IN THE SUPREME COURT OF FLORIDA

CEASAR H. ROBINSON,	
Petitioner,	
v.	**Case No. 93,210**
STATE OF FLORIDA,	
Respondent.	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL
IN AND FOR THE SECOND DISTRICT

SUPPLEMENTAL ANSWER BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

PATRICIA A. McCARTHY
Assistant Attorney General
Florida Bar No. 0331163
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2367
(813)873-4739

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

CASES

MISCELLANEOUS

STATEMENT OF THE CASE AND FACTS

The state relies upon the statement of the case and facts sets forth in its answer brief.

STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

SUMMARY OF THE ARGUMENT

Except in the most extraordinary of circumstances, a defendant is not entitled to a new trial based on newly discovered evidence where the only effect of the newly discovered evidence would be to impeach or contradict a witness. The state respectfully submits that newly discovered impeachment evidence does not constitute grounds for a new trial pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure unless, in the very rare instance, it is shown that: 1) the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of trial, and the defendant or his counsel could not have known them by the use of diligence; 2) the impeachment evidence is inherently credible in nature; 3) the impeachment evidence is not cumulative; 4) the defendant's conviction turned on the testimony of the witness(es) to whom the impeachment pertains; and 5) the impeachment evidence destroys the credibility of said witness(es) such that it would have probably changed the result of the trial.

A defendant must carry a heavy burden of showing that impeachment evidence probably would have changed the verdict where the newly discovered evidence pertains to the credibility of a witness. Where, as here, there is other evidence supporting both the conviction and the credibility of the witness(es) to whom the impeachment pertains, the defendant asserting impeaching evidence does not satisfy the standard for granting a new trial.

Sub judice, Robinson fails to meet the new trial standard with his impeachment evidence. Even according deferential review of the successor judge's credibility findings, convict Hollins' testimony was not shown to be inherently reliable in nature. As the district court properly observed, Hollins' character was also susceptible to impeachment, inter alia, based on his prior record.

More importantly, the record demonstrates that Hollins' testimony pertains only to the credibility of the surviving shooting victim and that Robinson's convictions did not rest solely upon her testimony. Bernadette's identification of Robinson in the immediate aftermath of the shooting had ample support in strong circumstantial evidence of Robinson's guilt adduced at the 1982 trial. Because Hollins' account does not discredit and destroy the independent evidence as well as the surviving victim's account, Hollins' impeachment testimony does not suffice to warrant a new trial in this case.

Accordingly, the trial court abused its discretion in granting a new trial based on Hollins' impeachment testimony. Taking into account the overall evidence, the district court properly reversed the trial court's order. In view of the trial record, the nature of Hollins' testimony is not such that it would probably result in an acquittal upon retrial.

ARGUMENT

ISSUE: WHETHER NEWLY DISCOVERED IMPEACHMENT EVIDENCE CAN BE GROUNDS FOR A NEW TRIAL.

This Court has previously addressed the issue of whether newly discovered impeachment can constitute grounds for a new trial in the context of Florida Rule of Criminal Procedure 3.600. A review of these decisions provide support for the principle that except in the most extraordinary circumstances, a defendant is not entitled to a new trial based on newly discovered evidence under Florida Rule of Criminal Procedure 3.850 where the only effect of the newly discovered evidence would be to impeach a witness.

In Clark v. State, 379 So. 2d 97 (Fla. 1979), the defendant was charged with first degree murder, kidnapping and extortion. At trial, his accomplice described in detail Clark's role in the murder and kidnapping. Clark presented no defense. After the jury found him guilty on all counts, Clark based a motion for new trial on the alleged discovery of a letter from a former cellmate of the defendant's accomplice. The letter indicated that the accomplice had told the cellmate he had shot the victim. Id., 379 So. 2d at 101.

