ORIGINAL

IN THE SUPREME COURT OF FLORIDA

ALBERT ROGERS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

Case No.: SC00-258

Lower Tribunal No.: 2D99-3861

CONSOLIDATED: SC60-96546

APPELLANT'S INITIAL BRIEF ON THE MERITS

On Review from the District Court of
Appeal, Second District
State of Florida

Rhoton & Hayman, P.A.

Loren D. Rhoton
Florida Bar Number 0055735
412 Madison Street
Suite 1111
Tampa, Florida 33602
(813)226-3138
(813)221-2182 FAX

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PRELIMINARY STATEMENT

As no record on appeal has been ordered to be prepared, the undersigned has prepared an Appendix to this Initial Brief on the Merits. The statements of case and facts will refer to matters contained in the Appendix. Each exhibit will be cited as "Ex." followed by the corresponding exhibit letter (i.e., "Ex. A).

TABLE OF CITATIONS

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Albert Rogers, Appellant stated herein, hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is spaced proportionately.

STATEMENT OF THE CASE AND FACTS

On November 4, 1994, The Petitioner, Albert Rogers, was convicted of two counts of Robbery and one count of Burglary with a Battery. Mr. Rogers was sentenced to Forty (40) years Florida State Prison. Mr. Rogers' Judgment and Sentence was affirmed by the Second District Court of Appeal for the State of Florida on July 26, 1996. Rogers v. State, 678 So.2d 343 (Fla. 2nd DCA 1996).

Following his appeal Mr. Rogers retained Attorney Frank Louderback to assist Mr. Rogers with a Florida Rule of Criminal Procedure 3.850 Motion for Post Conviction Relief. (Ex. A, p. 2). A 3.850 Motion was timely filed by Mr. Rogers' attorney. On December 9, 1998, the Sixth Judicial Circuit Court, in and for Pinellas County, summarily denied Mr. Rogers' 3.850 Motion.

Following the denial of his 3.850, Mr. Rogers received a letter from Attorney Louderback informing Mr. Rogers that the circuit court had denied the 3.850. (Ex. B). In said letter Attorney Louderback informed Mr. Rogers that "[although I do not agree with the judge's ruling, I do not feel that an appeal would be useful." (Ex. B). Louderback further informed Mr. Rogers that the "only further avenue" for relief would be to file a "motion" in the United States District Court alleging ineffective assistance of counsel at trial. (Ex. B).

Mr. Rogers did, in a timely manner, request that his attorney file a notice of

appeal of the circuit court's summary denial of his 3.850. (Ex. A, p. 3). However, Mr. Rogers was then told by his attorney that Mr. Rogers should waive the appeal and proceed to the Florida Supreme Court to seek post conviction relief. (Ex. A, p. 3). As a result, no notice of appeal was filed on Mr. Rogers' behalf by Attorney Louderback.

On or about October 8, 1999, Mr. Rogers filed a Petition for Writ of Habeas Corpus with the Second District Court of Appeal of Florida. (Ex. A). In said Petition Mr. Rogers requested a belated appeal of the summary denial of his 3.850 motion. (Ex. A, p. 4). The grounds for Mr. Rogers' request for a belated appeal were that he was misinformed by Attorney Louderback as to the need for an appeal of the summary denial of the 3.850 motion. (Ex. A, p. 3). In his Petition for Writ of Habeas Corpus Mr. Rogers alleged that "[h]ad counsel properly informed [Mr. Rogers] of the procedure to be applied in post conviction proceedings, he would have proceeded in pro se (sic) in the appeal of his motion for post conviction relief." (Ex. A, p. 3).

On November 5, 1999, the Second District issued an Order denying Mr. Rogers' Petition for Writ of Habeas Corpus. (Ex. C). The Second District relied on the case of Diaz v. State, 724 So.2d 595 (Fla. 2nd DCA 1996) in denying Mr. Rogers' Petition for Writ of Habeas Corpus. (Ex. C).

