

IN THE SUPREME COURT OF FLORIDA

TROY MERCK, JR.,

Appellant,

v.

CASE NO. SC16-899
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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RECEIVED, 08/08/2016 12:38:32 PM, Clerk, Supreme Court

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STATEMENT OF THE CASE AND FACTS

In 1993, Troy Merck was convicted of the first degree murder of James Newton and sentenced to death. The following factual background was taken from this Court's opinion affirming Merck's conviction, but reversing his death sentence and remanding the case for resentencing:

Merck was convicted of first-degree murder of the victim, James Anthony Newton. Newton died after Merck repeatedly stabbed him while the two men were in the parking lot of a bar in Pinellas County shortly after 2 a.m. on October 12, 1991. The bar had closed at 2 a.m., and several patrons of the bar remained in the parking lot. The evidence was that several of these individuals, including the victim, Merck, and those who witnessed the murder, had consumed a substantial amount of alcohol during the evening while at the bar.

After closing, Merck and his companion, both of whom had recently come to Florida from North Carolina, were in the bar's parking lot. The two were either close to or leaning on a vehicle in which several people were sitting. One of the car's occupants asked them not to lean on the car. Merck and his companion sarcastically apologized. The victim approached the car and began talking to the car's owner. When Merck overheard the owner congratulate the victim on his birthday, Merck made a snide remark. The victim responded by telling Merck to mind his own business. Merck attempted to provoke the victim to fight; however, the victim refused.

Merck then asked his companion for the keys to the car in which he had come to the bar. At the car, Merck unlocked the passenger-side door and took off his shirt and threw it in the back seat. Thereafter, Merck approached the victim, telling the victim that Merck was going to "teach him how to bleed." Merck rushed the victim and began hitting him in the back with punches. The person who had been talking to the victim testified that she saw a glint of light from some sort of blade and saw blood spots on the victim's

back. The victim fell to the ground and died from multiple stab wounds; the main fatal wound was to the neck.

Merck was indicted on November 14, 1991, for the first-degree murder of James Anthony Newton. The case went to trial and ended in a mistrial on November 6, 1992, because the jury was unable to reach a verdict. After a second trial, Merck was found guilty as charged. The jury recommended death by a vote of nine to three. The trial judge found two aggravating factors: (1) the murder was especially heinous, atrocious, or cruel; and (2) previous conviction of felonies involving the use or threat of violence. The court found no statutory mitigating factors and two nonstatutory mitigating factors: (1) abused childhood; and (2) alcohol use on the night of the offense. The trial court sentenced Merck to death.

Merck v. State, 664 So. 2d 939, 940-41 (Fla. 1995) (footnotes omitted).

In September 1997, Merck was again sentenced to death. However, this Court reversed Merck's death sentence, Merck v. State, 763 So. 2d 295 (Fla. 2000), and remanded for another sentencing hearing. At Merck's third sentencing hearing in 2004, the jury recommended the death penalty by a vote of nine to three. The trial court followed the jury's recommendation and sentenced Merck to death, and this Court affirmed his death sentence. Merck v. State, 975 So. 2d 1054 (Fla. 2007), cert. denied, 555 U.S. 840, 129 S. Ct. 73 (2008).

On February 27, 2008, this Court appointed the Office of the Capital Collateral Regional Counsel - Middle Region (CCRC) to handle postconviction proceedings for Merck. Thereafter, in

2009, CCRC, on behalf of Merck, filed a motion for postconviction relief. After conducting an evidentiary hearing, the trial court issued an order on August 27, 2010, denying Merck's motion. In addition to appealing the lower court's denial of his postconviction motion, CCRC also simultaneously filed a Petition for Writ of Habeas Corpus with this Court alleging ineffective assistance of appellate counsel. In a consolidated opinion, this Court denied all relief. Merck v. State, 124 So. 3d 785 (Fla. 2013).

On May 14, 2013, CCRC filed a petition for writ of habeas corpus in federal court on behalf of Merck. Shortly thereafter, Merck filed a *pro se* motion for substitution of counsel and/or appointment of conflict-free counsel alleging that CCRC performed ineffectively in his state court postconviction proceedings. On February 12, 2014, the federal court granted Merck's motion and Linda McDermott was appointed as counsel pursuant to the Criminal Justice Act (CJA).

