IN THE SUPREME COURT OF FLORIDA

THEODORE SPERA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC06-1304
4th DCA Case No. 4D04-4535

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APPELLEE'S ANSWER BRIEF

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STATEMENT OF THE CASE

On March 13, 2001, Petitioner was charged by amended information with one count of fleeing or attempting to elude, one count of obstructing an officer without violence, one count of burglary of an occupied dwelling, one count of possession of heroin, and one count of possession of cocaine (State's Response at Exhibit A). On April 3, 2001, a jury found Petitioner guilty of fleeing or attempting to elude, guilty of burglary of an occupied dwelling, and not guilty of the remaining charges (State's Response at Exhibit H). The trial court adjudicated Petitioner guilty and sentenced Petitioner to 9.3 years in prison (State's Response at Exhibits I, M).

On November 13, 2002, the Fourth District Court of Appeal affirmed Petitioner's conviction and sentence on direct appeal in a per curiam decision without a published opinion. Spera v. State, 833 So. 2d 150 (Fla. 4th DCA 2002).

On October 30, 2003, Petitioner submitted a motion for postconviction relief to the trial court (Motion for Postconviction Relief). On September 15, 2004, the State submitted a response to Petitioner's motion for postconviction relief (State's Response). On October 26, 2004, the trial court summarily denied Petitioner's motion for postconviction relief without conducting an evidentiary hearing (Order Denying

Motion). Petitioner appealed the denial of his motion for postconviction relief to the Fourth District Court of Appeal (Notice of Appeal).

On February 22, 2006, the Fourth District Court of Appeal affirmed the denial of Petitioner's motion for postconviction relief in a unanimous *en banc* decision. Spera v. State, 923 So. 2d 543 (Fla. 4th DCA 2006). On September 1, 2006, this Court accepted jurisdiction in this case.

STATEMENT OF THE FACTS

Respondent accepts and adds to Petitioner's statement of the facts.

Petitioner's motion for postconviction relief asserted that:

> Defendant was denied effective assistance of counsel for the following reasons:
>
> a. Defendant was represented by John Garcia, Esq. at trial and during the subsequent appeal. Despite requests from Defendant, Garcia failed to adequately prepare for the trial, did not interview relevant witnesses, and did not present a case in chief on behalf of Defendant. Garcia failed to adequately communicate with his client until shortly before the trial, and was not adequately prepared for trial. Garcia's incompetence in this regard is exemplified in Volume I, Page 2 of the trial transcript, where Garcia indicates that he "ha[d] not much luck with all the witnesses called to take the deposition." Garcia's "luck" was in fact a result of his failure

to begin preparations for the trial until the weekend before. During the trial, Garcia presented only a cursory attempt at a defense, and did not call witnesses on Defendant's behalf, although he had been instructed to do so. At sentencing, Garcia failed to present any evidence of mitigating circumstances, despite the fact that Defendant had evidence and witnesses available to present evidence. Similarly, Garcia filed a barely cursory appellate brief with the Fourth District Court of Appeal.

b. Garcia failed to adequately inform Defendant of the possible penalties he faced if convicted so that he could properly evaluate the merits of a plea offer presented by the State. In the information, Defendant was charged with three separate felonies and two misdemeanors, the most significant of which carried a maximum of fifteen years' [sic] incarceration. Defendant had a substantial prior felony record in the State of New York, and had been incarcerated for these crimes. Defendant's sentencing score under the Criminal Punishment Code called for a minimum sentence of 9.3 years on the burglary count alone, and could have resulted in a substantially longer sentence if Defendant had been convicted of any of the other felonies. Despite this, the State offered to resolve the case for a sentence of three to five years (Volume I, Page 14). Garcia did not advise Defendant of the possible sentence if he was convicted, but merely advised him to reject the plea offer, and further advised that Defendant would likely receive "county jail time" if convicted. When asked by the Court whether Defendant had properly rejected the deal, Garcia did not directly answer, but instead indicated that Defendant would be willing to take county jail time and did not wish to

> return to New York for probation violations (Volume I, page 15). In response the Court asked Garcia to explore the issue with Defendant, but Garcia did not do so.

(Motion for Postconviction Relief at 2-3).

Petitioner's motion for postconviction relief was submitted and signed by an attorney for Petitioner (Motion for Postconviction Relief at 4).

SUMMARY OF THE ARGUMENT

A trial court must grant leave to amend a motion for postconviction relief that contains a technical deficiency. However, a trial court is not required to grant leave to amend a motion for postconviction relief that fails to present sufficient facts to establish prejudice.

