IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO6-242

ROY CLIFTON SWAFFORD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___" – Record on appeal to this Court in the 1988 direct appeal;

"PC-R1. ___" – Record on appeal to this Court from the 1990 summary denial of post-conviction relief;

PC-R2. ___" – Record on appeal to this Court from the 1994 appeal from the second summary denial of post-conviction relief;

"PC-R3. ___" – Record on appeal to this Court from the 1996 appeal from the third summary denial of post-conviction relief;

"PC-R4T. ___" – Transcript of evidentiary hearing conducted February 6-7, 1997;

"PC-R5. ___" – Record on appeal to this Court in the appeal from the denial of DNA testing;

"PC-R6. ___" – Record on appeal to this Court in the appeal from the denial of Rule 3.850 motion filed in 2003;

"PC-R7. ___" – Record on appeal in the current appeal on the circuit court's final order on remand, filed in 2006.

All other citations will be self-explanatory or will otherwise be explained.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT I

MR. SWAFFORD WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FULL AND FAIR HEARING ON HIS DNA MOTION IN THAT THE LOWER COURT FAILED TO FOLLOW THIS COURT'S MANDATE IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

> *No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved.*

Dillbeck v. State, 643 So. 2d 1027, 1030 (1994).

The issue here is the scope of Fla. R. Crim. P. 3.853, and whether the trial court in Mr. Swafford's case complied with

this Court's order. The State argues that it has complied with this Court's mandate and that any evidentiary development is beyond the scope of this Court's order.

Thus, anything other than the granting of Mr. Swafford's DNA motion is beyond the scope of this Court's remand. See, State's Answer Brief at page 22. Any public record requests, requests for further testing or evidentiary clarification of FDLE's testing results is outside the scope of this Court's order. Any cross examination of the FDLE lab analysts about contamination is beyond the scope of the mandate, despite this Court's specific order that the issue should be addressed. As a consequence, the trial court's order is devoid of fact findings regarding contamination or the authenticity of the evidence because no hearing was conducted on these issues.

The State argues that Rule 3.853 is exclusively a "discovery tool" but says any examination on the contamination issue should be done in a Rule 3.851 proceeding. At the same time, it argues that Mr. Swafford should have used Rule 3.851 as a "basis to request relief and to place before the judge any information gathered through 3.853 that may require an evidentiary hearing." See, State's Answer at page 22-23. The State does not explain how Mr. Swafford is to gather information on whether FDLE's testing was valid or whether the samples were contaminated if the trial court fails to allow evidentiary development of these issues. The trial court has foreclosed any examination of the FDLE witnesses and withheld the documents those experts relied on. The State's brief fails to address the

due process implications of such lopsided procedures. See, Dillbeck v. State, 643 So. 2d 1027, 1030 (1994); citing Hickson v. State, 630 So. 2d 172 (Fla. 1993)[allowing the state's expert to examine a defendant will keep the state from being unduly prejudiced because a defendant will not be able to rely on expert testimony that the state has no effective means of rebutting].

Fla. R. Crim. P. 3.851 requires a postconviction defendant's investigation and fact gathering be completed **before** he files his Rule 3.851 postconviction motion. A legally sufficient postconviction motion must contain "detailed allegations of the factual basis for any claim for which an evidentiary hearing is sought" and a memorandum of law supporting the claim with applicable case law. Fla. R. Crim. P. 3.851(e)(1)(D). There are **no** discovery provisions in this rule.

Without having access to discovery through Rule 3.852 (public records) or Rule 3.853 (DNA), a defendant has no way of knowing what the facts are or what his claims for relief may be. Nonetheless, the State urges Mr. Swafford to file a Rule 3.851 motion and swear or affirm that the facts in it are true when he has been precluded from exploring the veracity of those facts.

Mr. Swafford has no way of proving that contamination occurred on the tested samples either from the crime scene or from the practices and methods of FDLE.[1] But the presence of a

[1]Contrary to the State's argument, this Court did not distinguish what it meant by "contamination" at the crime scene or at the FDLE crime lab. The fact that the State disagrees with Mr. Swafford's interpretation means an evidentiary hearing is

DNA mixture on hair samples and the inconsistent and inconclusive results within FDLE itself raise red flags that the issue needs to be explored. The State did not discuss these red flags nor their implications in its brief.

