IN THE SUPREME COURT OF FLORIDA

WILLIAM HAROLD KELLEY

Appellant

v.

CASE NO.: SC06-1574
L.T. NO.: CR81-0535

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT WILLIAM HAROLD KELLEY

On Direct Review from the
10th Judicial Circuit Court,
in and for Highlands County, Florida

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INTRODUCTION

The State wrongly asserts that Kelley seeks "unending" discovery. Kelley only requested **ninety days** to conduct discovery of persons with knowledge of the evidence, in order to determine whether evidence asserted to be **"lost** or destroyed" could be located and used to exonerate him through DNA testing. R9 1684-92. That discovery was necessary, based on new information regarding the chain of custody, to test the State's assertion that none of this evidence can be located. Given the many cases where such evidence has been discovered after unequivocal assurances that it no longer exists, Kelley's narrowly tailored discovery request was entirely reasonable.

When you lose your car keys, you re-trace your steps until you find them. All Kelley sought was an opportunity to re-trace the steps in the chain of custody of this evidence. That request encompassed a finite time period and a finite number of prior custodians of the evidence. That is not an "unending" process, though it is an important process because a person's life literally is on the line. The remedy provided by rule 3.853 is no remedy at all if a defendant is not allowed discovery to locate the evidence for DNA testing.

The State's description of its evidence at the hearing is impermissibly slanted and incomplete. The State wholly ignores the telling admissions of the witnesses -- some of whom had

spent no more than fifteen minutes looking for the evidence that could exonerate an innocent man -- about what they did not do in their search, including failing to (1) search under the names of known co-conspirators/co-defendants, or (2) contact prior custodians with personal knowledge of what happened to the evidence on their watch. IB 10-15. All of the information regarding the custody and disposition of this evidence rests in the control of the State, and fundamental fairness requires the State to come forward with a full explanation. Kelley's life should not be forfeited based on an incomplete investigation.

Absent a thorough and comprehensive investigation by the State, it cannot be assumed the evidence no longer exists. See Thompson v. State, 922 So. 2d 383, 383 (Fla. 2d DCA 2006) (recognizing naked assertion DNA evidence no longer exists is insufficient proof that evidence was actually destroyed). This has been demonstrated time and time again in recent cases reversing convictions because of "found" DNA evidence that had been deemed lost for many years. Amicus Brief, at 1-3, 8-14, 16-18. If the State does not determine what happened to the evidence, the court cannot assume that it has in fact been destroyed.

Consistent with the prophylactic purpose of rule 3.853, the defendant must be allowed to test these assertions through adequate discovery before the hearing to verify that potentially

exonerating evidence truly has been destroyed. Spaziano v. State, 879 So. 2d 51 (Fla. 5th DCA 2004). Otherwise, defendants seeking to take advantage of rule 3.853 effectively would be foreclosed from obtaining any remedy under it because they could not locate the evidence to have it tested for DNA. The State's approach to rule 3.853 would render its guarantee of an opportunity to test relevant evidence for DNA "a teasing illusion like a munificent bequest in a pauper's will." Edwards v. California, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

The facts of this case underscore the very purpose for which this Court enacted rule 3.853. Kelley's motion is not a last ditch effort to delay execution, as the State suggests. Kelley always has maintained his innocence. A federal district court judge found substantial basis to believe that Kelley was innocent. Kelley v. Singletary, 222 F. Supp. 2d 1357 (S.D. Fla. 2002). All courts have recognized this case to be a close call. This Court recognized this case is unusual, noting that the result would be different "if there was even the slightest hint of prosecutorial misconduct." Kelley v. State, 486 So. 2d 578, 582 (Fla. 1986). So too it would be different with DNA testing.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING KELLEY'S REQUEST FOR PRE-HEARING DISCOVERY

Contrary to the State's argument, the Fifth District held that pre-hearing discovery should have been permitted under facts substantially similar to this case. Spaziano, 879 So. 2d at 52-55. Applying this Court's decision in State v. Lewis, 656 So. 2d 1248 (Fla. 1995), to a Motion for DNA Testing, the Fifth District held discovery should have been permitted because Spaziano had reason to believe physical evidence existed at one time that could prove his innocence. 879 So. 2d at 53. Even though the State maintained the evidence had been destroyed, the court could not discern what efforts custodians had made to find it, and hence the record did not conclusively establish the evidence had been destroyed. Id. at 53-55. Spaziano was entitled to discovery "to verify that the evidence no longer exists . . . ." Id.

