
IN THE
SUPREME COURT OF THE STATE OF FLORIDA

NOVEMBER TERM 1999

BOOKER BIRDSONG, JR.,
Petitioner,

v.

THE STATE OF FLORIDA,
Respondent.

FILED
DEBBIE CAUSSEAU

NOV 17 1999

CLERK, SUPREME COURT

BY DJ

On Petition for Writ of Certiorari to the
Third District Court of Appeal
for the State of Florida

SECOND
AMENDED BRIEF ON JURISDICTION

Respectfully submitted,

Booker T Birdsong

Booker Birdsong, Jr., pro se
Reg. No. 42831-004
Federal Corrections Institution
P.O. Box 979137
Miami, Florida 33197

CERTIFICATE OF INTERESTED PARTIES

There are no other parties who have an interest in the just resolution of this cause than those listed in the caption of the case.

CERTIFICATE OF TYPE SIZE AND STYLE

The foregoing brief is formulated with 10-point Courier type, a font that is not proportionately spaced.

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STATEMENT OF THE CASE AND FACTS

On August 11, 1986, Petitioner entered a plea of guilty to a charge of robbery and was sentenced to twelve years imprisonment; case number 86-9201.^{1/} The circuit court entered judgment and then remanded Petitioner to the custody of the Department of Corrections. Petitioner fully served his sentence of imprisonment.

On February 17, 1998, Petitioner sought a writ of error coram nobis, which was subsequently denied on May 8, 1999.^{2/} A timely notice of appeal was filed. Following a period of approximately eight months from the date of the filing of the notice of appeal, absent an acknowledgment of the notice of appeal, Petitioner sought a writ of mandamus in the appellate court.

The Third District Court of Appeal, in a per curiam opinion "affirm[ed] the denial of defendant's motion for postconviction relief and den[ied] both his Petition for

^{1/} Petitioner initially raised the following grounds: (1) that his plea was not voluntarily, knowingly, and intelligently entered into; (2) that he did not understand the consequences of his plea. As a result of the procedural bar, Petitioner has usurped an issue in his attempt to demonstrate that the procedural bar under §3.850(b) is improper. (This issue is, of course, the first claim for relief).

^{2/} Rather obscurely the circuit court entered a second order on June 19, 1998 denying Petitioner's common law petition. The court then failed to grant an appeal which led to the request for mandamus.

Writ of Error Coram Nobis and his Petition for Writ of Mandamus." (Opinion order, May 19, 1999, (A-1 at 1, 2)). The appellate court found that "laches may bar claim for postconviction relief," quoting Smith v. State, 506 So.2d 69 (Fla. 1st DCA 1987) and that Florida Rule of Criminal Procedure §3.850(b) imposes a two-year limitation period for the timely filing of postconviction motions, which Petitioner cannot satisfy. The appellate court's decision is final, in that a timely petition for rehearing was denied on June 16, 1999. (A-2).

STATEMENT OF THE ISSUES

1. WHETHER FLORIDA COURTS ARE MISINTERPRETING FLORIDA RULE OF CRIMINAL PROCEDURE §3.850(b) AS BEING SO BROAD AS TO TIME BAR OR GIVE RISE TO LACHES WITH RESPECT TO A "PETITION" FOR WRIT OF ERROR CORAM NOBIS FILED ON BEHALF OF A LITIGANT WHO IS NOT "IN CUSTODY" AS REQUIRED UNDER §3.850(a)'s JURISDICTIONAL SCHEME?

2. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO EXPLAIN OR ADVISE PETITIONER OF HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS BEFORE ACCEPTING GUILTY PLEA IN CRIMINAL CASE NUMBER 86-9201, AS MANDATED UNDER BOYKIN V. ALABAMA, 395 U.S. 238 (1969), AND WHETHER PETITIONER EFFECTIVELY WAIVED HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS ABSENT AN "ON THE RECORD" EXPLANATION OR ADVISEMENT?

