

IN THE SUPREME COURT OF FLORIDA

LYNWOOD WILLIAMS
Appellant,

Case No.: 96-546

v.

2nd D.C.A Case No.: 99-01282

STATE OF FLORIDA,
Appellee.

**APPELLANT'S AMENDED
INITIAL BRIEF ON THE MERITS**

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

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PRELIMINARY STATEMENT

As no record on appeal has been ordered to be prepared, the undersigned has prepared an Appendix to his Initial Brief on the Merits. In this Amended Brief, the undersigned will refer to matters contained in the original Appendices which have already been provided to this Honorable Court. 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 number (i.e., “Ex.1”).

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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 Lynwood Williams, 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 CASE

On March 6, 1996, the Appellant, Lynwood Williams, was convicted by a jury of first degree murder in the Thirteenth Judicial Circuit, in and For Hillsborough County, Florida. Mr. Williams was sentenced to life imprisonment with a minimum mandatory sentence of twenty-five (25) years. (Ex. 1). Mr. Williams appealed his conviction to the Second District Court of Appeal and his judgment and sentence were affirmed on October 24, 1997. (Ex. 2).

Subsequent to his direct appeal, Mr. Williams filed a Florida Rule of Criminal Procedure 3.850 Motion For Post Conviction Relief on May 13, 1998. An evidentiary hearing was held on Mr. Williams' 3.850 Motion on January 14, 1999. On February 17, 1999, the Circuit Court denied Mr. Williams relief on his 3.850 Motion. (Ex. 3). A notice of appeal, appealing the denial of the post conviction motion, was filed with the circuit court on March 22, 1999. (Ex. 4).

On April 7, 1999, the Second District Court of Appeal of Florida, issued an order to show cause as to why Mr. Williams' appeal should not be dismissed as untimely. (Ex. 5). On or about April 10, 1999, a Response to Order to Show Cause and Motion for Belated Appeal was filed on Mr. Williams' behalf. (Ex. 6). On May 7, 1999, the Second District Court denied Mr. Williams motion for belated appeal. (Ex. 7).

On May 17, 1999, A Motion for Rehearing and Motion for Rehearing En Banc

was filed with the District Court on behalf of Mr. Williams. Said motion argued that the District Court had previously granted belated appeals from post conviction motions in cases similar to Mr. Williams' and thus, should likewise have granted a belated appeal to Mr. Williams. On June 2, 1999, Mr. Williams filed an Amended Motion for Rehearing and Motion for Rehearing En Banc. The amended motion was based on the above noted intra-district conflict raised in the original motion and the recent case of Steele v. Kehoe, 24 F.L.W. S237 (Fla. 1999). (Ex. 8).

On August 20, 1999, the Second District Court of Appeal entered an Order Dismissing Appeal. (Ex. 9). In the same Order the District Court granted the amended motion for rehearing to the extent that it 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. 9, p.3).

On or about September 15, 1999, a notice to invoke the discretionary jurisdiction of this Court was filed with the Second District Court of Appeal. (Ex.10).

On September 21, 1999, this Honorable Court entered an Order postponing a ruling on jurisdiction and ordering Mr. Williams to file a brief on the merits of his case.

STATEMENT OF THE FACTS

Mr. Williams is currently serving a life sentence for first degree murder. (Ex. 1, p.5). Subsequent to his conviction and direct appeal Mr. Williams filed a Florida Rule of Criminal Procedure 3.850 Motion for Post Conviction Relief with the Thirteenth Judicial Circuit Court, in and for Hillsborough county. Mr. Williams retained the undersigned's law firm to represent him on his post conviction motion and any appeals from the denial of said motion. After an evidentiary hearing on Mr. Williams' 3.850 motion, the circuit court denied said motion on February 17, 1999. (Ex. 3).

Prior to the circuit court's denial of the 3.850 motion, Mr. Williams informed the undersigned that should the post conviction motion be denied, he (Mr. Williams) wanted the undersigned to file a notice of appeal. (Ex. 9, pp1-2). The undersigned informed Mr. Williams that should the 3.850 be denied, the undersigned would then file the notice of appeal.

The undersigned received a copy of the circuit court's order denying Mr. Williams post conviction motion of February 23, 1999. The cover sheet for the court order was dated February 22, 1999. (Ex. 11). The undersigned mistakenly calculated the time for filing Mr. Williams' notice of appeal from the February 22, 1999, date on the circuit court's cover sheet instead of from the February 17, 1999, Order denying the motion. As a result of the undersigned's miscalculation of the thirty day filing

period for Mr. Williams' notice of appeal, said notice of appeal was filed several days after the thirty day filing period had lapsed. (Ex. 9, p. 2). Said failure to timely file the notice of appeal was in no way attributable to Mr. Williams and was, in fact, beyond Mr. Williams' control. Mr. Williams is, and was at the time, incarcerated and was reasonably relying on counsel's promise to timely file a notice of appeal.

As a result of the failure to timely file a notice of appeal, the Second District Court of Appeal ordered Mr. Williams to show cause as to why his appeal should not be dismissed as untimely. (Ex. 5). In response to said Order the undersigned filed a response and motion for belated appeal. (Ex. 6). In the motion for belated appeal the undersigned informed the District Court that the untimely filing of the notice of appeal was the undersigned's fault and was in no way due to any actions on the part of Mr. Williams. (Ex. 6, pp. 1-2). On May 7, 1999, the Second District Court of Appeal entered an Order denying Mr. Williams a belated appeal. (Ex. 7).

