

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1734

LOWER TRIBUNAL NO. 79-167-CFB

PAUL WILLIAM SCOTT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Scott's motion for DNA testing. The motion was brought pursuant to Fla. R. Crim. P. 3.853. The circuit court denied Mr. Scott's claims after a non-evidentiary hearing.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation:

"Vol. R." - record on appeal to this Court;

"T." - transcript of DNA motion hearing.

REQUEST FOR ORAL ARGUMENT

Mr. Scott has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Scott, through counsel, urges that the Court permit oral argument.

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STATEMENT OF THE CASE

This case has an extensive procedural history. Mr. Scott was sentenced to death for a 1978 murder, which was affirmed by this Court on direct appeal. Scott v. State, 411 So.2d 866 (Fla. 1982). Mr. Scott subsequently petitioned this Court for a writ of habeas corpus and a writ of error coram nobis, both of which were denied. Scott v. Wainwright, 433 So.2d 974 (Fla. 1983). Mr. Scott then filed a Rule 3.850 motion that eventually was decided adversely to him and was affirmed by this Court. Scott v. State, 513 So.2d 653 (Fla. 1985). A death warrant was signed for Mr. Scott in 1990. After granting a stay for new postconviction counsel to file another Rule 3.850 motion, that motion was summarily denied and affirmed by this Court, as was second habeas petition. Scott v. Dugger, 634 So.2d 1062 (Fla. 1993). After a second death warrant was signed in 1994, Mr. Scott filed a third Rule 3.850 motion that was denied and subsequently this Court remanded for an evidentiary hearing. Scott v. State, 657 So.2d 1129 (Fla. 1995). His second writ of habeas corpus to this Court was denied concurrently with the remand. Scott v. Singletary, 657 So.2d 1129 (Fla. 1995). After remand and the evidentiary hearing the trial court denied relief and this Court affirmed. Scott v. State, 717 So.2d 908 (Fla. 1998), cert. denied, Scott v. Florida, 525 U.S. 972, 119 S.Ct. 425, 142 L.Ed.2d 346 (1998).

Mr. Scott has also litigated his cause in the federal court system. His initial habeas petition was denied. Scott v. Dugger, 686

F.Supp. 1488 (S.D. Fla. 1988), aff'd, 891 F.2d 800 (11th Cir. 1989), cert. denied, 498 U.S. 881, 111 S.Ct. 224, 112 L.Ed.2d 179 (1990). The Eleventh Circuit also denied a request that it recall its mandate. Scott v. Singletary, 38 F.3d 1547 (11th Cir. 1994).

Mr. Scott most recently filed a post-conviction motion for DNA testing which was summarily denied. This appeal follows.

STATEMENT OF THE FACTS

The U.S. Eleventh Circuit Court of Appeals has stated the facts in this case as follows:

On December 4, 1978, between 7 and 10 p.m., appellant, Paul William Scott, Charles Soutullo, and Richard Kondian, engaged in a conversation that Soutullo's girlfriend (Felicia) could not hear. According to Soutullo, the appellant and Kondian asked him to join them in robbing Jim Alessi and killing him by injecting battery acid into his body. Soutullo refused to join and told Felicia about the conversation. Late that evening, Alessi arrived at his father's house to borrow the father's station wagon. Alessi, Kondian, and the appellant then left Alessi's father's house in the station wagon and another vehicle.

The next morning, Palm Beach County, Florida, law enforcement officers found Alessi's nude body in his living room amidst a large amount of blood and disarranged furniture. The officers found Alessi's feet and hands bound with electrical and telephone cords. A teddy bear statue was broken and scattered near Alessi's feet. The officers also found the appellant's fingerprints in the kitchen, on an ashtray in the family room, on the cover of a book in the living room, and on the bloodstained tip of a knife. Articles in the house indicated that a violent struggle had taken place moving from room to room. Alessi's death resulted from several blows to the head by a blunt instrument. Examination revealed that Alessi's hands and feet had been tied while he

was still alive, causing swelling. Following Alessi's murder, the appellant and Kondian stole Alessi's automobile and stole jewelry from Alessi's flower and jewelry store in another part of the city. On December 7, 1978, Soutullo told law enforcement officers about the conversation with the appellant and Kondian regarding the robbery plans. On January 4, 1979, law enforcement officers arrested the appellant in California. Following the arrest, law enforcement officers seized a golden bear charm from the appellant's room.

Scott v. Dugger, 891 F.2d 800,801-802 (11th Cir. 1989).