On or about November 17, 1999, Mr. Rogers filed a Motion for Rehearing with the Second District Court of Appeal. (Ex. D). On January 19, 2000 the Second District Court of Appeal denied Mr. Rogers' Motion for Rehearing. (Ex. E). In the same Opinion the District Court certified the following question of great public importance to this Court:

> "DOES THE HOLDING IN LAMBRIX V. STATE, 698 SO.2d 247 FLA. 1996), WHEN CONSIDERED IN LIGHT OF THE SUPREME COURT OF FLORIDA'S PRONOUNCEMENT IN STEELE V. KEHOE, 24 Fla. L. WEEKLY S237 (FLA. MAY 27, 1999), FORECLOSE THE PROVISION OF A BELATED APPEAL FROM THE DENIAL OF A POSTCONVICTION MOTION WHEN THE NOTICE OF APPEAL WAS NOT TIMELY FILED DUE TO THE INEFFECTIVENESS OF COUNSEL IN THE COLLATERAL PROCEEDING?" (Ex. E, p.2).

On March 28, 2000, this Honorable Court entered an Order Accepting Jurisdiction and Dispensing with Oral Argument.

SUMMARY OF THE ARGUMENT

Mr. Rogers retained counsel to represent him on his 3.850 motion for post conviction relief. As a result, Mr. Rogers reasonably expected that his interests would be adequately protected by his counsel. Mr. Rogers' attorney informed Mr. Rogers that the only avenue for relief available to Mr. Rogers was to pursue relief in the Federal District Court. As a result of counsel's misadvice an appeal of the denial of Mr. Rogers' 3.850 was not timely filed. Said failure to file the appeal was due in full to the misadvice of counsel and was in no way due to the actions of Mr. Rogers. Mr. Rogers informed counsel that he wished to appeal the denial of his 3.850 and counsel informed Mr. Williams that the only relief available was to pursue relief at the federal level. Mr. Williams should not be punished for the mistake of his counsel when the failure to file the notice of appeal was due, in total, to the misadvice of Mr. Rogers' attorney.

ISSUE

THE APPELLANT SHOULD NOT BE DENIED HIS RIGHT TO FILE AN APPEAL FROM THE DENIAL OF HIS FLORIDA RULE OF CRIMINAL PROCEDURE 3.850 MOTION FOR POST CONVICTION RELIEF WHERE HE REQUESTED THAT HIS ATTORNEY PURSUE SUCH AN APPEAL AND, THROUGH NO FAULT OF THE APPELLANT, COUNSEL MISINFORMED THE APPELLANT AS TO THE NECESSITY FOR AN APPEAL OF THE DENIAL OF THE 3.850.

It is true that a criminal defendant does not have a due process right, pursuant to the Sixth Amendment of the United States Constitution, to effective assistance of counsel in a post conviction proceeding. Lambrix v. State, 698 So.2d 247 (Fla. 1996). However, the holding of Lambrix does not dictate that a post conviction Movant is to receive no due process whatsoever. In fact, it was held in State v. Weeks, 166 So.2d 892 (Fla. 1964), that "[postconviction] remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States." Weeks at 896. For example, in Weeks and Graham v. State, 372 So.2d 1363 (Fla. 1979), this Court held that due process required the appointment of postconviction counsel when a prisoner filed a substantially meritorious postconviction motion and a hearing on the motion was potentially so complex that the assistance of counsel was needed. Thus, although a post conviction movant may not have the right to effective post conviction

counsel pursuant to the Sixth Amendment of the United States Constitution, said movant shall still be afforded the more flexible standards of due process.