In federal court, Merck sought leave to amend his habeas petition with an unexhausted Brady/Giglio claim,¹ and the federal court issued an order deferring ruling on his request until Merck had exhausted his state court remedies regarding the claim. The federal court stayed the habeas case pending Merck's

¹ Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972).

exhaustion of his state remedies.

On June 15, 2015, Merck's federally-appointed counsel filed a successive motion for postconviction relief in state court pursuant to Florida Rule of Criminal Procedure 3.851. The following day, the State moved to strike the successive postconviction motion as Merck's federally-appointed counsel was not counsel of record for Merck in state court and the motion was therefore unauthorized. The trial court agreed with the State and issued an order on July 9, 2015, striking Merck's successive motion.

Merck appealed the trial court's ruling, and on January 8, 2016, this Court issued an order dismissing without prejudice Appellant's appeal. Merck v. State, SC15-1439 (Jan. 8, 2016) (dismissing "without prejudice for Linda McDermott to seek substitution of counsel in the circuit court pursuant to Suggs v. State, 152 So. 3d 471 (Fla. 2014)"). Appellant filed a motion for rehearing which is currently pending before this Court.

On January 25, 2016, Merck returned to circuit court and his federally-appointed counsel filed a motion for substitution of counsel, a motion to hold proceedings in abeyance, and a successive motion for postconviction relief. (PCR:5-32). Appellee again filed a motion to strike the unauthorized successive postconviction motion. (PCR:33-36). On April 22,

2016, the circuit court issued an order striking all of the pleadings filed by Linda McDermott as she was unauthorized to represent Merck in state court and neither Merck or his state-appointed counsel, CCRC, had filed a motion to withdraw alleging a conflict of interest as described in Florida Statutes, section 27.703. (PCR:81-86).

SUMMARY OF THE ARGUMENT

The instant appeal is the second time Merck's federally-appointed counsel has sought review of a lower court's order dismissing her unauthorized filings. As previously argued in Merck v. State, SC15-1439, this Court lacks jurisdiction to entertain an appeal from a trial court's order striking unauthorized pleadings. In an order dated January 8, 2016, this Court dismissed Merck's previous appeal without prejudice, but did not specifically address the jurisdictional question. Merck v. State, SC15-1439 (Jan. 8, 2016). The State continues to assert that this Court lacks jurisdiction over this case.

Even if this Court reviews the order on appeal, just as in the prior case, this Court should dismiss the appeal as the trial court acted within its discretion in striking the unauthorized pleadings filed by Merck's federally-appointed counsel. Merck is represented in state court by CCRC, and until CCRC is no longer counsel of record for Merck, any and all motions filed by another attorney on his behalf are unauthorized. The remedy in this case is for Merck, or his appointed counsel (CCRC), to seek an order from the lower court allowing for the substitution of counsel.

ARGUMENT

ISSUE I

**THE TRIAL COURT PROPERLY STRUCK THE UNAUTHORIZED
MOTIONS FILED BY MERCK'S FEDERALLY-APPOINTED COUNSEL.**

Appellant, Troy Merck, Jr., is a death row inmate represented in state court by the Office of Capital Collateral Regional Counsel - Middle District (CCRC). In his federal habeas proceedings, Merck filed *pro se* pleadings and alleged a conflict with CCRC. Merck ultimately obtained the appointment of Linda McDermott as his federal counsel. Thereafter, Ms. McDermott filed a successive postconviction motion on behalf of Merck in state court and the circuit court struck the pleading as counsel was unauthorized to file it as she was not counsel of record in state court. Ms. McDermott appealed this ruling to this Court, and on January 8, 2016, this Court dismissed the appeal without prejudice for Linda McDermott to seek the substitution of counsel in state court. Merck v. State, SC15-1439 (Fla. Jan. 8, 2016).²

Following this Court's order dismissing the appeal, Linda McDermott returned to state court and once again filed an unauthorized successive motion for postconviction relief, as well as motions for substitution of counsel and to stay the proceedings pending this Court's resolution of the motion for

² This case remains pending on Merck's motion for rehearing.

rehearing in case number SC15-1439. Appellee again moved to dismiss the unauthorized successive motion for postconviction relief and requested that the court toll the time period for filing a response. After ordering and receiving a response from CCRC indicating that a conflict existed, the trial court issued an order striking Merck's motions as Linda McDermott was unauthorized to file the pleadings on behalf of Appellant as she was not counsel of record. Merck now appeals this order.

