

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 REPLY TO
APPELLEE'S BRIEF ON THE MERITS**

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

Rhoton & Hayman, P.A.

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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 THE CASE AND FACTS

In this brief Mr. Williams will rely on the Statement of Case and Statement of Facts as presented in the Appellant's Amended Initial Brief on the Merits.

SUMMARY OF THE ARGUMENT

Directly relevant to the instant case is this Court's ruling, in Steele v. Kehoe, 24, Fla. L. Weekly S237 (Fla. May 27, 1999). In Steele this Court held that the more flexible standards of due process announced in the Fifth Amendment of the United States Constitution dictate that a post conviction movant should be allowed to file a belated 3.850 where retained counsel agreed to file a 3.850 Motion for Post Conviction Relief but failed to timely do so. The more flexible standard of due process should also be applied to allow a belated appeal where a post conviction movant asks retained counsel to file an appeal of the denial of a 3.850 motion and counsel fails to timely file a notice of appeal.

ARGUMENT

ISSUE: THE HOLDING OF STEELE V KEHOE, 24, FLA. L. WEEKLY S237 (FLA. MAY 27, 1999) DICTATES THAT A POST CONVICTION MOVANT SHOULD BE GRANTED A BELATED APPEAL OF THE DENIAL OF A FLORIDA RULE OF CRIMINAL PROCEDURE 3.850 MOTION FOR POST CONVICTION RELIEF WHEN THE NOTICE OF APPEAL WAS NOT TIMELY FILED, CONTRARY TO THE MOVANT'S INSTRUCTIONS TO HIS ATTORNEY.

The holding of this Court in STEELE V KEHOE, 24, FLA. L. WEEKLY S237 (FLA. MAY 27, 1999), specifically acknowledges 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 post conviction counsel. However, as was specifically addressed in Steele, “[postconviction] remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States.” Steele citing State v. Weeks, 166 So.2d 892, 896 (Fla. 1964). And pursuant to said “more flexible” standard of due process, a post conviction movant will not be denied his right to file a 3.850 motion because his or her attorney agreed to but failed to file such a motion. Steele v. Kehoe, 24, Fla. L. Weekly S237 (Fla. May 27, 1999).

The Appellee, in its Answer Brief on the merits makes much to-do about the fact that a post conviction movant is not constitutionally entitled to effective assistance of post conviction counsel. As such, the Appellee appears to be arguing

that Mr. Williams should not be granted a belated appeal of the denial of his post conviction motion based on the ineffectiveness of his counsel in failing to timely file his appeal. Mr. Williams concedes such a fact, as did this Court in Steele. Mr. Williams does not, for one moment argue that his counsel was ineffective and as a result, a belated appeal should be granted. Instead Mr. Williams' position is that he should be granted a belated appeal pursuant to the more flexible standards of due process due to a movant in a post conviction case. Mr. Williams intended to appeal the denial of his 3.850 motion and was of the belief that his appeal would be timely filed by his attorney. Through no fault of his own, Mr. Williams has now been denied the right to appeal the denial of his 3.850. Such a denial is fundamentally unfair and the more flexible standards of due process, as enunciated in Steele, dictate that Mr. Williams should be granted a belated appeal.

Thus, it appears that the Appellee's position in the present case is completely misplaced. The Appellee, in its Answer Brief on the Merits does not in any manner meaningfully address the crux of the holding of Steele. A litany of cases is cited by the Appellee which stand for the proposition that a post conviction movant is not constitutionally entitled to effective assistance of post conviction counsel. Mr. Williams has conceded this point again and again. There is no reason for him to attack the cases presented by the Appellee; They are good law. However, barely even acknowledged in the Appellee's Answer Brief is the significant holding that post

conviction movants are entitled to the more flexible standard of due process as provided in the Fifth Amendment of the United States Constitution. Additionally untouched by the Appellee is the holding that said “more flexible standard” of due process would entitle a post conviction movant to file a belated post conviction motion where the movant has retained counsel to pursue such a motion and counsel, through no fault of the movant, fails to timely file such a motion.

The Appellee attempts to argue that just because Steele grants a 3.850 movant the right to file a belated 3.850 (based upon counsel’s failure to timely file such a motion) such a right should not be granted to a movant appealing the denial fo a 3.850. Once again the appellant appears to misunderstand the import of Steele, stating “[t]hat Florida provides a further vehicle for review does not automatically mean that the right to effective assistance of counsel engages in the continuing quest for collateral relief on appeal.” (Answer Brief on the Merits at 12). Once again the Appellee confuses the Sixth Amendment right to effective assistance of counsel with the more flexible standard of due process announced in the Fifth Amendment of the United States Constitution. **The issue simply is not, as the appellant seems to argue, whether Mr. Williams was due effective assistance of counsel on the appeal of his 3.850.** The issue is whether the more flexible standards of due process, as enunciated in Steele, apply to an attorney’s failure, contrary to his client’s instructions, to timely file a notice of appeal of the denial of a post conviction motion.

The untimely filing by an attorney of both a 3.850 and the notice of appeal of the denial of a 3.850 are extremely similar. In both situations the State has seen fit to provide the filing of such a vehicle as a matter of right. The appeal of the denial of a 3.850 motion for post conviction relief is not a discretionary appeal. Such an appeal is specifically provided for in Florida Rule of Criminal Procedure 3.850(g). As such, the State's attempt to distinguish between the importance of a 3.850 and the appeal thereof is unconvincing. If due process rights attach and provide that a post conviction movant should be allowed to file a belated 3.850 when retained counsel fails to timely file such a motion, said rights should be just as applicable to post conviction counsel failing to timely file a notice of appeal from the denial of a 3.850. It is all a part of the post conviction process and the due process rights delineated in Steele should apply. As a result Mr. Williams should be granted a belated appeal of the denial of his 3.850 motion.

CONCLUSION

Based upon the foregoing arguments and citations of authority, Mr. Williams respectfully requests that this Honorable Court accept jurisdiction of this case and enter an Order granting Mr. Williams a belated appeal of the denial of his Florida Rule of Criminal Procedure 3.850 Motion for Post Conviction Relief.

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 November, 1999, to the Office of the Attorney General, 2002 North Lois Avenue, Tampa, Florida 33607-2367.

Loren D. Rhoton