In Steele v. Kehoe, 24 F.L.W. S237 (Fla. 1999), this Honorable Court addressed a situation similar to Mr. Rogers' and found that the defendant was due relief pursuant to the more flexible standards of due process announced in the Fifth Amendment of the United States Constitution. In Steele, William Steele was convicted of first degree murder and sentenced to life in prison. Id. Mr. Steele claimed that he retained attorney Terrence Kehoe to file a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, and that said attorney orally agreed to file a motion for postconviction relief. Id. Kehoe failed to file a post conviction motion on Steele's behalf in a timely manner, i.e., after the two year period of limitations for filing such a motion had expired. Id. Mr. Steele's pro se rule 3.850 motions were rejected by the trial court and the Fifth District Court of Appeal because they were filed after the two-year deadline had expired. Id.

As a result of his post conviction actions being barred, Steele filed a legal malpractice complaint against Kehoe. But, since Steele's 3.850 motions had been dismissed, Steele did not have an opportunity to demonstrate hat he was improperly convicted as a result of his attorney's negligence. Id. The trial court

dismissed Steele's complaint because he could not prove his actual innocence or that his underlying conviction had been set aside. Id.

The dismissal of Steele's complaint was affirmed by the Fifth District Court of Appeal because exoneration is a prerequisite to a legal malpractice action arising from a criminal conviction. Id. However, the Fifth District was troubled by the result, noting that irrespective of its holding, a monetary remedy in a civil action would be inadequate to redress Steele's injury. And, although the court recognized that, pursuant to Lambrix v. State 698 So.2d 247 (Fla. 1996), Steele had no right to effective postconviction counsel, they did consider what other possible remedies were available. The District Court considered what remedies would be available to a prisoner who hired an attorney to pursue postconviction relief and said attorney failed to timely file a motion within the two year period. The District Court held that "[i]f a prisoner is denied the opportunity to challenge his conviction under an appropriate rule only because of the negligence of his attorney, then due process requires a belated filing procedure similar to that allowed in belated appeals." Steele v. Kehoe, 724 So.2d 1192 (Fla. 5th DCA 1998).

On appeal, this Court in Steele v. Kehoe, 24 F.L.W. S237 (Fla. 1999), agreed with the District Court, stating that "...**due process** entitles a prisoner to a

hearing on a claim that he or she missed the deadline to file a rule 3.850 motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner." Id. (emphasis added). As such, this Court held that the correct procedure would be for the trial court to conduct a hearing on whether Kehoe undertook to file a 3.850 motion on Steele's behalf, but failed to timely file the motion. And, if such circumstances are proven, then the right to file a belated 3.850 motion should be granted.

The due process that was applicable to the appellant in Steele should also be due to Mr. Rogers. Mr. Rogers' case is similar to the factual situation in Steele, with one significant exception: Mr. Rogers' post conviction attack was one step further along than in Steele. As in Steele, Mr. Rogers is serving a substantial term of imprisonment. As in Steele, Mr. Rogers retained private counsel to represent him in a Florida Rule of Criminal Procedure 3.850 motion. Counsel filed a 3.850 Motion for Post Conviction Relief on behalf of Mr. Rogers. When his 3.850 was summarily denied, Mr. Rogers informed Attorney Louderback that he (Mr. Rogers) wished for counsel to appeal the denial. Counsel incorrectly informed Mr. Rogers that the "only further avenue" for relief would be to file a "motion" in the United States District Court alleging ineffective assistance of counsel at trial.

(Exhibit B).[1] As in Steele, Mr. Rogers asked his counsel to file a pleading (notice of appeal) for Mr. Rogers. Attorney Louderback misadvised Mr. Rogers as to the availability of an appeal of the summary denial of the 3.850. In reliance on his counsel's erroneous advice, Mr. Rogers did not pursue an appeal of the denial of his 3.850 in a timely manner. As in Steele, counsel's actions, or lack thereof acted to cut short Mr. Rogers' post conviction remedies. And, as in Steele, the more flexible standards of due process as announced in the Fifth Amendment of the United States Constitution, should be applied in this case, and Mr. Rogers should be granted a belated appeal in the Second District Court of Appeal. The holding of Steele dictates that Mr. Rogers simply should not be punished for his counsel's ignorance of the applicable post conviction procedures.