ARGUMENT

> THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR POSTCONVICTION RELIEF WITHOUT LEAVE TO AMEND BECAUSE PETITIONER'S MOTION FAILED TO ALLEGE SUFFICIENT FACTS TO SHOW THAT HE WAS PREJUDICED BY THE ALLEGED DEFICIENT PERFORMANCE.

A. Standard of Review

The sufficiency of an allegation of ineffective assistance of counsel is a question of law that is reviewed *de novo*. Nelson v. State, 875 So. 2d 579, 581 (Fla. 2004) (citing State v. Glatzmayer, 789 So. 2d 297, 301-02 n.7 (Fla. 2001)).

B. Law

The United States Supreme Court established the standard for evaluating claims of ineffective assistance of counsel:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning s the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

A motion for postconviction relief must contain "a brief statement of the facts (and other conditions) relied on in support of the motion." Fla. R. Crim. P. 3.850(c)(6).

C. Discussion

In 1999, this Court decided Gaskin v. State, 737 So. 2d 509 (Fla. 1999), a capital case involving an appeal of the denial of a motion for postconviction relief that contained twenty-one claims. In a footnote, this Court explained that the trial court should have held an evidentiary hearing on several claims of ineffective assistance of counsel:

> Gaskin contends the trial court erred in

denying these claims on the ground that they were insufficiently pleaded. Specifically, the trial court denied Gaskin's claims of ineffective assistance of guilt and penalty phase counsel, in part because he failed to name the witnesses he intended to call and state whether they were available to testify. Contrary to the trial court's finding, however, there is no requirement under rule 3.850 that a movant must allege the *names* and *identities* of witnesses in addition to the nature of their testimony in a postconviction motion. Rather, rule 3.850 merely requires the motion to state the judgment or sentence under attack, whether there was an appeal from the judgment and the disposition thereof, whether a previous postconviction motion was filed and, if so, the reason the claims in the present motion were not filed in the former motion, the nature of the relief sought, and a *brief statement of the facts* relied upon in support of the motion. See Fla. R. Crim. P. 3.850(c).

In Valle v. State, 705 So. 2d 1331 (Fla. 1997), we held it was error for the trial court to summarily deny Valle's 3.850 motion on the basis that no supporting affidavits had been submitted:

> Rule 3.850(c), which sets forth the contents of a 3.850 motion, requires a movant to include a brief statement of the facts (and other conditions) relied on in support of the motion. Fla. R. Crim. P. 3.850(c)(6). However, nothing in the rule requires the movant to attach an affidavit or authorizes a trial court to deny the motion on the basis of a movant's failure to do so.

Id. at 1334. Likewise, nothing in the rule

> states that a movant must allege the identities of the witnesses, the nature of their testimony, or their availability to testify. It is during the evidentiary hearing that Gaskin must come forward with witnesses to substantiate the allegations raised in the postconviction motion. Therefore, we hold that it was error for the trial court to require Gaskin to plead the identities of witnesses in order to be entitled to a hearing.

Gaskin, 737 So. 2d at 514 n.10. Notably, in the same opinion, this Court rejected other claims of ineffective assistance of counsel because the defendant failed to allege "how the outcome of his trial would have been different had counsel properly objected to the asserted error." Id. at 513 n.7.

Five years later, this Court revisited the issue in Nelson v. State, 875 So. 2d 579 (Fla. 2004), a case resolving conflict between the Second and Fifth District Courts of Appeal. In Nelson, this Court receded from language in the tenth footnote in Gaskin which stated that a defendant does not need to allege the names of the witnesses, the substance of their testimony, or their availability to testify at trial. Nelson, 875 So. 2d at 582. This Court explained that the statement in the footnote was "overbroad in respect to the requirement to plead what a witness's testimony would have been and the witness's availability to have testified at trial." Id.

This Court stated that "[i]n a 3.850 motion, a defendant

must therefore assert facts that support his or her claim that counsel's performance was deficient and that the defendant was prejudiced by counsel's deficient performance." Id. at 583. Where a defendant alleges that counsel was ineffective for failing to call, interview, or present witnesses at trial, "a defendant would be required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview or present the witness who would have so testified prejudiced the case." Id. (citing Reaves v. State, 826 So. 2d 932, 940 (Fla. 2002)). This Court provided guidance regarding pleading defects:

> We do not, however, want postconviction relief to be denied simply because of a pleading defect if that pleading defect could be remedied by a good faith amendment to the motion. Therefore, when a defendant fails to allege that a witness would have been available, the defendant should be granted leave to amend the motion within a specified time period. If no amendment is filed within the time allowed, then the denial can be with prejudice.