The May 7, 1999, Order of the District Court referred to the case of Diaz v. State, 724 So.2d 595 (Fla. 2nd DCA 1998). (Ex. 7). Diaz, in an apparently mistaken interpretation of Lambrix v. State, 698 So.2d 247 (Fla. 1996), held that a district court could not allow a belated appeal from the denial of a motion for post conviction relief where counsel failed to timely file a notice of appeal upon the defendant's timely request for such an appeal. The Diaz opinion relied on one line of dicta from Lambrix v. State, 698 So.2d 247 (Fla. 1996), wherein this Honorable Court stated simply that

“claims of ineffective assistance of postconviction counsel do not present a valid basis for relief.” Lambrix at 248.

On May 17, 1999, A Motion for Rehearing and Motion for Rehearing En Banc was filed with the District Court on behalf of Mr. Williams. Said motion argued that the District Court had previously granted belated appeals from post conviction motions in cases similar to Mr. Williams’ and thus, should likewise have granted a belated appeal to Mr. Williams. On June 2, 1999, Mr. Williams filed an Amended Motion for Rehearing and Motion for Rehearing En Banc. The amended motion was based on the previously noted intra-district conflict raised in the original motion and the recent case of Steele v. Kehoe, 24 F.L.W. S237 (Fla. 1999). In said motion it was argued that Mr. Williams had every intention of appealing the denial of his 3.850 motion for post conviction relief and that he should not be punished for his attorney’s untimely filing of the notice of appeal. (Ex. 8).

In response to the Amended Motion for Rehearing and Motion for Rehearing En Banc, the District Court granted the amended motion for rehearing to the extent that it 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. 9, p.3).

SUMMARY OF THE ARGUMENT

Mr. Williams retained counsel to represent him on his 3.850 motion for post conviction relief and on any denial of said motion. As a result, Mr. Williams reasonably expected that his interests would be adequately protected by his counsel. The fact that Mr. Williams' notice of appeal from the denial of his 3.850 was not timely filed was in no way due to the actions of Mr. Williams. Mr. Williams informed counsel that he wished to appeal the denial of his 3.850 and counsel informed Mr. Williams that he would pursue such an appeal on Mr. Williams' behalf. Counsel mistakenly miscalculated the filing date for the notice of appeal and the untimely filing was due to counsel's mistake. Mr. Williams should not be punished for the mistake of his counsel when the untimely filing of the notice of appeal was in no way the mistake of Mr. Williams.

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 MISTAKENLY FILED THE NOTICE OF APPEAL SEVERAL DAYS OUTSIDE OF THE THIRTY DAY PERIOD OF LIMITATION FOR FILING A NOTICE OF APPEAL.

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. Williams' 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 that 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 is also due to Mr. Williams. Mr. Williams' case is almost identical to the factual situation in Steele, with one exception: Mr. Williams' post conviction attack was one step further along than in Steele. As in Steele, Mr. Williams is serving a life sentence for first degree murder. As in Steele, Mr. Williams retained private counsel to represent him in a Florida Rule of Criminal Procedure 3.850 motion. Counsel represented Mr. Williams at an evidentiary hearing on his 3.850. Mr. Williams informed counsel that should the motion be denied by the trial court, he (Mr. Williams) wished for counsel to appeal the denial. Counsel informed Mr. Williams that he would pursue an appeal on Mr. Williams' behalf should the 3.850 Motion be denied at the trial court level. Thus, as in Steele, retained counsel, pursuant to Mr. Williams' request, was supposed to file a pleading for Mr. Williams. As in Steele, Mr. Williams' counsel, due to mistake and confusion, failed to timely file an essential pleading. As in Steele, counsel's actions, or lack thereof acted to cut short Mr.

Williams 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. Williams should be granted a belated appeal in the Second District Court of Appeal. The holding of Steele dictates that Mr. Williams simply should not be punished for the mistake of his retained counsel.

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 deny Mr. Williams 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 and 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. Williams 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., miscalculation of filing dates on the part of counsel) caused a notice of appeal to be untimely filed. 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. Williams' failure to timely file his notice of appeal was due to circumstances beyond Mr. Williams' control. Mr. Williams instructed counsel to file a notice of appeal and believed in good faith that counsel would timely file such a notice. Due to the miscalculation of counsel, Mr. Williams was unfairly deprived of his right to appeal the denial of his motion for post conviction relief. Such a result is clearly unjust and Mr. Williams 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. Williams. 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. Williams is due a belated appeal on the denial of his Florida Rule of Criminal Procedure 3.850 Motion for Post Conviction Relief. Mr. Williams asked his retained counsel to file an appeal should his 3.850 be denied by the trial court. Retained counsel informed Mr. Williams that he would file a notice of appeal if the 3.850 were denied. Due to a miscalculation by counsel as to the deadline for filing the notice of appeal, the notice of appeal was filed several days late. The untimely filing of the notice of appeal was due solely to the mistake of counsel and was in no way attributable to Mr. Williams.

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. Williams 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. Williams a belated appeal.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing initial brief has been delivered by regular U.S. Mail this _____ day of October, 1999, to the Office of the Attorney General, The Capitol, Plaza Level One, Tallahassee, Florida 32399-1050.

Loren D. Rhoton