In light of this Honorable Court's holding in Steele, it is apparent that the Second District Court of Appeal was in error in relying on the following cases to

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[1] Counsel's advice that the "only further avenue" available was to seek federal relief was clearly incorrect as Title 28 U.S.C. Section 2254(b)(1)(A) requires a state inmate seeking federal habeas corpus relief to have "exhausted the remedies available in the courts of the State..." before seeking habeas corpus relief in the United States District Courts. Title 28 U.S.C. Section 2254(c) further provides that a petitioner shall not be deemed to have "exhausted the remedies available of the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise **by any available procedure**, the question presented." (emphasis added). Since Mr. Rogers did have the right to pursue an appeal of the denial of his 3.850 pursuant to Florida Rule of Appellate Procedure 9.140(i), the failure to pursue such an appeal would be a failure to exhaust Mr. Rogers' State remedies for the purpose of pursuing federal habeas corpus relief. As such, Attorney Louderback's advice regarding the necessity of an appeal was clearly erroneous.

deny Mr. Rogers a belated appeal: Diaz v. State, 724 So.2d 595 (Fla. 2nd DCA, 1998) and Lambrix v. State, 698 So.2d 247 (Fla. 1996). Diaz held, based upon Lambrix v. State, 698 So.2d 247 (Fla. 1996), that a defendant is not entitled to a belated appeal due to ineffectiveness of counsel in a post conviction proceeding when counsel, contrary to his client's instructions, fails to timely file a notice of appeal. Diaz at 596. However, a careful review of Lambrix, and consideration of Steele, indicates that the Second District Court was in error in relying on Lambrix for denying relief in Diaz and the instant case.

In Lambrix the movant filed a number of post conviction motions, including: (1) a petition for habeas corpus alleging ineffective assistance of appellate counsel; (2) a motion for postconviction relief alleging ineffectiveness of trial counsel; (3) another petition for writ of habeas corpus alleging ineffectiveness of appellate counsel; and, (4) a federal petition for writ of habeas corpus alleging the above issues. Id. at 247. Finally Mr. Lambrix filed another motion for post conviction relief asserting that he was deprived of the right to represent himself in his initial motion for postconviction relief in violation of Faretta v. California, 422 U.S. 806 (1975). Lambrix at 248. Said final motion for post conviction relief was filed four years outside of the Rule 3.850 two year period of limitations for filing such a motion. Id. Lambrix also argued that his collateral counsel was ineffective

for failing to appeal the trial court's denial of his request to represent himself on his prior post conviction motion. Id. Finally, Mr. Lambrix argued that the proper remedy was to allow him to file a new original motion for post conviction relief.

This Honorable Court held, in Lambrix, that it did not need to reach the merits of Mr. Lambrix's claim that he should have been allowed to represent himself in his motion for post conviction relief because the motion was successive an abusive as it was filed subsequent to several other similar motions. Said motion was also filed outside of the two year period of limitations as set forth in Rule 3.850. Further, in relation to Lambrix's claim that his collateral counsel's failure to appeal the trial court's denial of his request to represent himself was ineffective assistance of counsel, this Court stated that "claims of ineffective assistance of counsel do not present a valid basis for relief." Id. The Lambrix Court did not elaborate on the preceding statement any further than that one sentence.

Lambrix was relied upon by the Second District Court of Appeal in Diaz v. State, 724 So.2d 595 (Fla. 2nd DCA, 1998). Likewise, Diaz was relied upon in denying Mr. Rogers a belated appeal in the instant case. It is respectfully submitted that the factual scenario in Lambrix was far different from that presented in Diaz and the instant case. In Lambrix the defendant had previously