Nelson, 875 So. 2d at 583-84.

Less than a year after this Court issued the Nelson decision, this Court decided Bryant v. State, 901 So. 2d 810 (Fla. 2005). In Bryant, a capital case, this Court discussed a claim that trial counsel was ineffective for failing to obtain a false confession expert. Id. at 821. This Court found the

claim legally insufficient because the defendant failed to allege specific facts about which a confession expert would testify, failed to provide proposed testimony, and did not claim to have obtained an expert. Id. This Court explained that "[w]ithout more specific factual allegations, such as proposed testimony, this claim is insufficient under Nelson." Bryant, 901 So. 2d at 822. This Court affirmed the summary denial of this claim where the trial court did not provide the defendant with leave to amend the claim. Id. at 821-22, 830.

Relying upon the decisions from this Court, the Fourth District Court of Appeal concluded that a movant must be granted leave to amend technical omissions but not substantive deficiencies. Spera, 923 So. 2d at 545. According to the Fourth District Court of Appeal, their decision in Spera conflicts with Keevis v. State, 908 So. 2d 552, 553 (Fla. 2d DCA 2005), because Keevis "broadly appl[ies] Nelson to encompass any omission in pleading." Spera, 923 So. 2d at 545.

Therefore, the conclusion of the Fourth District Court of Appeal in this case that the trial court was not required to grant Petitioner leave to amend his motion is supported by the following facts:

1. This Court, in Gaskin, determined that the defendant was not entitled to leave to amend some claims of ineffective

assistance of counsel that failed to allege how the outcome of the trial could have been different had counsel objected to the asserted error. Gaskin, 737 So. 2d at 513 n.7.

2. This Court, in Nelson, could have, but did not, state that a movant must be granted leave to amend any pleading defect in a motion for postconviction relief. Instead, this Court stated that a defendant should be granted leave to amend a motion for postconviction relief when the defendant fails to allege that a witness would have been available. Nelson, 875 So. 2d at 583-84.
3. This Court, in Bryant, approved the summary denial of a claim in a motion for postconviction relief without leave to amend where the defendant failed to allege specific facts that an expert witness would testify to and the defendant failed to claim that he obtained such an expert witness. Bryant, 901 So. 2d at 821-22.
4. In this case, Petitioner failed to identify any of the witnesses who would testify, failed to describe the expected testimony of the witnesses, and failed to explain how the absence of adequate discussions with his attorney prejudiced his case.

Petitioner contends that he has a right to amend his motion

because his motion was filed in 2003 when Gaskin was the governing law. However, Petitioner's motion did not comply with existing law when it was filed. In Gaskin, this Court found some claims legally and facially insufficient because the claims did not allege prejudice pursuant to Strickland. Gaskin, 737 So. 2d at 513 n.7. Petitioner's claims are likewise insufficient because Petitioner failed to present facts to show prejudice. See id.; Lawrence v. State, 831 So. 2d 121, 128-29 (Fla. 2002) (affirming the denial of a claim that failed to plead specific facts).

Furthermore, Petitioner had the opportunity to amend his pending claim after this Court decided Nelson. See Gaskin, 737 So. 2d at 517-18 (stating that a 3.850 movant has the right to amend or supplement a motion at any time within the two-year time limit as long as the trial court has not yet ruled on the merits of the motion). Petitioner's claim was not denied until nearly five months after the Nelson decision was issued. Petitioner also had the opportunity to file a timely, but successive, motion on the basis of a change in the law once the trial court denied his motion. See R. Crim. P. 3.850(f) (indicating that a trial court has the discretion to consider a successive motion). Once Petitioner's claim was denied, there were more than two weeks remaining on Petitioner's two-year

period to file a motion for postconviction relief. There is no basis for this Court to grant Petitioner leave to amend his motion.

CONCLUSION

Based on the foregoing argument, Respondent requests that this Honorable Court affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail to Bruce Rogow, Broward Financial Centre, Suite 1930, 500 East Broward Blvd., Fort Lauderdale, Florida 33394, this 9th day of March 2007.

_____

MARK J. HAMEL
Counsel for Appellee

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Courier New font, 12 point, and double spaced.

_____
MARK J. HAMEL
Counsel for Appellee