Instead, the State argues that Mr. Swafford's requests for the public records FDLE relied on and further testing to clarify the inconclusive results are "beyond the scope" of Rule 3.853 and this Court's order. The State argues that Mr. Swafford cannot question FDLE unless it is at a Rule 3.851 hearing. He cannot further test FDLE's inconclusive results or submit the DNA results into evidence unless it is at a Rule 3.851 hearing. He also cannot have an expert of his own choosing to rebut the state's case unless he is certified by the two agencies delineated in Rule 3.853. Yet, Fla. R. Crim. P. 3.853 specifically provides for evidentiary development and further testing with good cause shown See, Fla. Rule Crim. P. 3.853.

The State sidesteps the obvious inconsistencies in this case, by saying any problems should be addressed in a post-conviction motion. It cites King v. State, 808 So. 2d 1237 (2002) to support its argument, however, the case is distinguishable. The King court had not specifically ordered that the issue of contamination be addressed in Rule 3.853 proceedings. King's procedural posture was different. Mr. King

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required to resolve the issue. If the State's concerns are, as it espouses, to get to the truth of the matter, then it should be interested in putting to rest the contamination controversy by having a hearing on the matter.

never filed a proper Motion for DNA Testing under Rule 3.853. His motion was a successor 3.851 under warrant, not during regular post-conviction proceedings, as it is here. Mr. King had not shown that FDLE testing was inaccurate or that there was any other type of DNA testing that could be done. This Court found that no statute or rule *required* additional testing. See, King v. State, 808 So. 2d at 1248. This Court did not say additional testing was precluded if a proper predicate could be shown.

The case of Duckett v. State, 918 So. 2d 224 (2005) is equally misplaced here. Like King, Mr. Duckett did not file a proper motion for DNA testing under Rule 3.853. This Court remanded for DNA testing with a specific order limiting the testing. Mr. Duckett sought to have other items tested without filing the requisite motions and filed additional motions for Brady information which were outside the scope of the order. Duckett v. State, 918 So. 2d at 239.

Mr. Swafford has passed the threshold that Mr. King and Mr. Duckett could not. He has demonstrated a reasonable probability that he would be acquitted or receive a life sentence if the test results were favorable to him. Mr. Swafford filed a legally sufficient motion for DNA testing and has been granted leave for DNA testing of the items tested. But, he did not have the opportunity to have an adversarial testing of the DNA results in order to challenge the evidence. Thus, King and Duckett have no value as authority here.

Even if Rule 3.853 were silent on the issue of an

evidentiary hearing and further testing, this Court ordered that the contamination issue be addressed. The State's proclamation that it has an interest in preserving the evidence and has done so for 24 years does not answer the question of whether contamination played a role in the inconsistency of the results today.[2]

The State's brief never addresses the inconsistencies in FDLE's test results even though FDLE identified male DNA on a hair found on a white towel with a flower pattern which did **not** match Mr. Swafford. It also found a "limited DNA mixture" but obtained no "interpretable" results on the victim's fingernail scrapings. A DNA mixture can indicate contamination issues in the testing procedures. FDLE also found a DNA "mixture" on hair evidence that had been mounted on glass slides since the 1980s. FDLE was only able to test those hair strands that contained a follicle with cells containing a nucleus. Mr. Swafford argues that a hair follicle cannot originate from two persons.

Further, the results of the acid phosphotase test also are inconsistent. At trial in 1985, FDLE got a positive result for acid phosphatase on vaginal and anal swabs. FDLE's recent testing indicates no acid phosphatase or semen is present. This evidence directly rebuts the State's case and shows Mr. Swafford

[2]It is not clear the level of commitment the State had in actually preserving the evidence when their own FDLE analyst testified that the samples were badly degraded and there was nothing they could do about that.

did not commit sexual assault or murder. It also shows contamination issues in the FDLE crime lab.

After FDLE failed to get a result on the hair samples, it sent the samples to Mitotyping Technologies for further testing. Mitotyping obtained a result. Their test results show that a hair found in the victim's panties did **not** belong to the victim or Mr. Swafford. Either FDLE's testing was contaminated or the samples are truly from someone else. None of this evidence has been presented in court, admitted into evidence or subjected to examination by counsel.