Like Kelley's case, the evidence used to convict Spaziano was circumstantial, and his conviction was twenty-nine years old. 879 So. 2d at 52. Just as in Spaziano, Kelley was entitled to discovery to verify that the "lost" evidence could not be found with a complete investigation, not just a halfhearted one.

The State's argument regarding the supposed lack of specificity of Kelley's requested discovery is belied by Kelley's request specifying the discovery he sought. R1 6-7, 13-28; R9 1684-94, 1719-43. He listed the evidence he sought to locate that had not been identified by the State as destroyed. R1 6-7, 13-38. He identified the state agencies from which he sought to obtain records that could lead to relevant evidence. Id. Upon learning the identity of individuals with knowledge of the evidence, he asked to depose them, as well as "any former custodians who maintained or processed the physical evidence at issue either (i) in or around 1966 when the evidence was collected from the crime scene or (ii) in or around 1976 when the physical evidence was reportedly destroyed pursuant to court order . . . ." R9 1688-89.

The whole purpose of the requested discovery was to identify persons with knowledge of this evidence, and the discovery request was based on the only information the State previously had been willing to provide. Kelley's discovery request was as specific as was reasonably possible.

Moreover, absent an order from the trial court, Kelley had no other way to locate physical evidence in the State's custody. Fla. R. Crim. P. 3.850; State v. Lewis, 656 So. 2d 1248 (Fla. 1995); Spaziano, 879 So. 2d at 54-55. Kelley could not avoid that requirement by contacting the State's own witnesses and

conducting an ex parte interview of them. To suggest that Kelley should have conducted discovery by proxy through the State Attorney's Office ignores reality. There is nothing in the record to show the State would have provided voluntarily the same discovery it was strenuously opposing in court.

The State's own evidence at the hearing confirmed the need for the requested discovery. The State's current employees who testified admitted they did not conduct an exhaustive search for the evidence and that there remain unexhausted avenues for locating it. IB 10-15. Specific people who have direct knowledge of this evidence were identified for the first time at the hearing. R 10 1821, 1827-29, 1848-49, 1897-98, 1928-31, 1943-44; R11 1980, 2001-04, 2006, 1015, 2027-30, 2033-34. Had their identity been disclosed earlier, Kelley could have called these witnesses to testify about their knowledge, even if the State did not.

Instead, Kelley was left to learn of them at the final hearing itself, after it was too late to subpoena them as witnesses. Yet that was his only opportunity to prove the merits of his motion. The State's suggestion that Kelley was not surprised by the testimony, which disclosed, for the first time, the names of <u>others</u> with knowledge of this evidence, could not be further from the truth.

Rodriguez v. State, 919 So. 2d 1252 (Fla. 2005), where the defendant was permitted to interview the witnesses prior to the hearing and could have requested a continuance to conduct such interviews, makes the point. There was no opportunity here to interview the witnesses, no chance to depose them before the evidentiary hearing, and the request for continuance was denied. The prejudice to Kelley from the lack of discovery is patent.

II. THE TRIAL COURT FAILED TO PROVIDE ADEQUATE NOTICE TO KELLEY THAT THE JUNE 6TH HEARING WAS A FINAL, EVIDENTIARY HEARING.

When the court announced the June 6th hearing would be a final evidentiary hearing, that was not a "clarification," as the State suggests -- it was directly contrary to the court's prior ruling that it would be a "preliminary" hearing. R9 1080-83. Kelley promptly filed an Emergency Motion for Reconsideration, emphasizing that the court failed to provide him with adequate notice of that hearing, which "effectively preclude[d] him from adequately preparing for the final hearing." R9 1684-92. Three weeks was not a reasonable time to prepare for a final hearing on a vitally important issue, particularly given the new witnesses who had just been identified by the State as having relevant knowledge about the evidence. Id. That is a classic procedural due process argument. J.B. v. Fla. Dep't of Children & Family Serv., 768 So. 2d 1060, 1063 (Fla. 2000) (holding a court's failure to give

adequate notice was violation of due process because "the defendant shall be given fair notice [] and afforded a real opportunity to be heard and defend [] in an orderly procedure, before judgment is rendered against him").

To preserve an issue for appeal, an objection merely must be specific enough "to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal.... [M]agic words are not needed to make a proper objection." Williams v. State, 414 So. 2d 509, 511-12 (Fla. 1982). The trial court knew Kelley was complaining of the prejudice of being forced to a final hearing without adequate notice or discovery. Kelley preserved this issue.

