IN THE SUPREME COURT OF FLORIDA

GERALD LYNN BATES,

Petitioner,

v. CASE NO. SC02-1481

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

SUPPLEMENTAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner was the defendant before the trial court and the appellant in the lower tribunal. A one volume record on appeal will be referred to as "I R," followed by the appropriate page number in parentheses.

This brief is filed in accord with this Court's order of May 28, 2004.

QUESTION PRESENTED

DOES THE TWO-YEAR TIME PERIOD OF WOOD v. STATE, 750 So. 2d 592 (Fla. 1999), APPLY TO PETITIONER?

Petitioner filed a pro se petition for writ of error coram nobis on September 7, 1999, attacking his 1990 plea to possession of cocaine, on the grounds that his counsel had affirmatively mis-advised him that the 1990 conviction could never be used to enhance a later sentence (I R 1-12). On November 8, 1999, petitioner filed a pro se motion to treat his petition as a motion for post-conviction relief under Fla. R. Crim. P. 3.850, on authority of Wood v. State, *supra*. (I R 13-15).

The trial judge summarily denied relief without a hearing, finding that the motion was untimely and his claims could not be presented in a petition for writ of error coram nobis (I R 16-18).

In the lower tribunal, the state noted the history of a petition for writ of error coram nobis (Answer Brief of Appellee at 4-6),[1] and conceded that it was timely-filed within two years of this Court's opinion in Wood, which was

[1]This Court ordered the briefs transmitted on May 10, 2004. Petitioner was not represented by counsel until the lower tribunal decided the appeal and appointed this Office to represent him by unreported order.

issued on May 27, 1999 (Answer Brief of Appellee at 6).

The lower tribunal disagreed with the trial judge and held that petitioner's pro se pleadings were timely because they were filed within two years of Wood v. State, *supra*. Bates v. State, 828 So. 2d 626, 629 (Fla. 1st DCA 2002). The lower tribunal was correct, as will be argued below.

Moreover, the state's counsel who filed the Answer Brief in this Court did not assert that his petition was untimely. The state's counsel who appeared a oral argument on January 8, 2003, did not assert that his petition was untimely. The state should be estopped from arguing otherwise in its supplemental brief.

First, a history lesson. The present Rule 3.850 has its roots in Gideon v. Wainwright, 372 U.S. 335 (1963), which held that a defendant could not be sentenced to prison without the assistance of counsel. This Court enacted the original version of the Rule to allow defendants who were in custody "a simplified, expeditious and efficient" vehicle to attack their pre-Gideon convictions without the need of filing a cumbersome petition for writ of habeas corpus or a writ of error coram nobis. Roy v. Wainwright, 151 So. 2d 825, 827 (Fla. 1963).

Petitioner will next address chronologically the cases cited in this Court's May 27 order. In Lawson v. State, 225 So. 2d 581 (Fla. 3rd DCA 1969), the defendant filed a motion under the original version of the Rule in 1967, to attack a 1953 conviction and sentence, from which he was paroled in 1956. Even though he was not presently "in custody" under the 1953 sentence, the appellate court held that he was permitted to file such a motion since he would be serving the remainder of that sentence after he had served two intervening sentences. This Court approved this result, overruled its prior decision in Fretwell v. Wainwright, 185 So. 2d 701 (Fla. 1966), and held that Mr. Lawson had standing to attack his 1953 counsel-less conviction. Lawson v. State, 231 So. 2d 205 (Fla. 1970).

The next issue to be addressed in the history of the Rule was whether relief under Rule 3.850 would lie if the defendant was no longer in custody, or whether the defendant would have to rely on the old coram nobis procedure. The question was answered in Weir v. State, 319 So. 2d 80 (Fla. 2nd DCA 1975).

There the defendant filed a motion to vacate in 1975, attacking a conviction entered over 30 years earlier in 1943. The court held that since he was not in custody under his 1943 conviction, he could not file a Rule 3.850 motion. However,

the court held that his motion should be construed as a petition for writ of coram nobis, and remanded for the judge to hold an evidentiary hearing on the motion as construed.