Appellant, Paul Scott, filed a pro se motion for postconviction DNA testing on September 23, 2005 (Vol. 21, 41144121). Subsequently, and pursuant to the trial court's order, an amended motion was filed on November 17, 2005. (Vol. 22, 41224136). The trial court appointed counsel Michael Morris, who amended the original motion on two occasions. Within the final version of his DNA motion, Mr. Scott requested testing on five items of evidence, including:

1. Blood stains from a wood chair found in the kitchen;
2. Blood stain from family room hallway to bedroom floor area, circle of blood 3.5 inches to 4 inches in diameter;
3. Blood stains on the south wall;
4. Blood stains from the dividing wall of bed and family room, south end;
5. Blood stains from hall wall.

See Vol. 22, 4190-4193.

The trial court ordered the State of Florida to respond to Mr. Scott's motion. A non-evidentiary hearing on Defendant's Second Amended Motion for Postconviction DNA Testing was eventually held on August 14, 2006. Immediately following the brief hearing, the trial court rendered its Order Denying

Defendant's Second Amended Motion for Postconviction DNA Testing.

See Vol. 22, 4300-4301. In pertinent part the order found:

1. The Motion is technically legally insufficient in the Defendant fails to allege that he is innocent and fails to allege how the DNA Testing required by the Motion would exonerate him of the crime of which he was convicted.

2. However, even if the Motion was technically legally sufficient, it fails on its merits because the Defendant has failed to show reasonable probability that the Defendant would have been acquitted or would have received a lesser sentence if the DNA evidence tested favorably and had been admitted at trial. The other evidence at trial, specifically fingerprint evidence, indisputably demonstrated that the Defendant was present at the scene. Viewed in its entirety, the evidence at trial is such that there is no reasonable probability that Defendant would have been acquitted or received a lesser sentence had DNA evidence been admitted.

Vol. 22, 4300-4301.

SUMMARY OF ARGUMENT

The trial court did not abide by the requirements of Rule 3.853(c)(5), Fl.R.Cr.P., in its Order Denying Defendant's Second Amended Motion for Postconviction DNA Testing. The trial court failed to make the required findings as to (1) whether the physical evidence that may contain DNA still exists; (2) whether the results of testing likely would be admissible at trial; (3) whether there exists reliable proof to establish that the evidence is authentic and would be admissible at a future hearing; and (4) whether there is a reasonable probability that Mr. Scott would have been acquitted or received a lesser sentence if the DNA evidence was admitted at trial.

The trial court's finding that the motion "fails on its merits," and therefore should be summarily denied, is erroneous because the record does not show conclusively that Mr. Scott is not entitled to relief. The trial court also failed to attach any portions of the trial record or conduct an evidentiary hearing to determine these issues.

STANDARD OF REVIEW

As the issues decided here were purely legal with no findings of fact, this Court should apply a standard of de novo review.

ARGUMENT I

MR. SCOTT'S MOTION FOR POSTCONVICTION DNA TESTING IS TECHNICALLY SUFFICIENT AND THE LOWER COURT ERRED WHEN IT FOUND OTHERWISE.

Rule 3.853(b), Fl.R.Cr.P. provides a clear outline of what a defendant must do in filing a motion for DNA testing pursuant to that rule. Specifically, 3.853(b) mandates that a motion for DNA testing must include the following:

(b) *Contents of the Motion* - The motion for postconviction DNA testing must be under oath and must include the following:

(1) a statement of the facts relied upon in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained;

(2) a statement that the evidence was not previously tested for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result establishing that the movant is not the person who committed the crime;

(3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;

(4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received;

(5) a statement of any other facts relevant to the motion; and

(6) a certificate that a copy of the motion has been served on the prosecuting authority.

In its order summarily denying DNA testing, the circuit court found that "[t]he Motion is technically legally insufficient in that Defendant fails to allege that he is innocent and fails to allege how the DNA Testing (sic) required by the Motion would exonerate him of the crime of which he was convicted." Vol. 22, 4300. It is not clear what exactly the circuit court meant in finding that the motion was "technically legally insufficient." This Court has held that a motion is technically sufficient when all of the components of 3.853(b) have been met. See, e.g., Sireci v. State, 908 So.2d 321, 325 (Fla. 2005)(finding that, as defendant's DNA motion met all the requirements of 3.853(b)(1)-(6), the lower court erred in finding that the motion was not technically sufficient); See also Manual v. State, 855 So.2d 97 (Fla.2nd DCA 2003).