SUMMARY OF THE ARGUMENT

The Court should grant the writ of certiorari and thereafter cause a writ of habeas corpus to issue pursuant to Article V, Section 3(b)(9) of the Florida Constitution, in that, prior to the decision in Wood v. State, 24 Fla.L.Weekly &240 (Fla. May 27, 1999), the Petitioner's ancient common law writ of error petition was the appropriate remedy. As he is no longer "in custody," (at least not physical custody) and the ancient writ of error has been abolished (via Wood), his claim that his (federally protected) Sixth Amendment right --as explained in Boykin v. Alabama, 395 U.S. 238 (1969) --has been denied, states a valid cause for the issuance of habeas corpus. See, Article I, Section 13. ("Habeas corpus"), Fla. Const.; Article I, Section 9. ("Due process"), Fla. Const.; Article I, Section 16.(a) ("Rights of accused..."). Further the Court recognizes, under oath [see, Article VI, Section 3. ("Oath... 'I do solemnly swear...that I will protect and defend the Constitution of the United States...'")], that the denial of a federally protected right is no mere trifle, but rather tests the intellectual honesty of those who are charged with enforcing our great Constitution, regarding it above personal preferences, political motivations, and the ever increasingly dishonest notions of good social

policy.

In reliance upon the clear and convincing argument that Petitioner was denied three specifically enumerated rights, guaranteed under the Sixth Amendment to the United States Constitution, it is correctly and succinctly stated that a remedy in the nature of habeas corpus must lie.

ISSUE ONE

WHETHER FLORIDA COURTS ARE MISINTERPRETING
FLORIDA RULE OF CRIMINAL PROCEDURE §3.850 (b)
AS BEING SO BROAD AS TO TIME BAR OR GIVE
RISE TO LACHES WITH RESPECT TO A "PETITION"
FOR WRIT OF ERROR CORAM NOBIS FILED ON BEHALF
OF A LITIGANT WHO IS NOT "IN CUSTODY" AS
REQUIRED UNDER §3.850 (a)'s JURISDICTIONAL
SCHEME?

On May 27, 1999, this Court in Wood v. State, 24 Fla.L. Weekly S240 (Fla. May 27, 1999,) had occasion to abolish the common law writ of error coram nobis. To accomplish the abolition of the ancient writ, the requirements for habeas corpus relief (i.e., Rule 3.850), were drastically altered.

A petitioner who now seeks habeas relief in the State of Florida will be (or so it appears) allowed a two year grace period running from the date of the opinion in Wood. See e.g., Fla.R.Crim.P. §3.850(b) (computing time limitations period). Since the ancient writ of error coram nobis has now been formally abolished, the grace period is wholly appropriate and should apply in this case as well.

Petitioner's cases in the lower tribunals centered and indeed hinged on the application of the ancient writ of

error, which is now nonexistent. Fortunately, this Court hath the power to remand this cause to the circuit court for a timely determination under Rule 3.850, or in its sound discretion, to issue a writ of habeas corpus pursuant to Article V, Section 3(b)(9). Certiorari for a nonexistent remedy is not appropriate, but under Wood this Court may cause the issuance of a writ of habeas corpus.

ISSUE TWO

WHETHER THE CIRCUIT COURT ERRED IN FAILING TO EXPLAIN OR ADVISE PETITIONER OF HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS BEFORE ACCEPTING GUILTY PLEA IN CRIMINAL CASE NUMBER 86-9201, AS MANDATED UNDER BOYKIN V. ALABAMA, 395 U.S. 238 (1969), AND WHETHER PETITIONER EFFECTIVELY WAIVED HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS ABSENT AN "ON THE RECORD" EXPLANATION OR ADVISEMENT?

The issue herein presented asks this Court to determine two factors: (1) If the Petitioner has sufficiently met his threshold burden of demonstrating noncompliance with the requirements of Boykin, and (2) if under federal standards Petitioner effectively waived his constitutional rights. The question of an effective waiver of a constitutional right, is, of course, governed by federal standards. Douglas v. Alabama, 380 U.S. 415, 422 (1965); Boykin, 395 U.S. at 242-243.

In Boykin, the United States Supreme Court specifically enumerated the constitutional rights which courts must explain to a defendant in the taking of a proper plea:

Several constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. The first is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the states by reason of the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1 (1974). Second is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145 (1968). Third is the right to confront one's accusers. Pointer v. Texas, 380 U.S. 400 (1965).