filed numerous motions for post conviction relief and his final 3.850 motion was, thus, successive and an abuse of process. In Diaz and the instant case the Movants' post conviction motions were properly filed. In Lambrix, in addition to being successive and abusive, Mr. Lambrix's 3.850 was filed in an untimely manner, four years outside of the two year period of limitations. In Diaz and the instant case, the 3.850 motions were timely filed. Finally, in Lambrix, the defendant's claim was that his collateral counsel's failure to appeal the specific issue of the trial court's failure to allow him to represent himself on the 3.850 amounted to ineffectiveness of counsel; As such, Lambrix argued that he should be able to file a completely new and original motion for post conviction relief. In Diaz and the instant case the issue is not whether a new an original 3.850 motion should be allowed to be filed due to ineffectiveness of counsel; instead, the issue is whether the appellants should be granted a belated appeal where circumstances beyond the appellants' control, (i.e., post conviction counsel's erroneous advise as to the propriety of filing a notice of appeal) caused an appeal to not be pursued in a timely manner. It is clear that Lambrix is an entirely separate an different factual scenario from Diaz and the instant case, and as such, the reasoning behind Lambrix should not be applied to the instant case.

Instead, the instant case is more akin to Steele v. Kehoe, 24 F.L.W. S237

(Fla. 1999), and the following cases: Hildebrand v. Singletary, 666 So.2d 274 (Fla. 4th DCA 1996) [belated appeal on post conviction motion granted where petitioner, through no fault of his own, did not timely file a notice of appeal because he did not receive a copy of the order denying his motion in a timely fashion]; and Darden v. State, 588 So.2d 275 (Fla. 2nd DCA 1991) [belated appeal granted in post conviction proceeding where order denying motion for relief failed to inform the petitioner of his right to appeal within 30 days]. As in Darden, and Hildebrand, Mr. Rogers' failure to timely file his notice of appeal was due to circumstances beyond Mr. Rogers' control. Mr. Rogers instructed counsel to file a notice of appeal. Due to counsel's erroneous advice, Mr. Rogers was unfairly deprived of his right to appeal the denial of his motion for post conviction relief. Had Mr. Rogers been properly informed as to the necessary procedures for pursuing post conviction relief, Mr. Rogers would have pursued an appeal of the denial of his 3.850 *pro se.* Such a result is clearly unjust and Mr. Rogers should not have to suffer such an injustice where the failure to timely file the notice of appeal was in no way attributable to Mr. Rogers. The above argument is born out in Steele v. Kehoe 24 F.L.W. S237 (Fla. 1999).

CONCLUSION

Based on the foregoing arguments and citations of authority it is apparent that Mr. Rogers is due a belated appeal on the denial of his Florida Rule of Criminal Procedure 3.850 Motion for Post Conviction Relief. Mr. Rogers asked his retained counsel to file an appeal of the denial of his 3.850. Retained counsel misinformed Mr. Rogers as to the propriety of filing an appeal of the circuit court's denial of Mr. Rogers' 3.850. The failure to file a notice of appeal was due solely to the misadvice of counsel and was in no way attributable to Mr. Rogers.

The more flexible standards of due process under the Fifth Amendment of the United States Constitution, as delineated in Steele v. Kehoe, 24 F.L.W. S237 (Fla. 1999), dictate that Mr. Rogers should be granted a belated appeal of the denial of his 3.850 motion. Application of the rationale in Steele clearly demonstrates that the Second District Court of Appeal was in error in relying on Diaz and Lambrix in denying Mr. Rogers a belated appeal.

WHEREFORE, Mr. Rogers respectfully requests that this Court remand this case back to the Second District Court of Appeal with instructions to grant Mr. Rogers a belated appeal on the denial of his 3.850 Motion.

Respectfully submitted,

Rhoton & Hayman, P.A.

Loren D. Rhoton
Florida Bar #0055735
412 Madison Street
Suite 1111
Tampa, Florida 33602
(813)228-0070
(813)221-2182 FAX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing initial brief has been delivered by regular U.S. Mail this 21st day of April, 2000, to the Office of the Attorney General, The Capitol, Plaza Level One, Tallahassee, Florida 32399-1050.

Loren D. Rhoton