Contrary to the lower court's findings, Mr. Scott filed a facially,

technically sufficient DNA motion in accordance with 3.853(b) and applicable caselaw. See Vol.22, 4190-4193. He described the physical evidence to be tested and the last known location of such evidence, as required by 3.853(b)(1). See Vol. 22, 4190-4191 at ¶2-3. In accordance with 3.853(b)(2), Mr. Scott stated that the evidence he wished to have tested was not previously tested for DNA. See id. at ¶4. Additionally, and contrary to the lower court's finding, Mr. Scott explicitly claimed that he was "innocent of the crime of which he was convicted" (i.e., capital first-degree murder), and provided an explanation of how the tested evidence would establish his innocence of the capital crime for which he was convicted and sentenced, as required by 3.853(b)(3). See id. 4191 at ¶5. Finally, in accordance with 3.853(b)(4), Mr. Scott also alleged that his identity was genuinely disputed in his case, insofar as he denied being present for the murder, but admitted being present for an altercation between himself, the co-defendant, and the victim. See id. at 4191-2 ¶6. Specifically, Mr. Scott argued that if the blood evidence which he requested to have tested was determined not to belong to the victim, it would undermine the State's case against him by demonstrating that Mr. Scott was not guilty of capital first-degree murder, but rather innocent or guilty of a lesser charge predicated on a "defense of others" theory. See id. at 4192 ¶7. These statements are in compliance with 3.853(b), and contrary to the lower court's finding that Mr. Scott failed to allege how the DNA testing would exonerate him. Therefore, the lower court erred in ruling that Mr. Scott's motion was

"technically legally insufficient" and DNA testing should be ordered by this Court, or, alternatively, reverse and remand to the lower court for an evidentiary hearing as to the propriety of DNA testing.

ARGUMENT II

THE TRIAL COURT'S FINDING THAT THE MOTION "FAILS ON ITS MERITS" AND THEREFORE SHOULD BE SUMMARILY DENIED VIOLATES MR. SCOTT'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION FOR FAILURE TO FOLLOW THE DICTATES OF RULE 3.853(c)(5) AND FAILURE TO ATTACH AND/OR REFERENCE RECORD PORTIONS THAT SHOW MR. SCOTT IS CONCLUSIVELY ENTITLED TO NO RELIEF.

The trial court did not abide by the requirements of Rule 3.853(c)(5), Fl.R.Cr.P., in its Order Denying Defendant's Second Amended Motion for Postconviction DNA Testing. The trial court failed to make the required findings as to (1) whether the physical evidence that may contain DNA still exists; (2) whether the results of testing would be admissible likely would be admissible at trial; (3) whether there exists reliable proof to establish that the evidence is authentic and would be admissible at a future hearing; and (4) whether there is a reasonable probability that Mr. Scott would have been acquitted or received a lesser sentence if the DNA evidence was admitted at trial.

Rule 3.853(c)(5), Fl.R.Cr.P. directs trial courts as to the findings that must be made when ruling on motions requesting postconviction DNA testing. The first requirement is to determine "[w]hether it has been shown that physical evidence that may contain DNA still exists." Rule 3.853(c)(5)(A), Fl.R.Cr.P. The lower court failed to make such a finding and does not mention this required finding

whatsoever in its order denying DNA testing. See Vol. 22, 4300-01.

The second requirement is that the lower court must find "[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." Rule 3.853(c)(5)(B), Fl.R.Cr.P. Essentially, this subsection requires the court to make two findings: the first in regard to the authenticity of the evidence; and the second as to whether such evidence would be admissible. Yet within the lower court's order denying Mr. Scott DNA testing, neither authenticity nor admissibility is even addressed. The lower court's failure to make these essential determinations is a clear subversion of the rule and a violation of Mr. Scott's due process rights.

The third requirement mandated by the Rule is for the lower court to ascertain "[w]hether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial." Rule 3.853(c)(5)(C), Fl.R.Cr.P. Like 3.853(c)(5)(B), this provision necessitates two findings: whether there is a reasonable probability of acquittal; and, if not outright acquittal, would the DNA results produce a reasonable probability of a lesser sentence.

The lower court erred in its finding that the motion failed on its merits because Mr. Scott "failed to show a reasonable probability that the Defendant would have been acquitted or would have received a lesser

sentence if the DNA evidence tested favorably and had been admitted at trial." Vol.22, 4300 at ¶3. This finding is flawed because the record does not conclusively show that the defendant is not entitled to relief and the court never stated any such finding. Additionally, the lower court failed to attach any portions of the trial record or conduct an evidentiary hearing to determine this issue.

This Court dealt with a similar situation in Schofield v. State, 861 So.2d 1244 (Fla. 2003), wherein this Court stated: The trial court relied on the State's assertion that DNA testing would not exonerate Schofield, but it failed to attach any portions of the trial record or conduct an evidentiary hearing on this issue. Therefore, this court can rely only on the allegations made by Schofield and the State. See Riley, 851 So.2d at 812-13. Neither this court nor the trial court can consider the discrepancies between Schofield's and the State's allegations without considering the trial transcript or conducting an evidentiary hearing. See id. at 813. Accordingly, we reverse and remand for further proceedings.