Boykin, 395 U.S. at 243. "We cannot presume a waiver of these three important federal rights from a silent record." Id., at 243 (underscoring added).

Petitioner Birdsong's claim, as in Boykin, denotes that there is no transcript of the proceedings, meaning that the constitutional rights were not effectively waived on the record. Under the standard set in Fox v. Kelso, 911 F.2d 563, 570 (11th Cir. 1990), coupled with Boykin, this Court may exercise jurisdiction.

CONCLUSION

Based upon the foregoing analysis, and the Court's decision in Wood v. State, (citation omitted), jurisdiction has been established. It is respectfully prayed that this Court will cause the issuance of a writ of habeas corpus to vacate the conviction, or remand this cause to the lower tribunal for further proceedings under Rule 3.850, or any other relief as is deemed appropriate.

Respectfully submitted,

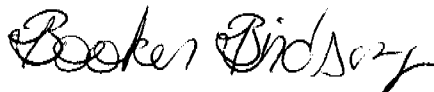
Booker T Birdsong

Booker Birdsong, Jr., pro se
Reg. No. 42831-004
Federal Correction Institution
P.O. Box 979137
Miami, Florida 33197

CERTIFICATE OF SERVICE

I certify that on this 14th day of November 1999, in accordance with this Court's November 5, 1999 order (which was received on November 9, 1999), the Second Amended Brief on Jurisdiction was delivered to prison authorities for forwarding, and served upon the Respondent of Record:
Office of the Attorney General, Department of Legal Affairs,
RiverGate Plaza, 444 Brickell Avenue, Miami, Florida 33131.

Respectfully submitted,



Booker Birdsong, Jr., pro se
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P.O. Box 979137
Miami, Florida 33197

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1999

BOOKER BIRDSONG, JR.,

**

Appellant,

** CASE NOS. 98-3325
98-1935

vs.

**

THE STATE OF FLORIDA,

**

LOWER
TRIBUNAL NO. 86-9201

Appellee.

**

Opinion filed May 19, 1999.

Case No. 98-3325: An Appeal under Fla. R. App. P. 9.140(i) from the Circuit Court for Dade County, and Petition for Writ of Error Coram Nobis, Barbara S. Levenson, Judge.

Case No. 98-1935: On Petition for Writ of Mandamus to the Circuit Court for Dade County, Barbara S. Levenson, Judge.

Booker Birdsong, Jr., in proper person.

Robert A. Butterworth, Attorney General, for appellee.

Before NESBITT, JORGENSON, and LEVY, JJ.

PER CURIAM.

We affirm the denial of defendant's motion for postconviction

relief, and deny both his Petition for Writ of Error Coram Nobis and his Petition for Writ of Mandamus. See Fla. R. Crim. P. 3.850(b) (imposing two-year limitation on seeking postconviction relief in noncapital case unless facts on which claim is predicated were unknown to movant or movant's attorney and could not have been ascertained by the exercise of due diligence); see also Calloway v. State, 699 So. 2d 849 (Fla. 3d DCA 1997) (holding that habeas petition cannot be used to circumvent the limitations period imposed by rule 3.850); Smith v. State, 506 So. 2d 69 (Fla. 1st DCA 1987) (holding that laches may bar claim for postconviction relief).

Denial of Motion for Postconviction relief, affirmed;
Petitions for Writ of Error Coram Nobis and Mandamus, denied.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

THE STATE OF FLORIDA,

CRIMINAL DIVISION

Plaintiff,

Judge Barbara S. Levenson

vs.

Case No. 86-9201

BOOKER BIRDSON,

**ORDER DENYING DEFENDANT'S
MOTION FOR POST-CONVICTION
RELIEF**

Defendant.
_____ /

The Court has considered defendant's motion for post-conviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850 and denies the motion without evidentiary hearing on the following ground(s),

Motion is not timely filed

Motion is legally insufficient because

the defendant's proposition of law is unfounded or the law upon which he relies is faulty, or has changed.

oath is legally insufficient

defendant's allegations are refuted by the record (see attached)

defendant fails to state sufficient facts in support of the motion

motion is duplicitous of prior 3.850 motion (s). These grounds were or could have been raised, on direct appeal.

