IN THE SUPREME COURT OF FLORIDA

CASE NO. SC-08-1808

LOWER TRIBUNAL No. 85-8933 CFANO

MARK ALLEN DAVIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT I

THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DENYING MR. DAVIS' RULE 3.851 MOTION WITHOUT AN EVIDENTIARY HEARING.

Appellee asserts that the circuit court's summary denial of Mr. Davis' rule 3.851 motion was proper. According to Appellee, the circuit court properly denied Mr. Davis' claim without a hearing because Mr. Davis failed to state the telephone numbers of the newly discovered witnesses; he failed to provide a statement that the witnesses were available to testify at an evidentiary hearing; and he failed to state why the witnesses were not previously available (Answer at 6, 11).[1]

[1]Succinctly put, the State's argument belies the truth. Any deficiencies in Mr. Davis' successive Rule 3.851 motion do not give rise to summarily denying relief. Indeed, the State fails to note that postconviction counsel was late in receiving the State's written response to his Rule 3.851. And, the State fails to note that in its written response it claimed none of the pleading deficiencies raised at the case management conference, but instead addressed the merits of Mr. Davis' claims. Under the State's own argument, the State's failure to address any deficiencies was not properly asserted in its written response and the State should not have been permitted to orally amend its written pleading, as was argued in relation to Mr. Davis' counsel's attempt to address the State's "new" arguments.

Initially, contrary to Appellee's assertion, while the lower court stated that "[t]he State is correct that the defendant's pleadings fail to conform to rule 3.815(e)(2)(c)", (PC-R2. Vol. II, 203), the court did not strike Mr. Davis' motion nor did the court indicate this was the reason for denying it (PC-R2. Vol. II, 200-12). Moreover, Appellee overlooks the fact that Mr. Davis specifically pled the new facts upon which his postconviction motion was based, that he attached the affidavit of Beverly Castle (PC-R2. Supp. 1) and the declaration of Kimberly Rieck (PC-R2. Vol. 1, 35), and that he specifically stated that, "Despite previous efforts to locate and interview Rieck and Castle, Mr. Davis was only recently able to interview the witnesses." (PC-R2. Vol. I, 7).[2]

Further, during the case management conference, counsel for Mr. Davis addressed the witnesses' availability to testify:

> The statement about their availability, I mean, obviously they are in Illinois. If they were to refuse to come, then we would have to come to the Court and seek, you know –
>
> MR. CROW: For an extradite.
>
> MS. MCDERMOTT: -- for a certificate of -- I'm sorry. If I could make my argument without interruption, I would appreciate that.
>
> MR. CROW: I apologize.
>
> MS. MCDERMOTT: But I would have to come to the Court and seek a certificate of materiality and then obviously go to Illinois and ask a judge there to force the witnesses to come. I'm certainly willing to do that. And, you know, I'm not sure. I think they would be willing to come. But in any event, **we could get them here if we were given an evidentiary hearing.**

[2]Mr. Davis also listed the addresses of the witnesses in his postconviction motion.

(PC-R2. Vol. II, at 23-24)(emphasis added). Counsel for Mr. Davis also elaborated on the issue of diligence, explaining that investigators made attempts to locate the witnesses, but that they were unsuccessful (PC-R2. Vol. II, at 9-10, 27). Counsel explained that testimony regarding these attempts would be presented at an evidentiary hearing.[3]

[3]And, in his motion for rehearing, Mr. Davis provided the phone numbers for each of his witnesses.

Despite the fact that Mr. Davis complied with Rule 3.851, Appellee disagrees with the notion that a deficient postconviction pleading can be cured ("To hold that the failure to comply with the pleading requirement could be 'cured' by subsequently providing the information in a motion for rehearing would completely undermine the purpose of the rule and would be a waste of valuable judicial resources.")(Answer at 12). Appellee's assertion is contrary to this Court's precedence. See, e.g., Spera v. State, 971 So. 2d 754, 755 (Fla. 2007), Bryant v. State, 901 So. 2d 810, 818 (Fla. 2005)("Although a trial court may 'strike' a postconviction motion where a civil complaint would be 'dismissed', the trial court, like the court in the civil context, should grant leave to amend the motion to cure the defects that led the court to strike the original motion.").[4] Further, Appellee's assertion that Mr. Davis waited until the motion for rehearing to "cure" his pleading[5] is misleading. On several occasions during the case management conference, Mr. Davis attempted to provide information which the State alleged was absent or insufficiently explained in Mr. Davis' postconviction motion.[6] The State, however, continually objected to these attempts. For example, when Mr. Davis' counsel attempted to discuss his diligence in locating the witnesses, the State objected, stating, "And I think Counsel is now trying to – - instead of pleading the allegations like it should have been and explaining the allegations of why this is newly discovered in the pleading, they are trying to add into the record items that are actually outside the record and not the subject of

