ORIGINAL

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.

REPLY BRIEF OF APPELLANT

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ARGUMENT

THE STATE'S ARGUMENT THAT THE "TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST FOR DNA TESTING" FAILS TO RECOGNIZE THE TRIAL COURT'S 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 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.

Within the State's brief much focus is placed on their factual assertions. This ignores the fact that an evidentiary hearing was not held as required and that the trial court failed to attach the portions of the record the **trial court** was relying on for its order. The trial court may have accepted or rejected the State's argument and assertions at the hearing, yet without the attached portions proper appellate review is thwarted.

The trial court failed to follow the requirements of Rule 3.853(c)(5), Fl.R.Cr.P. Findings should have been made 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. This simply

was not done. 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 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.
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> 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.

The third requirement is the only requirement somewhat addressed by the trial court in its order, however, this finding is incomplete and inadequate. The third requirement 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. This provision requires the trial court to make 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 found that Mr. Scott's motion failed on its merits because he "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

fails in four respects:

1. The record does not conclusively show that the defendant is not entitled to relief;

2. The court never stated any such finding;

3. The court failed to attach any portions of the trial record;

4. The court failed to 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).

Rule 9.141(b)(2)(D), Fl.R.App.P. also states 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 failure to attach or specifically reference the portions of the record or trial transcript, if any, that were relied upon to deny DNA testing is clear error. Error results because, "[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." Schofield, 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.

Importantly, the lower court never made a determination regarding the reasonable probability of a lesser sentence. The jury recommendation of death for Mr. Scott was 7-5, the barest of majorities. 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 is a travesty.

The lower court only rendered the conclusory finding, without explanation, 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. 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.

In direct contrast to the State's lengthy factual dissertation in their answer brief, the lower court simply relied upon this same conclusory statement to find that Mr. Scott failed to show a reasonable probability that he would have been acquitted. The only addition was, "[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.

Within his DNA motion Mr. Scott made allegations contrary to the State's position and the court's finding in its order denying relief.[1] The court's failure to

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[1] 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

specifically address these allegations demonstrates the need to attach portions of the record that conclusively refute Mr. Scott's claim.[2]

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.

> 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.

[2] 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.

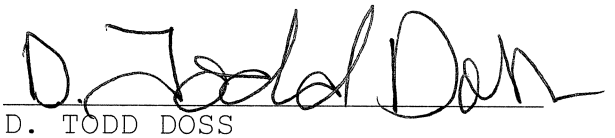
Vol. 22, 4192.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply 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 15th day of July 2008.

CERTIFICATE OF FONT

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



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