Moreover, the State does not address why it would be preferable to duplicate in a Rule 3.851 motion and proceedings the same arguments that should be resolved at the conclusion of the DNA testing. If Mr. Swafford were to be required to file a Rule 3.851 motion without a resolution on the contamination issue, it would be necessary for him to plead his concerns about contamination of the FDLE results without evidentiary support. He would also have to plead his claims without conducting an examination of the FDLE analysts (a discovery function reserved for Rule 3.853), and then file an amended Rule 3.851 motion with new information. Still, the State claims in its brief that an evidentiary hearing on DNA testing is beyond the scope of this Court's remand and beyond the subject of Rule 3.853. See, State's Answer Brief at page 26.

Contrary to being "spurious allegations,"[3] these are issues

[3]Mr. Swafford's argument citation to contamination examples was, contrary to the State's argument, not a recitation of precedent.

Mr. Swafford wishes to explore by examining the FDLE crime scene analysts and through further testing at his expense. He cannot know the value of his allegations unless he is allowed the opportunity to explore them.

Contrary to Mr. Swafford, the State has unlimited access to the DNA testing information and FDLE analysts who conducted the testing. The only way Mr. Swafford can determine whether contamination has occurred is to have his own expert conduct an examination or further testing. Though the State claims Mr. Swafford is "disingenuous" in arguing that the State has blocked his efforts to get definitive answers, it continues to do so here. See, State's Answer Brief at page 29.

The State also argues that there has been "no showing" that testing done by FDLE is inaccurate. See, State's Answer at page 28. Yet, it prevents Mr. Swafford's attempts to do so. The State repeatedly argues that the independent laboratory Mr. Swafford requested to resolve the inconsistencies is not certified. It never addresses Mr. Swafford's argument that the State itself has used this same laboratory in its own cases.

Once again, the State has complete control. It can use whatever laboratory it wishes to conduct DNA testing, but Mr. Swafford is restricted. While Rule 3.853 *does* specify that additional testing must be conducted by a certified laboratory, all of the issues regarding this provision have not been

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His argument is that contamination problems at FDLE are the issues he would explore in an evidentiary hearing.

thoroughly litigated, as the rule is still new. Cf. Hitchcock v Dugger, 481 U.S. 393 (1987)[a jury must be allowed to consider non-statutory mitigators]; Espinosa v. Florida, 112 S. Ct. 2926 (1992)[jury weighing invalid aggravator unconstitutional]; Ring v. Arizona, 122 S. Ct. 2428 (2002)[jury must find aggravators]. It is without question that in order to change or raise concerns about a law, it must first be challenged. Thus, Mr. Swafford is not suggesting that the rules should not "apply to him." See, State's Answer Brief at page 28. He is challenging a blanket provision that precludes him from having a defense expert and testing of his choice provided he can show that the testing is sufficiently reliable.

Here, Mr. Swafford sought to use the same DNA expert and laboratory the State has used. Mr. Swafford argued that he should be able to have a defense expert provided he can demonstrate that the independent laboratory, and its results are sufficiently reliable to meet acceptable Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) standards. No meaningful examination can occur without this expertise and assistance.

Mr. Swafford is not asking for a special exception for himself. He argues that the purpose of the statute's certification language was to ensure that independent testing be done by reliable institutions. However, the restrictive statutory language limits only defendants to laboratories certified by two organizations who make no guarantees as to reliability. Mr. Swafford argues that the statute and rule should accommodate other methods of establishing the reliability

of a laboratory. Certainly, the State is not suggesting that the prosecutions in its cases that have used Dr. Blakely and Forensic Science Associates are now suspect and unreliable. Just as it cannot say that accreditation by American Society of Crime Laboratory Directors or National Forensic Science Training Center has precluded laboratories from suffering from contamination or prevented unreliable results. Mr. Swafford is suggesting that his request for an independent laboratory should be addressed on a case-by-case basis and subjected to the same Frye analysis that is used in Florida's capital trials. The use of a different standard only in postconviction DNA cases raises constitutional questions of equal protection and due process violations that exist simply because postconviction defendants are further along in the appellate process. See, United States Constitution, Sixth, Eighth and Fourteenth Amendments. In these circumstances, Mr. Swafford is entitled to relief.

CONCLUSION

For the foregoing reasons, this Court should vacate the lower court's order denying Mr. Swafford's request for further DNA testing and allow him to obtain a definitive result, and order the lower court to conduct an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail delivery to Barbara Davis and Ken Nunnelly, Assistant Attorneys General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 on July 20, 2006.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with the font requirements of Fla. R. App. P Rule 9.210(a)(2).

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