appeal the trial court's grant of a writ of error *coram nobis*. White, however, involved a Rule 3.850 motion, not a writ of error *coram nobis*. Consequently, White never addressed the Florida Supreme Court cases holding that the State cannot appeal a grant of the writ. Further, in contrast to the common law writ, Rule 3.850 expressly allows the State to appeal a trial court's order on the motion. See Rule 3.850(g).

Nevertheless, even if this Court wishes to modify, clarify or reverse its previous decisions and to allow the State to appeal a grant of a writ, the standard of review on appeal should remain a "clear abuse of discretion" because trial courts are in the best position to review and correct fundamental defects in proceedings before them.

III. THE PLEA COLLOQUY AND THE TESTIMONY AT THE EVIDENTIARY HEARING DEMONSTRATE THAT THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

The State reproduces the transcript on the day of Petitioner's arraignment apparently to illustrate that Petitioner received effective assistance of counsel and that the trial court

abused its discretion by holding that the Sixth Amendment was violated. However, the transcript clearly shows the very opposite, that is that representation was constitutionally deficient. For example, the transcript demonstrates that: (1) counsel had not spoken to Petitioner before the day of the arraignment, and any conversation they did have on that day was extremely brief, (2) counsel had not received any discovery from the State and had not reviewed any documents in the court file, (3) counsel never advised Petitioner of the applicable sentencing guidelines range and Petitioner was under the impression that if he was convicted he would receive the statutory maximum of 15 years.

Further, the State quotes language from a case other than Petitioner's. On page 3 of the State's brief, lines 9-19 do not have anything to do with Petitioner's case and instead refer to another case also arraigned on that day. This error is material because the quoted portion implies that counsel had spoken to the officer involved. In the instant case, not only did Petitioner's counsel never speak to an officer, he failed to speak with any witnesses. In addition, counsel never even reviewed the witnesses' statements in the court file.

Significantly, at the evidentiary hearing before the trial court, Petitioner's former counsel confirmed that he had never spoken to Petitioner before the day that Petitioner pleaded guilty, had never reviewed any documents in the court file, he had not interviewed any witnesses, had not investigated any possible defenses or search and seizure issues, and undertook

Petitioner's representation despite the fact that he had previously represented the State's key witness and that the Office of the Public Defender was representing this individual during the investigation of Petitioner's case.

The trial court found that if counsel had reviewed the court file, he would not have proceeded in the face of a clear conflict of interest. Further, counsel would also have discovered documents referring to Petitioner's drug and alcohol problem. Consequently, the questioning of Petitioner about his drug and alcohol use would have revealed that Petitioner was under the influence of drugs on the day of his guilty plea. Ignorant of this crucial information available from the court file, counsel recommended that Petitioner plead guilty to probation which subjected Petitioner to mandatory drug-testing. Inevitably, Petitioner tested positive for drugs two days after pleading guilty and his probation was therefore violated, resulting in his incarceration. Despite the overwhelming evidence of ineffective assistance of counsel apparent from the record itself, the State in its brief exclaims that: "The record in this case is devoid of any allegation or proof of any lapse in Mr. Bober's representation of Petitioner." Respondent's Brief at page 35.

IV. IF THIS COURT DECIDES TO REMAND, PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON THE ISSUE OF INVOLUNTARINESS OF PLEA.

The State claims that Petitioner's response of "No" to the question: "Are you today under the influence of drugs or alcohol?" conclusively refutes his claim that his plea was involuntary because he was under the influence of drugs and

alcohol. Respondent's Brief at 18. This is wrong as a matter of law and if this Court decides to remand on the issue of involuntariness Petitioner is entitled to an evidentiary hearing.

In Sanders v. United States, 373 U.S. 1 (1963), the Supreme Court held that a court could not reject a petitioner's argument, made in a § 2255 motion, that he was incompetent when tried simply because the file and record of the case did not reveal that he was intoxicated. Id. at 19. The court stressed that the record would not necessarily reflect the fact of petitioner's intoxication. The Court explained that: "However regular the proceedings at which he signed a waiver of indictment, declined assistance of counsel, and pleaded guilty might appear from the transcript, it still might be the case that petitioner did not make an intelligent and understanding waiver of his constitutional rights." Id. at 19-20 (citations omitted). The Court remanded for an evidentiary hearing because the facts upon which petitioner's claim was predicated were outside of the record. Id. at 20.