Other (specify)

See attached page:

The defendant has thirty (30) days from this date to appeal this ruling.

DONE AND ORDERED in Miami, Dade County, Florida this 8th day of May,
1998.


JUDGE BARBARA S. LEVENSON

Copies furnished to:
Booker Birdson, Defendant
Office of the State Attorney

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO: *F46-9201*

THE STATE OF FLORIDA,

Plaintiff,

vs. *Booker Birdson*

Defendant.

FILED
JUN 19 1998

Petition

The Court has considered the defendant's ~~Motion~~ for *Writ of Error Coram Nobis*, and having been fully advised in the premise, the Court rules on the following ground(s):

The motion is not timely filed.

The motion is legally insufficient because:

the defendant's proposition of law is unfounded or the law upon which he relies is faulty, or has changed.

the defendant is represented by counsel (motions will only be accepted from counsel).

the defendant's is not represented by counsel, but this Court has no jurisdiction.

the defendant is not represented by counsel, but motion is not supported by facts

motion is duplicitous of prior 3.850 motion(s). These grounds were or could have been raised in prior motion(s).

Other (specify) *denied. Your Writs of Error Coram Nobis do not claim errors of fact as required by law. (defendant's) Petitions 4/28/98 and 5/11/98 denied*

The Defendant has thirty (30) days from this date to appeal this ruling.

DONE AND ORDERED in Miami, Dade County, Florida this _____ day of _____ 1997.

E. Seesley

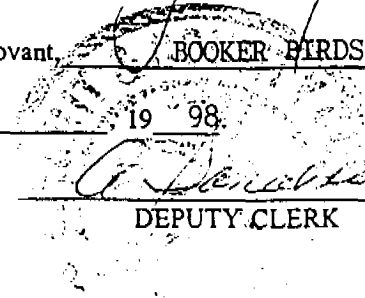
CIRCUIT COURT JUDGE

I certify that a copy of this order has been furnished to the Movant, BOOKER BIRDSON

by mail this 19th day of JUNE

A. Denard

DEPUTY CLERK



IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1999

WEDNESDAY, JUNE 16, 1999

BOOKER BIRDSONG, JR.,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

**

**

** CASE NO. 98-3325
98-1935

** LOWER
TRIBUNAL NO. 96-9201

**

**

Upon consideration, appellant's motion for rehearing is hereby denied. NESBITT, JORGENSON and LEVY, JJ., concur.

A True Copy

ATTEST:

MARY CAY BLANES

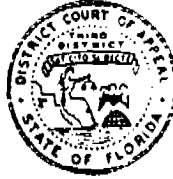
Clerk District Court of
Appeal, Third District

By

cc: Booker Birdsong, Jr.

Robert A. Butterworth

/NB



ALAN R. SCHWARTZ
CHIEF JUDGE
JOSEPH NESBITT
JAMES R. JORGENSEN
GERALD B. COPE, JR.
DAVID L. LEVY
DAVID M. GERSTEN
MARIO P. GODERICH
MELVIA B. GREEN
JOHN G. FLETCHER
ROBERT L. SHEVIN
RODOLFO SORONDO, JR.
JUDGES

DISTRICT COURT OF APPEAL
THIRD DISTRICT
2001 S.W. 117 AVENUE
MIAMI, FLORIDA 33175-1716
TELEPHONE (305) 229-3200

MARY CAY BLANKS
CLERK
KENNETH F. POTTER
MARSHAL
ANN E. HEARIN
CHIEF DEPUTY CLERK
DOROTHY L. TUTT
DEPUTY MARSHAL

July 2, 1999

RE: Booker Birdsong, Jr. vs. State
CIRCUIT #86-9201
DCA #98-3325, 98-1935

This is to advise you that the mandate in the above styled cause has been issued this date and mailed to Harvey Ruvin, Clerk of the Circuit Court of Dade County, Florida.