As Kelley made clear below, providing a capital defendant facing the death penalty with only three weeks to fully and finally adjudicate his right to DNA testing provided by this Court and the Legislature -- particularly in the absence of adequate disclosures by the State or discovery -- is a denial of a fair opportunity to be heard.[1] This lack of notice is not remedied simply because Kelley had four pro bono attorneys who were willing to pursue this motion, which would result in

[1] The State's argument, without citation, that the standard of review applicable to this issue is an abuse of discretion is contrary to this Court's precedent. In Trotter v. State, 825 So. 2d 363, 365 (Fla. 2002), this Court recognized that whether a person's due process rights were violated is a question of law reviewed de novo. The Court also recognized this principle in State v. Florida, 894 So. 2d 941 (Fla. 2005).

locating evidence that would prove Kelley is innocent through DNA testing. The focus of this Court's consideration is not the number of attorneys helping on this case. It is whether Kelley was deprived of adequate notice and a fair opportunity to prepare for the hearing. He was.

The State wrongly asserts that Kelley failed to state how much notice would be adequate. Kelley asked for a 90-day continuance, which necessarily acknowledged that would be adequate. R9 1684. Neither the State nor the court suggested that they did not know what amount of notice Kelley was requesting. The State's argument on appeal rings hollow.

The State incorrectly asserts Kelley delayed filing his DNA motion and has attempted to delay these proceedings. This Court granted the right to file postconviction DNA motions until July 1, 2006, which Kelley did. He then diligently sought discovery that would allow him to meaningfully exercise the rights granted to him by the Legislature and this Court to prove his innocence. He asked for only 90 days to prepare for the hearing, hardly an untoward amount of time. At every stage of this proceeding, Kelley identified the prejudice resulting to him from the trial court's rulings. The State's argument disregards the record.

III. THE TRIAL COURT ERRED IN RULING THAT THE STATE MET ITS BURDEN OF ESTABLISHING THAT DNA EVIDENCE NO LONGER EXISTS

Kelley never conceded that the evidence from the crime scene had in fact been lost or destroyed. Based on the State's representations, Kelley simply assumed the State was telling the truth. At the time, Kelley had no basis to disbelieve, much less challenge, the State's representations, particularly in light of the State's professional and ethical constraints. As such, the issue of whether all of the evidence was destroyed has never been litigated. Further, the State's apparent suggestion at page 39 of its brief that testimony was presented at the evidentiary hearing that all court-ordered evidence had been destroyed is not supported by the record citations provided and is incorrect. See infra.

In addition, the State's contention that all of the evidence was destroyed also is incorrect. The State has never provided proof that all physical evidence from the crime scene was destroyed under the 1976 trial court order. Instead, State's witnesses have admitted that they could not say that all of the evidence was destroyed. See, e.g., R7 1209; SR3 455-56, 569-72. Their testimony highlights the state of confusion over the supposed destruction of this evidence.

Moreover, the issue whether all of the evidence was destroyed has never been never ruled upon, contrary to the

State's argument. The trial court previously conducted a hearing to determine whether Kelley's due process rights were violated as a result of the purported court-ordered destruction of some of the evidence. The court never, however, determined whether the evidence that was allegedly destroyed included the evidence that was not introduced at Sweet's trial or held by the court.

This Court also did not rule on the issue in its 1990 affirmance of the order denying postconviction relief. AB 39-40. The opinion this Court references was from Kelley's 1986 direct appeal of his conviction, Kelley v. State, 486 So. 2d 578 (Fla. 1986). As the Court rightly noted, the issue of the "additional evidence" is addressed nowhere in its 1986 opinion. Id. The Court suggests in its 1990 decision that "it is clear that the issue was decided adversely to Kelley;" however, that statement necessarily refers to Kelley's earlier constitutional claim premised on the State's asserted court-ordered destruction of certain evidence. There is nothing in that opinion or in the record that shows the issue of destruction of "additional evidence" was litigated, much less decided adversely.

The record before this Court in 1986 and 1990 makes this clear. During Kelley's first trial, Glenn Darty, the State Attorney who had petitioned the court to dispose of the evidence, admitted he did not know which items he "actually ended up destroying." R5 1000. Darty further admitted he

received no notification of what was actually destroyed. Id. There is nothing in the record showing that the destruction of other evidence was fully litigated.