Schofield at 1245-46 (emphasis added).

The holding in Schofield was in accord with and reinforced the Court's holding in Riley v. State, 851 So.2d 811 (Fla. 2003). In Riley, this Court directed that the trial court must consider the trial transcript or conduct an evidentiary hearing to resolve factual discrepancies between the defendant and the State and include them as part of its findings. Id. at 813. Such a directive is in line with the requirement in 3.850/3.851 proceedings, as well as Rule 9.141(b)(2)(D), which also state that the record portions conclusively demonstrating that a defendant is entitled to no relief must be attached, or the cause will be reversed and remanded for an evidentiary hearing or other

appropriate relief. See accord, Ortiz v. State, 884 So.2d 70, 71 (Fla. 2nd DCA 2004). Here, the trial court failed to attach or specifically reference the portions of the record or trial transcript, if any, that were relied upon to deny DNA testing. This was clear error because here, as in Schofield, "[n]either this court nor the trial court can consider the discrepancies between [Scott's] and the State's allegations without considering the trial transcript or conducting an evidentiary hearing." 861 So.2d at 1245-46. The failure of the lower court to abide by the Rule therefore requires this Court to remand these proceedings for DNA testing or an evidentiary hearing as to whether DNA testing is appropriate.

Additionally, and in violation of the Rule, the lower court never attempted to deal with the issue of the reasonable probability of a lesser sentence. This question is of manifest importance in a case where a death sentence has been rendered upon the movant, as in Mr. Scott's case. The jury recommendation of death for Mr. Scott was 7-5, the barest of majorities. It was error for the lower court to never even consider whether exculpatory DNA results would have possibly swayed just one juror to vote for life, rather than death.

Proportionality is always an issue in a capital case. This Court has struggled with the proportionality issue in Mr. Scott's case, as demonstrated by Justice Overton's dissent from denial of rehearing more than 25 years ago:

I dissent from the denial of the petition for rehearing. There is a serious disparity in the sentencing of Scott and his co-defendant, Kondian, who pleaded guilty to murder and was sentenced to forty-five years imprisonment after the petitioner, Scott, was tried by a jury, convicted of murder, and sentenced to death. Petitioner correctly asserts that we have not addressed this issue in these proceedings. Even when the accomplice has been sentenced subsequent to the sentencing of the defendant Seeking review, it is proper for this Court to consider the propriety of disparate sentences, See Witt v. State, 342 So.2d 497,500 (Fla. 1977), (sic) to determine whether a death sentence is appropriate given the conduct of all participants in committing the crime.

Scott v. State, 419 So.2d 1058 (Fla. 1982).

In light of the narrow margin by which a death recommendation was made, and this Court struggling in its determination regarding proportionality, the finding of whether there is a reasonable probability that a lesser sentence would be entered is paramount in Mr. Scott's case. Unfortunately, the lower court failed to address this issue whatsoever, other than the conclusory statement that, "However, even if the Motion was technically legally sufficient, it fails on its merits because the Defendant has failed to show reasonable probability that the Defendant would have been acquitted or would have received a lesser sentence if the DNA evidence tested favorably and had been admitted at trial." Vol. 22, 4300. This statement is not nearly enough to deny Mr. Scott the requested DNA testing. The lower court failed to address any portion of the record or trial transcript in making this finding, nor did it attach the alleged portion of the record or transcript that demonstrated that Mr. Scott was conclusively entitled to no relief.

The lower court attempted to rely upon the same conclusory statement when making its flawed determination that Mr. Scott failed to show a reasonable probability that he would have been acquitted. The only additional comment was that, "[t]he other evidence at trial, specifically fingerprint evidence, indisputably demonstrated that the Defendant was present at the scene." Vol. 22, 4300-01. The lower court failed to reference the record as to which set of fingerprints it was referring to and how that would refute Mr. Scott's assertion that he was at the scene and involved in an altercation with the victim, Alessi, and Kondian, and was defending Kondian; and that he left the scene before the murder occurred. Mr. Scott specifically averred in his motion that,

Scott is innocent of the crime of which he was convicted. DNA testing will exonerate Scott by establishing:

a. With regard to items 37 and 90, DNA testing would establish that the blood circles are consistent with the victim's, James Alessi's, blood and consistent with an item (champagne bottle) that the other party, Richard Kondian, charged in the victim's murder has stated, post-trial, that he used to kill the victim.

b. With regard to items 24 and 25, DNA testing would establish that the blood stains did not belong to the victim as alleged at trial, but rather to Kondian or Scott. This would be in direct opposition to the State's theory at trial, which was supported by these blood stains. Vol. 22, 4191.