Very truly yours,

Clerk District Court of
Appeal, Third District

MCB/kw

cc: Booker Birdsong, Jr.; Robert A. Butterworth

Fla.R.Crim.P. §3.850(a), (b)

Florida Rule of Criminal Procedure §3.850(a) and (b) provide as follows:

(a) Grounds for Motion. A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released on the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution or laws of the United States or of the State of Florida, that the court was without jurisdiction to enter the judgment or to impose the sentence, that the sentence was in excess of the maximum authorized by law, that the plea was given involuntarily, or that the judgment or sentence is otherwise subject to collateral attack may move, in the court that entered the judgment or imposed the sentence, to vacate, set aside, or correct the judgment or sentence.

(b) Time Limitations. A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case or more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that:

(1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

(2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

DEBBIE CAUSSEAU, ACTING CLERK
Supreme Court of Florida

500 SOUTH DUVAL STREET
TALLAHASSEE 32399-1927
(850) 488-0125

Mr. Booker Birdsong, Jr.
Reg. No. 42831-004
Federal Corrections Institution
P. O. Box 979137
Miami, Florida 33197

10/11/99 filed 10/08/99

Booker Birdsong, Jr.

v.

State of Florida

CASE NO. 96,044

I have this date received the below-listed pleadings or documents:

Briefs filed in this Court must conform to Fla. R. App. P. 9.210. We are enclosing a copy of this rule.

Please amend your petitioner's brief on jurisdiction to include a table of contents; table of citations; certificate of font size; statement of the case and the facts; a summary of argument; argument with regard to each issue; conclusion and certificate of service. Your amended brief shall be served on or before October 21, 1999

Please make reference to the case number in all correspondence and pleadings.

Most cordially,



Acting Clerk
Supreme Court

**ALL PLEADINGS SIGNED BY
AN ATTORNEY MUST INCLUDE
THE ATTORNEY'S FLORIDA
BAR NUMBER.**

DC/bdm

cc: Ms. Christine E. Zahralaban

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1998
JANUARY 8, 1999

BOOKER BIRDSONG JR.,

Petitioner(s),

vs.

THE STATE OF FLORIDA,

Respondent(s).

** CASE NO. 98-03325
98-01935

**

**

** LOWER
TRIBUNAL NO. 86-9201

**

The petitioner is deemed insolvent and may proceed in forma pauperis for purposes of this cause.

Upon the Court's own motion, it is ordered that the above appeal and petition are hereby consolidated for all appellate purposes under case no. 98-3325.

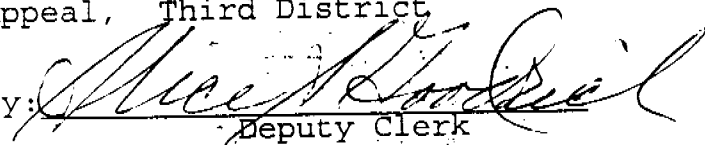
A True Copy

ATTEST:

MARY CAY BLANKS

Clerk District Court of
Appeal, Third District

By:


Deputy Clerk

cc: Booker Birdsong Jr.
Harvey Ruvin
/AG

Robert A. Butterworth

November 14, 1999

FILED
DEBBIE CAUSSEAUX

NOV 17 1999

CLERK, SUPREME COURT

BY dy

Debbie Causseaux, Acting Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1927

Attention:

Enclosed is the Second Amended Brief on Jurisdiction, in accordance with this Court's November 5, 1999 order directing that the November 4, 1999 Amended Brief be refiled to reflect a page limit of ten (10) pages.

Respectfully,

Booker T. Birdsong

Booker Birdsong, Jr., pro se
Reg. No. 42831-004
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Federal Corrections Institution
P. O. Box 979137
Miami, Florida 33197

11/5/99 filed 11-4-99

Booker Birdsong, Jr.

v.

State of Florida

CASE NO. 96,044

I have this date received the below-listed pleadings or documents:

Your amended brief was filed on November 4, 1999; however, it exceeds the ten (10) page limit. Please amend your brief not to exceed ten pages and resubmit to the Court and serve opposing counsel.

Please make reference to the case number in all correspondence and pleadings.

Most cordially,



Acting Clerk
Supreme Court

**ALL PLEADINGS SIGNED BY
AN ATTORNEY MUST INCLUDE
THE ATTORNEY'S FLORIDA
BAR NUMBER.**

DC/bdm

cc: Ms. Christine E. Zahralaban