IN THE SUPREME COURT OF FLORIDA

ANTHONY SPANN,

Appellant,

vs.

CASE NO. SC09-2330
(L. C. Case No. 97-1672-CFB)

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

On Direct Appeal from an Amended Final Order of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida, denying Spann's Successive Motion for Post Conviction Relief from Judgments and Sentences, including a Death Sentence.

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PRELIMINARY STATEMENT

Spann was the defendant in the trial court and is the appellant here. He was originally a co-defendant with Lenard Philmore, but the cases were severed for trial. He will be referred to as "Spann" or "the defendant." The State of Florida was the plaintiff in the trial court and is the appellee here. Lenard Philmore will be referred by his full name or "Philmore."

The state uses a somewhat different method of referring to the record on appeal. Spann therefore reiterates that the present record is in six volumes. Volume 1 contains the master index and progress docket sheets. The pages in this first volume are not numbered.

Volume 2 contains the transcript (pages 1-143) of the September 1, 2009, evidentiary hearing held on Spann's successive motion for post conviction relief. Volume 2 also contains the transcript (pages 144-175) of the *Huff* hearing held on July 8, 2009, regarding the successive motion. This volume will referred to by the letter "R," a volume number, the letters "PCT" (for post conviction transcript) and by a page number located in the upper right hand corner of each page. (The state refers to this part of the record in part by the letters "PCR" for post conviction record.)

Volumes 3-6 contain the pleadings, orders and evidence related to Spann's successive post conviction motion. The clerk of the circuit court

has provided a sequential page number (beginning with page 176 in order to coincide with the numbers of the pages referenced in Volume 2) in the bottom right hand corner of each page. Reference to this part of the record will be by the letter "R" followed by an appropriate volume and page number. The state's reference to this part of the record is by the letters "ROA."

The record on appeal regarding Spann's original state court trial is also a part of this record. It will be referred to as "ROA" followed by an appropriate volume and page number.

Spann's Initial Brief of Appellant will be referred to as "IB." The state's Answer Brief of Appellee will be referred to as "AB."

All emphasis is added unless indicated otherwise.

AS TO THE STATE'S STATEMENT OF THE CASE AND OF THE FACTS

The state's Answer Brief does not specifically challenge the contents of Spann's Statement of the Case and of the Facts as set forth on pages 8-23 of the Initial Brief of Appellant. Nor does it include specific subsections as to the nature of the case, jurisdiction of this Court and disposition in the lower tribunal. Instead, it describes with particularity and at length the course of the proceedings leading up to the trial court's December 31, 2009, amended final order (R3/312-24) that denied Spann's May 4, 2009 successive motion for post conviction relief (R3/176-191) based upon newly discovered evidence and filed per the provisions of Florida Rule of Criminal Procedure 3.851(e)(2).

Nature of the Case

This is a direct appeal of the aforementioned December 31, 2009, amended final order (R3/312-24) denying Spann post conviction relief from his judgments and sentences, including a death sentence.

Jurisdiction

Spann reiterates that the Supreme Court of Florida has jurisdiction to resolve the issues raised herein because this is a direct appeal of a final order that denied Spann post conviction relief in a capital case. Art. V, Sec. 3(b)(1), Fla. Const. "We have jurisdiction over all death penalty appeals."

Parker v. State, 873 So. 2d 270, 275, f. 1 (Fla. 2004). This includes jurisdiction of appeals from final orders denying post conviction relief in capital cases. *Parker v. State*, 542 So. 2d 356-57 (Fla. 1989).

The State's Statement of the Course of the Proceedings in the Lower Tribunal

The state does not take issue with Spann's statement of the course of the proceedings in the lower tribunal as set forth on pages 8-13 of the Initial Brief. Likewise, Spann does not take issue with the state's rendition of same as set forth on pages 1-11 of the Answer Brief.

Disposition in Lower Tribunal

There is no disagreement here. On November 13, 2009, the trial court rendered a final order denying the successive post conviction motion based upon the Philmore affidavit and recantation. (R3/282-294.) On December 8, 2009, Spann filed a notice of appeal to this Court. (R3/295-309.) On December 31, 2009, the trial court rendered an amended order denying the successive motion correcting a minor factual mistake. (R3/312-24.) On January 1, 2010, Spann filed an amended notice of appeal. (R3/334-36.)

As to the State's Statement of the Facts

The Facts as found by the Florida Supreme Court after the Direct Appeal of the Judgments of Conviction and Sentences.

Both parties set out the essential findings of this Court regarding the original direct appeal of Spann's judgments and sentences in their briefs, and there is no disagreement in that regard. The state quotes this Court's opinion in *Spann v. State*, 857 So. 2d 849-51, on pages 2-4 of the Answer Brief.

The Evidence Presented During the September 1, 2009, Evidentiary Hearing

The state does not take issue with Spann rendition of the testimony and documentary evidence presented during the evidentiary hearing on Spann's successive post conviction motion as set forth on pages 16-21 of the Initial Brief. The state references this testimony and evidence in the Argument section of its Answer Brief, which will be addressed below.