Next, in Lawrence v. State, 404 So. 2d 1129 (Fla. 3rd DCA 1981), the defendant filed a Rule 3.850 motion to attack a 1953 conviction, and alleged that the old conviction was being used by the Parole Commission to extend an unnamed sentence he was presently serving. The court held that he had satisfied the "in custody" requirement of the Rule.

Next, in Simmons v. State, 485 So. 2d 475 (Fla. 2nd DCA 1986), the court cited Wier and Lawrence, both *supra*, and held that the defendant was permitted to use a Rule 3.850 motion to attack two 1968 convictions because they were being used to delay his release on parole from his present unnamed sentence.

This Court attempted to clear up the confusion between Rule 3.850 and coram nobis in Richardson v. State, 546 So. 2d 1037, 1039 (Fla. 1989), which this Court held:

> We believe the only currently viable use for the writ of error coram nobis is where the defendant is no longer in custody, thereby precluding the use of rule 3.850 as a remedy.

Now Mr. Wood enters the arena. He filed a petition for writ of error coram nobis is 1996, attacking two Florida convictions entered in 1988, which were being used to enhance

a federal sentence on drug charges. He alleged that his lawyer in 1988 did not tell him the Florida convictions could be used against him later in federal court. The trial judge construed the petition as a Rule 3.850 motion, found that Mr. Wood met the in-custody requirement of Rule 3.850, because he was serving the federal sentences, but denied it because it was untimely.

The First District held that he could not use the ancient writ to circumvent the two-year time limit of Rule 3.850, and so his petition was untimely. Wood v. State, 698 So. 2d 293 (Fla. 1st DCA 1997).[2]

Thus, petitioner, whose 1990 Duval County conviction had become final, could not have filed his petition for writ of coram nobis prior to this Court's Wood decision on May 27, 1999, because he was subject to the First District's interpretation of the law.

On further review, this Court agreed with the First District's reasoning that both remedies were subject to the two year rule. This Court amended the Rule on May 27, 1999, to apply that time limit to both classes of defendants -- those who were in custody and those who were not:

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[2]The First District certified conflict with the contrary view of the Third District in *Malcolm v. State*, 605 So. 2d 945 (Fla. 3rd DCA 1992).

> both custodial and noncustodial movants may rely on and be governed by the rule, thereby eliminating the need for the writ.

Wood, *supra*, 750 So. 2d at 595. However, in order to give Mr. Wood and those, such as petitioner, an avenue of relief, this Court opened a two year window for coram nobis claims to be filed:

> all defendants adjudicated prior to this opinion shall have two years from the filing date within which to file claims traditionally cognizable under coram nobis.

Id. Again, petitioner, whose 1990 Duval County conviction had become final, could not have filed his petition for writ of coram nobis prior to this Court's Wood decision on May 27, 1999. But he properly took advantage of the two-year window to file his petition a little over three months later on September 7, 1999. Thus, his petition was timely-filed.

In Smith v. State, 784 So. 2d 460 (Fla. 4th DCA 2000), the defendant, much like petitioner in the instant case, entered a plea to aggravated battery for time served in 1994. On March 27, 2000, even though he had not yet been convicted of any subsequent crimes, he filed a post-conviction motion and alleged that his attorney had mis-advised him in 1994 that his plea to aggravated battery could never be used against him later in state or federal court. The state convinced the

trial court that the motion was untimely, as it was filed more than two years after his 1994 conviction had become final.

The appellate court held that the trial court was wrong to deny relief on that basis, since Mr. Smith was not in custody under the 1994 conviction at the time he had filed his motion in 2000. The state then argued on appeal that the defendant should have filed a petition for writ of error coram nobis when he had learned that his 1994 counsel's advice was erroneous. The appellate court relied on this Court's opinion in Wood and rejected this argument as well:

> If such a claim was considered sufficiently cognizable under coram nobis for the supreme court to find that Wood's motion was timely, the Appellant's motion also must be considered as timely.