[4]Appellee's reliance on this Court's decision in Ventura v. State, 2009 Fla. LEXIS 131 (Fla. Jan. 29, 2009),(Answer at 12), is misplaced. Unlike the decision in Ventura, Mr. Davis attached the relevant documents and proffered the critical factual witnesses in support of his claim. Moreover, unlike in Ventura, the alleged deficiencies here were primarily procedural in nature. Finally, as was the case here, there is no indication that Ventura made any attempt to cure any of the alleged deficiencies in his pleading.

[5]According to Appellee, "In the instant case, the motion for rehearing was filed six months after the initial motion and four months after the case management conference where defendant was on notice that he had failed to comply with the rules. There can be no good faith basis to assert that it is unfair to hold him to the rules when he made no attempt to supply the information until after relief had been denied." (Answer at 12).

[6]Mr. Davis offered to supply information if the court determined he needed to be more specific or if the pleading was not sufficient (PC-R.2 Vol. III, at 11-12, 13).

testimony or affidavit or cross-examination." (PC-R.2 Vol. III, at 9)[7]. When the lower court pointed out that Mr. Davis indicated in his postconviction motion that he had difficulty finding the witnesses, the State argued:

> MR. CROW: I think all she indicated is that they had previously looked for them but were only recently able to talk to them. So there was no explanation of what efforts were made over what period of time and in what manner to locate the witnesses since they all live in the same town of 30,000 people in Illinois that they lived in 20 years ago and so since they are all related. So that's one of the central points, I think, that clearly would justify a dismissal on the pleadings. And Counsel is attempting to enhance what she's failed to plead.

(PC-R.2 Vol. III, at 9-10).[8] When Mr. Davis pursued his attempts to explain any diligence issues, the State again objected:

> MS. MCDERMOTT: Judge, what I'm trying to do is let the Court know if we're given the opportunity to have an evidentiary hearing in this case, which I think under the case law we would certainly have at least the opportunity to show that we were diligent in the case, what I would present to the Court is that we did make a concerted effort at the time of said preparation of the initial 3.850 and the evidentiary hearing to find these two people and were unable to do that. **And I would be putting on the investigator who was the investigator at that time and also the investigator who investigated the case for me most recently to discuss** - -
>
> MR. CROW: **Again, Judge, the same objection. I think there is not even an allegation that the search was diligent in the pleading** --
>
> THE COURT: In paragraph 17 I found the actual paragraph. It says despite previous efforts to locate -- this is 17 of your motion on page 7, bottom of page 7 -- despite previous efforts to locate and review Rieck, White, and Castle, Mr. Davis was only recently able to interview the witnesses. And I think that's the only part that you really mention in your pleading whether or not --

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[7] In making this argument, it appears that the State was unaware of the fact that the case management conference concerned whether an evidentiary hearing would be held, and that at the evidentiary hearing the witnesses would be subject to cross-examination. Indeed, it is at an evidentiary hearing that investigators will testify and be challenged. A brief to this Court which includes a barebones allegation of their work ethic cannot replace testimony to determine diligence.

[8] To say that the witnesses lived in Illinois for a number of years is irrelevant to the determination of diligence. The witnesses are not, as the State incorrectly informed the circuit court, related to him. Indeed, the record reflects that Mr. Davis only ever met Ms. Rieck in Illinois once. They were not lifelong friends as the State implies. The fact that the witnesses were not found earlier is not due to a lack of diligence. However, the fact that they have been found now and are recanting key statements – the only statements used against Mr. Davis to support premeditation – is due to persistent diligence with respect to postconviction counsel's history in connection with this case.