The State also argues that its witnesses' searches were adequate, ignoring the testimony that some searches were wholly incomplete. Many of the witnesses spent only a minimal amount of time on their searches, and they did not search under relevant names or years for the evidence. IB 10-15. One witness did not even know that Kelley was tried more than one time. R11 1993-95. The testimony disclosed other places that could have been searched for the evidence, which were not, and other people with relevant knowledge about the evidence who were not asked about it. IB 10-15. The State's burden of proving that no DNA evidence exists was not satisfied.

The State's characterization of Kelley's claim as "frivolous" confirms his point that the State has never taken his legal entitlement under rule 3.853 seriously. Instead, the State engaged in half-hearted searches that were utterly insufficient under the circumstances here. Because the trial court correctly recognized that Kelley's motion was sufficient to shift the burden to the State to show that DNA evidence no longer exists, the State was required to establish that with a proper foundation. It did not.

Florida courts have held that a motion for DNA testing should not be denied when the record does not contain evidence to support the State's assertions that there is no evidence to test. See Hampton v. State, 924 So. 2d 34 (Fla. 3d DCA 2006); Thompson v. State, 922 So. 2d 383 (Fla. 2d DCA 2006); Carter v. State, 913 So. 2d 701 (Fla. 3d DCA 2005). That principle should apply here, where the State failed to account for all steps in the chain of custody, failed to conduct adequate searches, while at the same time refusing Kelley the pre-hearing discovery necessary to test the State's conclusory assertion that all of the evidence was no longer available.

Finally, contrary to the State's suggestion, the record does not show that relief would not be warranted even if a complete search were conducted. The State's review of the evidence at pages 44-47 discusses how the evidence was examined in 1966 before the advent DNA testing. Visual inspection and microscopic examination are no substitute for modern DNA testing. Rule 3.853 only contemplates that prior DNA evidence testing of the same evidence will preclude further testing. There was no such prior testing here.

In his rule 3.853 motion, Kelley argued not only that the evidence would not have Kelley's DNA on it, but also that it likely would have DNA evidence from the actual perpetrators. The State's theory always has been that two (and only two)

persons carried out the murder of Mr. Maxcy. If the evidence contains the DNA of Von Etter and Busias, Kelley effectively would be excluded as a murderer. The State's reliance on Hitchcock v. State, 866 So. 2d 23 (Fla. 2004), where all of the suspects would have been likely to have DNA on the evidence even if they did not commit the crime, is misplaced.

Importantly, rule 3.853 does not impose a burden upon Kelley to prove that DNA testing will provide exonerating evidence. A "claim is facially sufficient with regard to the exoneration issue if the alleged facts demonstrate that there is a reasonable probability that the defendant would have been acquitted if the DNA evidence had been admitted at trial." Knighten v. State, 829 So. 2d 249, 252 (Fla. 2d DCA 2002). That standard is consistent with the language of both rule 3.853 and section 925.11. Id. at 251-52. Kelley's motion meets this standard because it contains detailed statements of how each piece of evidence, if tested and admitted at trial, would make his exoneration "reasonably probable." R1 20-27.

Given the serious question as to the identity of the actual perpetrators of the murder, the absence of any physical evidence connecting Kelley to the murder, highly questionable identification testimony that was wholly unlike what Kelley indisputably looked like at the time of the murder, and the very real possibility that some evidence testable for DNA still

exists, this case presents precisely the type of scenario contemplated by the Legislature. It is entirely different from the cases cited by the State where this Court affirmed the denial of rule 3.853 motions because the defendant failed to show how DNA testing "would give rise to a reasonable probability of acquittal or a lesser sentence." Van Poyck v. State, 908 So. 2d 326, 330 (Fla. 2005); Cole v. State, 895 So. 2d 398, 402 (Fla. 2004); Robinson v. State, 865 So. 2d 1259, 1264 (Fla. 2004). In each of those cases, the defendants admitted to playing some role in the events leading up to the murders. Kelley always has maintained he played no role in Maxcy's murder.

The State cannot say that the evidence sought by Kelley would not exonerate him. Rule 3.853 requires that the court state "[w]hether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing." The trial court never got that far because it concluded, albeit incorrectly, that no evidence is available for testing. Kelley established the threshold required under rule 3.853, and the order should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was served via U.S. Mail to the following persons this 30th day of April, 2007.

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CERTIFICATE OF COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this Petition is 12-point Courier New, and that this Petition fully complies with the requirements of Florida Rules of Appellate Procedure 9.142 and 9.210.

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