Similarly, in Gunn v. State, 379 So.2d 431 (Fla. 2d DCA 1980), the court held that a defendant is entitled to an evidentiary hearing on the allegation that his plea was involuntary because he was intoxicated at the time it was entered, unless the record "conclusively" refutes defendant's allegation. Id. at 432. See also State v. Leroux, 689 So.2d 235 (Fla. 1996). In the instant case, not only does the record not conclusively refute Petitioner's allegation, documents in the court file actually support Petitioner's allegation.

V. THE TRIAL COURT APPLIED THE CORRECT STANDARD FOR GRANTING A WRIT OF ERROR *CORAM NOBIS*.

The trial court did not permit evidence to be introduced on the issue of involuntariness of the plea and instead granted the writ because it found that there was a fact unknown to the court which if known would have prevented the entry of judgment. The unknown fact was an actual conflict of interest. The trial court found an actual conflict because both the Office of the Public Defender and Mr. Bober himself had represented the witness who identified Petitioner as possessing the shotgun and the Office was representing this witness during the investigation of Petitioner's case. Had it been aware of the conflict, the court would have appointed new conflict-free counsel. Not only was counsel conflicted in this case, his representation of Petitioner fell well below the Sixth Amendment standard for numerous other reasons, and in sum, the representation received by Petitioner was abysmal.

The State argues that even if there was an actual conflict of interest Petitioner was not prejudiced. First, the States applies the wrong standard in that Petitioner is not required to meet the higher standard of prejudice and instead must show adverse impact on his representation. See Petitioner's Brief at 28 (collecting cases). Unlike the State, the trial court was well aware that the law requires an adverse impact on the representation in addition to there being an actual conflict of interest and thus conducted an evidentiary hearing to determine

adverse impact. See Petitioner's Brief at 26-27 (quoting from relevant portions of the hearing transcript).

The trial court found that Mr. Jimenez was the State's key witness against Petitioner and that the State's other witness was Jimenez' girlfriend. [R.204-05]. The trial court concluded that had it been advised of this conflict as required by Florida law it would have appointed other counsel and would not have accepted the plea. Id. Further, former counsel even testified that had he been aware of the conflict, he would not have allowed Petitioner to enter the plea. Substitute counsel would at the very least have spoken with Petitioner about the case and read the court file. Petitioner would have been made aware of defenses such as drug-induced insanity and viable search and seizure issues. Further, substitute counsel would have been required to advise Petitioner of the applicable sentencing guidelines range. Significantly, substitute counsel would not have allowed a person with a chronic drug and alcohol abuse problem apparent from the face of the record to plead guilty to probation involving mandatory drug testing, nor would counsel have allowed Petitioner to plead guilty on a day that he was under the influence of drugs.

CONCLUSION

The trial court's decision in this case was well-informed in that it ordered extensive briefing of all of the legal issues and held numerous hearings including an evidentiary hearing, at which Petitioner's former counsel testified and documents from the court file itself evidencing the conflict were introduced. The

trial court issued a well-reasoned written opinion, applying the correct legal standard to facts which it was thoroughly familiar with because it was the court that accepted Petitioner's guilty plea and that heard from witnesses at the evidentiary hearing. Thus, the trial court's decision was not a clear abuse of discretion. Further, its decision to hear a claim of ineffective assistance of counsel by way of a writ of error *coram nobis* was in accordance with existing precedent. In sharp contrast, the Third District's opinion is contrary to all precedent. Further, it denies access to the courts to those persons not in custody yet who suffer from an unconstitutional conviction and prevents courts from correcting fundamental defects in their proceedings.

Petitioner respectfully submits that persons who complain of a fundamental defect such as ineffective assistance of counsel and who are not in custody be allowed to file a writ of error *coram nobis*. The Third District's decision which forecloses this exclusive avenue of relief for persons not in custody should be reversed. Further, in the instant case, the trial court's decision that the writ should issue was not a clear abuse of discretion and should be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was mailed this 8th day of January, 1999 to MICHAEL J. NEIMAND, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33131.

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