Id. at 461. The same is true in the instant case. It must be remembered that at all times after his 1990 conviction, petitioner had no counsel to represent him on that case to attack that conviction. Just like Mr. Smith, petitioner was not in custody within two years of his 1990 conviction, and so he could not possibly have filed a Rule 3.850 motion.

Now enter Mr. Fritz Major. He filed a pro se petition for writ of coram nobis in this Court on August 7, 2000, after this Court's opinion in Wood. This became Major v. State, case no. SC00-1676. On September 6, 2000, this Court

transferred the petition to the trial court. The trial court treated the petition as a motion under Rule 3.850 and denied it. Major v. State, 790 So. 2d 550 (Fla. 3rd DCA 2001).

Major had alleged that he entered a plea to aggravated assault in Dade County in 1993, served his sentence, committed a federal crime, and his present federal sentence was enhanced because of his 1993 Florida conviction. He alleged that his lawyer failed to tell him in 1993 that his conviction could be used against him in a later proceeding. The Third District found that his claim, although without merit, was timely because it was filed within two years of this Court's opinion in Wood. Major, *supra*, 790 So. 2d at 551.

This Court found that the Third District had properly treated Major's pro se petition as a Rule 3.850 motion, and also found that it was timely, because it was filed within two years of this Court's opinion in Wood. Major v. State, 814 So. 2d 424, 426 (Fla. 2002).[3]

In the instant case, when petitioner learned that his 1990 counsel's advice was erroneous,[4] he took the only action

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[3]As noted in the initial brief at 9, *Major* left open the question presented here -- whether an allegation of affirmative mis-advice, as opposed to non-advice, sets forth a claim for relief.

[4]If there remains any question in this Court's mind as to when petitioner learned that his 1990 attorney's advice was

available to him -- he filed the instant pro se petition for writ of error coram nobis. This is the same procedural vehicle used by Mr. Wood and Mr. Major, and that which was advocated by the state in Smith, supra. Unsure of whether coram nobis was still proper under Wood, he then filed a pro se motion two months later for the judge to treat his petition as a motion under Rule 3.850.

In light of this confusing area of the law, petitioner has done all he could have done to present his facially-valid claim that his attorney in 1990 gave him affirmative mis-advice. If he chose the wrong vehicle, that faux pax should be overlooked because he was proceeding in pro se. *See*, *e.g.*, Andrews v. State, 160 So. 2d 726 (Fla. 3rd DCA 1964); (pro se prisoner filings must be liberally construed) and Fla. R. App. P. 9.040(c) ("If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought ... .").

The trial judge was wrong to conclude that petitioner's petition was untimely, in light of Wood and Major. The lower tribunal was correct to conclude that petitioner had presented a timely claim under Wood, but incorrect to conclude that he

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not correct, that matter can be explored at the evidentiary hearing.

was not entitled to relief. Petitioner has never had an evidentiary hearing on his claim of affirmative mis-advice.

This Court must find that petitioner filed a timely claim of ineffective assistance of counsel, answer the certified question in the affirmative, hold that petitioner has stated a valid claim for relief, and remand for an evidentiary hearing.

CONCLUSION

Based upon the arguments presented here, petitioner respectfully asks this Court to hold that petitioner has set forth a claim of relief since his attorney affirmatively gave him mis-advice regarding the ramifications of his 1990 plea to possession of cocaine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Trisha Meggs Pate and Daniel A. David, Assistant Attorneys General, The Capitol, Tallahassee, Florida; and to petitioner, #295638, Everglades CI, P.O. Box 949000, Miami, Florida 33194; on this 17th day of June, 2004.

_____
P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief was prepared in Courier New 12 point type.

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P. DOUGLAS BRINKMEYER