Addressing the requirements for new trial based on newly discovered evidence, this Court in Clark stated:

> **A new trial will not be awarded on the basis of newly discovered evidence** unless the evidence was discovered after trial, unless due diligence was exercised to have such evidence at the former trial, **unless the evidence goes to the merits of the cause and not merely to**

> **impeach a witness who testified**, unless the evidence is not cumulative, and unless it is such that it probably would have changed the verdict. Harvey v. State, 87 So. 2d 582 (Fla. 1956); McVeigh v. State, 73 So. 2d 694 (Fla. 1954); Branch v. State, 96 Fla. 307, 118 So. 13 (1928); Hudson v. State, 353 So. 2d 633 (Fla. 3d DCA 1977).

(emphasis supplied).

Determining that the evidence upon which Clark relied was, in reality, not newly discovered evidence but rather only a newly discovered witness, this Court found that the evidence in question was inherently non-credible nature and merely went to impeach the credibility of a witness. Because the defense had similar information at the time of trial in Clark, this Court concluded that the trial court correctly did not consider the letter to be newly discovered evidence. Id., 379 So. 2d at 101. The above quoted language, as well as the Court's analysis of the facts presented, reflect that evidence serving only to impeach a witness is insufficient to grant a new trial.

In Perry v. State, 395 So. 2d 170 (Fla. 1980), this Court addressed whether testimony pertaining only to the credibility of a witness to a robbery/murder justified a new trial. This Court rejected an absolute rule that impeachment testimony can never satisfy that portion of rule 3.600(a)(3), which requires that new evidence "would probably have changed the verdict." Id., 395 So. 2d at 173.

However, this Court in Perry did not order a new trial because

the impeaching evidence did not satisfy the new trial standard under rule 3.600. Id. Similar to the district court's decision sub judice regarding convict Hollins' impeachment testimony, this Court in Perry found from the record that the impeaching witness' character was itself susceptible to impeachment and nonsubstantive in nature. In addition, the advisory jury in Perry's case rejected the impeaching witness' testimony in recommending the death penalty. Id.

Although this Court did not address the Clark decision in Perry, it recently cited Clark on the matter of newly discovered impeachment evidence, in Woods v. State, 733 So. 2d 980 (Fla. 1999). On direct review of Woods' first degree and attempted first-degree murder convictions, this Court applied the following standard to Woods' claim that a new trial was warranted based on allegedly newly discovered evidence that a witness saw the shooting and the defendant was not the shooter:

> Rule 3.600 of the Florida Rules of Criminal Procedure states that courts shall grant a new trial where "[n]ew and material evidence, which, if introduced at trial would probably have changed the verdict or finding of the court, and which the defendant could not with reasonable diligence have discovered and produced at the trial, has been discovered." Fla. R. Crim. Pro. 3.600(a)(3). Under this rule, "**[a] new trial will not be awarded on the basis of newly discovered evidence** unless the evidence was discovered after trial, unless due diligence was exercised to have such evidence at the former trial, **unless the evidence goes to the merits of the cause and not merely to impeach a witness who testified**, unless the evidence is not cumulative, and unless it is such that it probably would have changed the verdict." Clark v. State, 379 So. 2d 97, 101 (Fla.

> 1979); see also Parker v. State, 641 So. 2d 369, 376 (Fla. 1994); Freeman v. State, 547 So. 2d 125, 128 (Fla. 1989), abrogated on other grounds, Fenelon v. State, 594 So.2d 292 (Fla. 1992); McVeigh v. State, 73 So. 2d 694, 698 (Fla. 1954); see generally Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (stating similar rule for new trial based on newly discovered evidence in postconviction proceedings); State v. Spaziano, 692 So.2d 174, 177 (Fla. 1997) (same). Absent an abuse of discretion, a trial court's order denying a motion for new trial will not be disturbed on appeal. See Jones, 709 So. 2d at 515; Spaziano, 692 So. 2d at 178.

Woods, 733 So. 2d at 988.

This Court went on to affirm the trial court's denial of Woods' motion for new trial on the grounds the [the allegedly newly discovered] witness lacked credibility and Woods failed to carry his burden to demonstrate that the testimony would have changed the result of the trial. Id., 733 So. 2d at 989. Although the Court affirmed based on the trial court's credibility finding that the impeachment evidence was not credible, it is apparent from the above quoted language in Woods that even if the newly discovered evidence was found to be credible, it must "go to the merits of the cause and not merely to impeach a witness who testified." Id., 733 So. 2d at 988.