> MS. MCDERMOTT: That's true, your Honor. I mean, I guess I don't see the impropriety in coming before the Court and telling you that the State has now contended that we haven't supplied you with sufficient information and trying to give you that information in terms of -- so that you can make a ruling on that. They're trying to get you to summarily deny the pleading. And I don't think the pleadings are the end of the story. That's why we have these case management conferences. Otherwise, what's the point if we can't come in and discuss the claim and tell you, Well, this is the information that I have on that. **And if this pleading is not sufficient, then let me supply you with information that I think is sufficient in obtaining an evidentiary hearing.**

(PC-R.2 Vol. III, at 10-12)(emphasis added).[9]

Appellee also fails to mention that the lower court ultimately overruled the State's objection "in regards to allowing Ms. McDermott to elaborate a little further as to her efforts in locating witnesses." (PC-R.2 Vol. III, at 20). The lower court did not strike Mr. Davis' pleading nor did it order any further supplementation. Appellee's insinuation that Mr. Davis somehow sat on his hands or his pleading should have been stricken because he did not act in good faith is disingenuous.

Next, despite Mr. Davis' explanation as to diligence, Appellee has deemed it to be "insufficient" (Answer at 14). Appellee claims that the record in this case established that the witnesses had been available for years, thus the circuit court correctly determined that the evidence was not newly discovered nor would it have probably produced an acquittal at trial or a lesser sentence in the penalty phase (Answer at 6). Appellee, like the circuit court, refuses to accept Mr. Davis' claim of diligence as true. Recently, in Rivera v. State, 995 So. 2d 191, 195-96 (Fla. 2008), in addressing allegations of diligence in a successive Rule 3.851 motion, this Court held:

> We do not agree with the trial court's conclusion that the record conclusively demonstrates these claims are procedurally barred. The bar against successive motions can be overcome if the movant can show that the grounds asserted were not known and could not have been known to the movant at the time of the previous motion. *Zeigler v. State*, 632 So. 2d 48, 51 (Fla. 1993). Rivera alleges that he did not have the plea offer to Zuccarello or other key State documents at the time of trial or during the prior postconviction proceedings. **Since no evidentiary hearing has been held, we must accept these allegations as true to the**

[9]The State later argued that, "But what I object to is to inject into the record these oral communications and to try to render it a pleading sufficient in that manner." (PC-R.2 Vol. III, at 19).

extent they are not refuted by the record. *See Peede v. State,* 748 So. 2d 253, 257 (Fla. 1999).

> Importantly, the record does not conclusively refute Rivera's allegations about his diligence in pursuing these claims. In the public records litigation surrounding the filing of Rivera's initial postconviction motion, Rivera repeatedly sought information about Zuccarello. While the State alleges that it complied with Rivera's requests, the records of the prior proceedings do not clearly establish or identify what materials were turned over to Rivera. In fact, certain materials concerning Zuccarello appear to have been withheld. The records from the first postconviction proceedings suggest that Rivera's efforts to discover information about Zuccarello were repeatedly avoided by the State through its limited responses to public records requests. Based on the record before us, the State has not sufficiently demonstrated that these claims are procedurally barred as successive.

(Emphasis added).

Mr. Davis has pled that he attempted to locate these witnesses, but was unsuccessful. There is nothing in the record to refute this. Thus, under the existing caselaw, Mr. Davis is, at a minimum, entitled to an evidentiary hearing as to the diligence of his claim.

Moreover, Appellee, like the lower court, fails to accept the statements of Rieck and Castle as true. Rather, Appellee dismisses Mr. Davis' allegations because they are in conflict with what was already in the record. Of course, as Mr. Davis stated in his initial brief, the fact that Rieck's and Castle's most recent statements conflict with their testimony at trial constitutes the need for an evidentiary hearing, as there are disputed issues of fact that need to be resolved. As this Court has repeatedly indicated, factual allegations as to the merits of a constitutional claim as well as to issues of diligence set forth in a Rule 3.851 motion must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996). Here, contrary to Appellee's assertion, the lower court erred in summarily denying Mr. Davis' motion.