As previously argued in Merck's prior appeal, case number SC15-1439, this Court lacks jurisdiction to entertain the appeal filed by Merck's federal counsel as the order striking the unauthorized pleadings is not an appealable final order.³ See Fla. R. App. P. 9.030; art. V, § 3(b)(1), Fla. Const. Although this Court did not address the jurisdictional question when previously dismissing Merck's appeal, the State again asserts that this appeal should be dismissed for lack of jurisdiction.

Even assuming this Court reviews the lower court's order, Merck has failed to demonstrate that the trial court abused its discretion in striking the unauthorized motions filed by Merck's federally-appointed counsel. As this Court has noted, "[a] trial

³ In Case No. SC15-1439, Merck sought to consolidate the pending motion for rehearing with the instant appeal. The State filed a motion to dismiss the instant appeal and also moved this Court to deny the motion for rehearing in SC15-1439. This Court has not yet ruled on these motions.

judge's decision to strike a motion is entitled to significant deference," and the decision is subject to an abuse of discretion standard of review. Bryant v. State, 901 So. 2d 810, 817 (Fla. 2005). Here, the trial court acted within its sound discretion in striking the unauthorized motions as CCRC is counsel of record for Merck in state court, and pursuant to Florida statutory law, CCRC remains counsel of record until a court "appoints or permits other counsel to appear as counsel of record." See § 27.702(2), Fla. Stat. (2016).

Merck's primary complaint in the instant appeal is that the trial court did not rule on Linda McDermott's motion to substitute counsel, but rather, struck the pleading.⁴ While the more efficient course of action may have been for the circuit court to conduct a hearing on Linda McDermott's motion for substitution of counsel, arguably, the court acted within its discretion in striking the pleading as Linda McDermott was not

⁴ Counsel briefly mentions the successive postconviction motion in her brief and erroneously asserts that "it is clear that Mr. Merck's motion for substitution of counsel and successive Rule 3.851 motion were properly filed." Initial Brief at 15-16. To the contrary, Merck's successive postconviction cannot be considered "properly filed" when counsel was not counsel of record as such a pleading is a legal nullity. See Sykes v. State, 974 So. 2d 1133, 1134 (Fla. 1st DCA 2008) ("We disregard the Department of Corrections' motion for rehearing or certification, which was filed by an attorney who is not of record in this case, because it is a legal nullity"); Sharp v. State, 884 So. 2d 510 (Fla. 2d DCA 2004) (noting that defendant's pro se pleading was unauthorized and a legal nullity as the defendant was represented by counsel).

counsel of record. Certainly, if Merck, and/or his state-appointed counsel CCRC, felt that a conflict existed as to CCRC's representation in state court, either party could have previously filed the appropriate motion seeking to obtain the substitution of counsel. Thus, the State submits that this Court should once again dismiss the instant appeal, or in the alternative, remand to allow Merck or CCRC the opportunity to file the appropriate motion and/or direct the trial court to conduct a hearing and determine whether a conflict exists which would allow CCRC to withdraw from the case. See Fla. R. Jud. Admin. 2.505(f)(1) & (2); see also Van Poyck v. State, No. 73,662 (Fla. May 10, 2013) (remanding case to circuit court for consideration of appropriate counsel); Bates v. Jones, SC16-1199 (Fla. July 18, 2016) (striking a pleading filed by counsel who was not counsel of record and noting that counsel could attempt to obtain an order of substitution of counsel in the circuit court pursuant to Suggs v. State, 152 So. 3d 471 (Fla. 2014)).

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court dismiss the instant appeal, or in the alternative, remand so as to allow Merck or CCRC to file the appropriate motion seeking to substitute counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of August, 2015, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Linda McDermott, Esquire, McClain & McDermott, P.A., 20301 Grande Oak Boulevard, Suite 118-61, Estero, Florida 33928 [lindammcdermott@msn.com].

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