Federal decisions addressing newly discovered evidence have found evidence which merely serves to impeach a witness to be an insufficient basis for a new trial. Although not involving a motion for new trial initiated by a defendant pursuant to Fed. R. Crim. P. 33, the decision in Mesarosh v. United States, 352 U.S. 1, 77 S.Ct. 1, 5, 1 L.Ed. 2d 1 (1956), reflects that "new evidence

which is 'merely cumulative or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial." It has been held that to succeed on a motion for a new trial based on newly discovered evidence, the movant must establish that (1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due to a lack of due diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material to issues before the court, and (5) the evidence is such that a new trial would probably produce a different result. See e.g., United States v. Gates, 10 F.3d 765, 767 (11th Cir. 1993), modified, 20 F.3d 1550 (11th Cir. 1994); United States v. Starrett, 55 F.3d 1525, 1554 (11th Cir. 1995). It has also been held that the failure to satisfy any one of these elements is fatal to a motion for a new trial. See e.g., United States v. Starrett, 55 F.3d at 1554; United States v. Lee, 68 F.3d 1267, 1274 (11th Cir. 1995).

When viewed in the context of a motion for newly discovered evidence pursuant to Florida Rule of Criminal Procedure 3.850, this reasoning is sound. The state asserts that except in the most extraordinary of circumstances, evidence which serves only to impeach or contradict a witness does not furnish a basis for granting postconviction relief under rule 3.850. A defendant such as Robinson must, of course, satisfy Florida's successive petition doctrine to gain merits review of a successive 3.850 motion

asserting newly discovered evidence. See generally, Zeigler v. State, 632 So. 2d 48, 51 (Fla. 1993); Pope v. State, 702 So. 2d 221, 223 (Fla. 1997).[1] A threshold showing under said doctrine is not satisfied where the only effect of the newly discovered evidence asserted would be merely to impeach or contradict a witness at the former trial.

The state contends that newly discovered impeachment evidence does not constitute grounds for a new trial unless, in the very rare instance, it is shown that: 1) the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of trial, and the defendant or his counsel could not have known them by the use of diligence; 2) the impeaching evidence is inherently credible in nature; 3) the impeaching evidence is not merely cumulative;[2] 4) the defendant's conviction turned on the

---

[1]Robinson twice previously was unsuccessful in prior rule 3.850 applications involving other grounds and in the appeals from the adverse rulings. Robinson v. State, 436 So. 2d 112 (Fla. 2d DCA 1983)[table]; Robinson v. State, 538 So. 2d 1262 (Fla. 2d DCA 1989)[table].

[2]In Williamson v. Dugger, 651 So.2d 84 (Fla. 1994), cert. denied, 516 U.S. 850, 116 S.Ct. 146, 133 L.Ed.2d 91, this Court addressed the summary denial of a first-degree murder defendant's claim of newly discovered evidence, based on affidavits of inmates incarcerated with a state witness claiming that the witness said he had lied to state authorities to avoid the electric chair. In affirming, this Court determined that cumulative impeachment evidence did not justify a new trial as follows:

> In order to prevail on a claim of newly discovered evidence, the evidence "must be of such nature that it would probably produce an acquittal on retrial." Jones v. State, 591 So. 2d 911, 915 (Fla. 1991). The

testimony of the witness(es) to whom the later impeachment pertains; and 4) the impeachment evidence destroys the credibility of the subject witness(es) such that it probably would have changed the verdict.