ARGUMENT II

RECENTLY DISCOVERED EVIDENCE DEMONSTRATES THAT MR. DAVIS' CAPITAL CONVICTION AND DEATH SENTENCE ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE EVIDENCE ESTABLISHES THAT MR. DAVIS' RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES

CONSTITUTION AND HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS WERE VIOLATED, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED FALSE EVIDENCE OR THAT TRIAL COUNSEL WAS INEFFECTIVE IN HIS REPRESENTATION OF MR. DAVIS.

Initially, Appellee asserts that Mr. Davis has failed to "allege facts of due diligence", thus the allegations here do not meet the definition for newly discovered evidence (Answer at 16).

As explained in Argument I and in his initial brief, Mr. Davis disagrees with this assertion. Mr. Davis has made a facially sufficient showing of due diligence; he has alleged that he made previous attempts to contact these witnesses and the record does not conclusively refute these allegations. Under this Court's precedent, Mr. Davis is entitled to an evidentiary hearing. See e.g., Rivera, 995 So. 2d at 195-96 (Fla. 2008); Card v. State, 652 So. 2d 344, 346 (Fla. 1995); Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996)

Appellee also claims that Mr. Davis has failed to establish that the State withheld material and exculpatory evidence (Answer at 17). As with the diligence issue, Appellee appears to be applying a standard of proof to Mr. Davis which would be applicable only subsequent to an evidentiary hearing. There is no requirement, nor would it make any logical sense, for Mr. Davis to have to establish a Brady violation prior to presenting testimony and evidence in support of his claim. At this juncture, Mr. Davis has plead facts which, when taken as true, would entitle him to relief. See Rivera, 995 So. 2d at 197 ("Under our postconviction rules, we must accept Rivera's claims as true and direct an evidentiary hearing on their validity unless the record *conclusively* demonstrates that Rivera is not entitled to relief.").

Appellee also claims that "Davis does not explain how the new statements are admissible" (Answer at 24). This assertion is inaccurate. As Mr. Davis stated in his initial brief, in Davis v. Alaska, 415 U.S.308, 315 (1974), the United States Supreme Court recognized "that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Here, Rieck's and Castle's motive for testifying as they did was information that was necessary for the jury to hear in assessing whether or not the witnesses were truthful. See Davis, 415 U.S. at 317-18 ("The claim of bias which the defense sought to develop was

admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, cf. *Alford v. United States*, 282 U.S. 687 (1931), as well as of Green's possible concern that he might be a suspect in the investigation")(footnote omitted).

Similar to the lower court, Appellee proceeds to argue against Mr. Davis' claim on the basis that Rieck's and Castle's most recent statements conflict with their previous testimony and statements (See e.g., Answer at 30-31)("Her [Castle's] trial testimony was consistent with the lengthy transcribed statement she gave Detective Rhodes on July 2, 1985. The statement refutes her claim, made over twenty-two years later, that she was in any hurry to get out of the interview or to say whatever they wanted to hear. Castle's statement does not explain why she testified the same way at trial, under oath, if she knew her interview statement was not true."); (Answer at 32)("Rieck's unnotarized Declaration, declared under penalty of perjury, now claims that Mark 'had to have been very drunk' when he came to get socks about 11:30 or 12 at night because 'he had been drinking all day.' Her declaration does not mention riding with Mark driving them in Mark's car to go pick up Carl's car about 4:30 to 5:00 P.M., or giving him money to go get McDonald's for their dinner and eating with him.").

Appellee's argument ignores the fact that an evidentiary hearing is warranted precisely because Rieck's and Castle's latest statements do not match their earlier testimony.[10] Contrary to Appellee's assertion, such contradictions constitute disputed issues of fact, thereby necessitating an evidentiary hearing. Maharaj, 684 So. 2d at 728.

CONCLUSION

Mr. Davis submits that this matter should be remanded to the circuit court for a full and fair evidentiary hearing.

[10] At trial, the State relied upon Rieck and Castle to establish premeditation. Without evidence of premeditation, the case against Mr. Davis was entirely circumstantial based on Mr. Davis' statement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to Candance Sabella, Senior Assistant Attorney General, Concourse Center #4, 3507 E. Frontage Rd., Tampa, Florida 33607, on April 13, 2009.

CERTIFICATE OF FONT

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