Within his motion for DNA testing, Mr. Scott goes on to explain the importance of this evidence in light of this Court's prior decisions in Mr. Scott's case:

Also relevant to the motion are the decisions of prior courts in Scott's case. Scott's case has a

lengthy appellate history. In deciding against Scott's motion for postconviction relief, the Supreme Court of Florida held that failure to present a "defense of others" defense at trial was not ineffective, as the physical evidence did not support the theory. Scott v. State, 513 So.2d 653 (Fla. 1987). The DNA testing sought in this motion would provide physical evidence that would support the theory.

Vol. 22, 4192.

These allegations are in direct opposition to the State's position and the Court's finding in its order denying relief. The lower court cannot simply rely upon bare assertions by the State (which are in direct conflict with the defendant's position) and fail to conduct an evidentiary hearing to resolve the dispute. As the Second District Court of Appeals aptly observed in a postconviction DNA case:

In making factual determinations, a trial court can consider only sworn evidence. Melvin v. State, 804 So.2d 460, 463 (Fla.2d DCA 2001)(sic)(holding that absent the parties' stipulations, courts may only find facts based on sworn evidence). Unsworn allegations are not evidence and are insufficient to prove any fact. Id.; Clark v. State, 662 So.2d 729, 730 (Fla. 2d DCA 1995)(finding that the "state's bare assertion" (sic)denying a factual matter was insufficient to rebut the defendant's sworn allegations). Accordingly, allegations in the State's unsworn response do not provide a sufficient basis on which to find that no DNA evidence exists.

Even an affidavit from the State would not be sufficient to resolve this factual issue. "An affidavit serves as the functional equivalent of testimony which is contradictory to the allegations sworn as true by the movant. As such, it would be subject to confrontation at an evidentiary hearing." Clark, 662 So.2d at 730;(sic) accord Cintron v. State, 508 So.2d 1315, 1316 (Fla. 2d DCA 1987));(sic) See also Youngblood v. State, 261 So.2d 867, 867-68 (Fla. 2d DCA1972)(sic)(holding that the trial court could not deny an evidentiary hearing on a claim of ineffective assistance of

counsel based on the strength of a countervailing affidavit from the defendant's attorney).

Borland v. State, 848 So.2d 1288, 1289-90(Fla. 2d DCA 2003).

Here, there was no evidentiary hearing and no reference to the record to substantiate the denial of DNA testing; therefore, the lower court's order was rendered in error. This complete lack of explanation, failure to cite the record, and attach relevant portions of the records to the order leave this Court with no choice but to order the DNA testing requested or reverse and remand for an evidentiary hearing as to the propriety of testing.

ARGUMENT III

THE LOWER COURT'S DENIAL OF DNA TESTING VIOLATED MR. SCOTT'S RIGHT TO HABEAS CORPUS RELIEF UNDER BOTH THE U.S. AND FLORIDA CONSTITUTIONS.

The U.S. and Florida Constitutions provide a right to access evidence for the purposes of DNA testing if that DNA testing could be used to prove one's innocence or to appeal for executive clemency. See Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853(DNA Testing), 807 So.2d 633(Fla. 2001), Anstead, J.(concurring in part and dissenting in part)(stating "At its core, access to DNA testing is simply a unique means of establishing a claim . . . under the constitutional writ of habeas corpus . . . Entitlement to access to the courts for relief under the writ of habeas corpus is provided for expressly in Florida's Constitution . . . The salient issue in such proceedings is whether there is a credible claim that a fundamental injustice has occurred.") 807 So.2d at 636-37. See also Harvey v. Horan,

285 F.3d 298 (4th Cir. 2002) Luttig, J. (Concurring)(arguing that the U.S. Constitution provides a right to access evidence for the purposes of postconviction DNA testing if such testing could prove one's actual innocence.) When DNA could prove a man's innocence of the charged crime or of the death penalty, denying him access and testing is in violation his rights to due process and equal protection under the Fifth and Fourteenth Amendments to the U.S. Constitution and the corresponding provision of the Florida Constitution.

CONCLUSION

Mr. Scott requests this Court remand to the circuit court and order the requested DNA testing forthwith; or, alternatively, remand and order an evidentiary hearing as to whether DNA testing is appropriate in the above-styled cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by U.S. Mail, postage prepaid, to Celia Terenzio, Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL 33041, this 17th day of March 2008.

CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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