This approach is in accord with this Court's decisions rendered in the context of the new trial rule, wherein the Court inherently recognizes the distinction between impeachment and substantive evidence. Further, this approach accounts for this Court's reluctance in Perry to adopt a rule automatically disqualifying impeaching evidence as a basis for new trial. In addition, this analysis comports with this Court's decision in

---

> affidavits at issue in this case constitute, at best, impeachment evidence. Aside from the assertion that Omer lied in his testimony at trial, the affidavits do not set forth in what particular way Omer lied. In fact, the statements contained in the affidavits in large part support the testimony that Omer gave at trial and are consistent with the State's case against Williamson. Moreover, Omer was substantially impeached at trial, including impeachment by a witness who heard Omer state that he intended to "fix [Williamson's] ass." Thus, the impeachment evidence contained in these affidavits is cumulative in nature as well.
>
> We find no error in the trial court's determination that Williamson's newly discovered claim constituted "an insufficient basis for relief." These affidavits do not meet the Jones standard, as such cumulative impeachment evidence would not probably produce an acquittal on retrial. See also United States v. Reed, 887 F.2d 1398, 1404 (11th Cir. 1989), cert. denied, 493 U.S. 1080, 110 S.Ct. 1136, 107 L.Ed.2d 1041 (1990) (newly discovered evidence must not be merely cumulative or impeaching).

Id., 651 So.2d at 88-89.

State v. Spaziano, 692 So. 2d 174, 177 (Fla. 1997), which teaches that the court addressing newly discovered evidence must evaluate of all of the evidence presented at trial in relation to the impeachment evidence.

The state stresses that a defendant must carry a heavy burden of showing that impeachment evidence probably would have changed the verdict where the newly discovered evidence pertains to the credibility of a witness. Where, as here, there is independent evidence supporting the conviction and the credibility of the witness who is the subject of the proposed impeachment, the defendant offering impeaching evidence does not satisfy the standard for granting a new trial based on newly discovered evidence.[3]

---

[3]Although Robinson seeks to employ the standard for determining whether a Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), violation has occurred, the state submits that such standard is inapposite in the absence of an allegation and showing that the state suppressed the newly asserted evidence.

However, to the extent the Brady holdings shed any light on the issue at hand, the state submits that the United States Supreme Court's recent decision in Strickler v. Greene __ U.S. __, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), reminds us that the standard is not whether the witness' testimony was prejudicial and discrediting the witness' testimony might have changed the outcome of the trial. The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Id., 119 S.Ct. at 1952. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id., (internal citation omitted).

Here, the impeachment account of Hollins, directed toward the surviving victim's testimony, cannot be said to undermine

In the instant case, Robinson fails to satisfy the new trial standard with Hollins' impeachment testimony. Even according deferential review of the successor judge's credibility findings, Hollins' testimony was not shown to be inherently reliable in nature. As the district court properly observed, Hollins' character was also susceptible to impeachment, inter alia, based on his prior record. State v. Robinson, 711 So. 2d at 623.

More importantly, the record of the evidentiary hearing and the trial record demonstrate that inmate Hollins' testimony pertains only to the credibility of the surviving shooting victim and that Robinson's convictions did not rest solely upon her testimony. Bernadette's identification of Robinson in the immediate aftermath of the shooting had ample support in strong circumstantial evidence of Robinson's guilt adduced at the 1982 trial. Because Hollins' account does not discredit, much less destroy, the independent evidence as well as the victim's account, Hollins' impeachment testimony does not suffice to warrant a new trial in this case.

Accordingly, the trial court abused its discretion in granting a new trial based on Hollins' impeachment testimony. Taking into account the overall evidence, the district court properly reversed

---

confidence in the outcome of Robinson's case. The strong independent evidence that Robinson was Bernadette's assailant and Avil's killer supports the conclusion that even if the surviving victim had been severely impeached, Robinson would have been convicted of the crimes he committed.

the trial court's order granting postconviction relief. The nature and effect of Hollins' testimony is not such that it would probably result in an acquittal upon retrial.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court approve the district court decision.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

_____

PATRICIA A. McCARTHY
Assistant Attorney General
Florida Bar No. 0331163
2002 N. Lois Ave. Suite 700
Tampa, Florida 33607-2367
(813) 873-4739

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Kevin Briggs, Assistant Public Defender, P.O. Box 9000)Drawer PD, Bartow, Florida 33831, this ____ day of October, 1999.

_____

COUNSEL FOR RESPONDENT