The Trial Court's Findings after the Post Conviction Hearing on the Newly Discovered Evidence Claim

Neither party contests the other party's rendition of the findings of the trial court that ultimately denied Spann's successive post conviction motion based upon the Philmore recantation. Of course, Spann disagrees with the findings themselves for the reasons set forth in the Initial Brief and this Reply Brief.

THE STATE'S SUMMARY OF THE ARGUMENT

The state's summary of the argument (AB, p. 12) is quite brief, consisting of the conclusion that the trial court was justified in finding that Philmore's recantation was not credible. Therefore, according to the state, it was not necessary for the trial court to reach the prejudice prong of the inquiry. And, even if that had become necessary, according to the state, "Spann has not carried his burden of proving he probably would be acquitted or received a life sentence on retrial." (Ibid.)

Spann asks that the state's summary not be credited because the trial court in denying the successive post conviction motion gave too much weight to intangible, subjective features of Philmore's testimony (such as the trial court's findings as to how seriously he took the hearing proceedings) that are not subject to proof or disproof for that matter. Furthermore, the trial court was mistaken in finding that Philmore's recantation testimony was inconsistent with the other facts in the case. Therefore, this Court should reverse the final order (R3/312-24) that denied Spann's successive post conviction motion based upon said recantation.

ARGUMENT

Standard of Appellate Review

The state does not take issue with Spann's statement of the standard of appellate review as set forth on page 25 of the Initial Brief of Appellant. By the same token, Spann does not take issue with the state's statement in this regard found on pages 13 and 14 of the Answer Brief. The parties agree that this Court reviews an order of the trial court that denies a post conviction claim of newly discovered evidence in a capital case *de novo* to determine whether the lower tribunal abused its discretion. *Hurst v. State*, 18 So. 3d 975, 992-93 (Fla. 2009). The newly discovered evidence must have been unknown to the trial court, the defendant and counsel at the time of trial and not susceptible of being known by the exercise of due diligence. The newly discovered evidence must be of such a nature that, had it been presented at trial, it would probably have produced an acquittal. The reviewing court must give deference to the trial court regarding its factual determinations, and those factual findings will not be disturbed so long as there is competent and substantial evidence in the record to support them. *Fototopolus v. State*, 838 So. 2d 1122 (Fla. 2002). "When the trial court rules on a newly discovered evidence claim after an evidentiary hearing, we review the trial court's findings on questions of fact, the credibility of

witnesses and the weight of the evidence for competent, substantial evidence." *Jones v. State*, 709 So. 2d 512, 521.

Merits

Point on Appeal: The trial court erred in determining that Philmore's post conviction testimony was not credible.

Spann notes first that the trial court specifically found that the Philmore recantation constituted newly discovered evidence under Florida Rule of Criminal Procedure 3.851(e)(2). (R3/317.) Thus, that is not an issue. However, it also found that the evidence submitted in support of the motion (Philmore's recantation) was not credible. (R3/317, 323.)

In support of the trial court's determination, on pages 14-17 of the Answer Brief, the state makes the point that, given the fact that recantation evidence is inherently unreliable, a defendant seeking relief on the basis of that evidence has an uphill battle, citing *Jones v. State*, 709 So. 2d 512, 521-22 (Fla. 1009). Spann concedes the point. However, the newly discovered evidence involving the recantation of testimony offered by a state witness does not have to be so strong as to conclusively show that it would have affected the guilty verdict in order for Spann to be entitled to relief. Instead, the new evidence (recantation) must be sufficiently believable to "probably" affect that verdict. *Spaziano v. State*, 660 So. 2d 1363, 1365 (Fla. 1995). "Thus, we hold that henceforth, in order to provide relief, the newly

discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial." *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991), emphasis added. A defendant can show prejudice if the newly discovered evidence is believable and if it "weakens the case against (the defendant) so as to give rise to a reasonable doubt as to his culpability." *Jones v. State*, 709 So. 2d 512, 526. As far as the sentence of death is concerned, prejudice is shown if the newly discovered evidence would probably yield a less severe sentence. *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991); *Williams v. State*, 961 So. 2d 299 (Fla. 2007).

Spann also agrees with the state (AB 15-17) that a recantation does not necessarily entitle Spann to relief per se. *Brown v. State*, 381 So. 2d 690 (Fla. 1980). In fact recantations are highly suspect and must be found by the trial court to be true. *Armstrong v. State*, 642 So. 2d 730, 735 (Fla. 1994). In making its determination of the truthfulness of the recantation and whether it would more than likely affect a jury verdict, the trial court is to determine the credibility of the recanting witness as well as the entirety of the evidence presented at the original state court trial. *Jones v. State*, 709 So. 2d 512, 521-22 (Fla. 1998).

In this case, the trial court did not believe Philmore's recantation for a variety of reasons. (R3/312-24.)

One of the reasons emphasized by the trial court and the state in the Answer Brief was that the recantation was contrary to Philmore's trial testimony. For example, at trial, Philmore testified that he could not drive a stick shift vehicle -- then said that he could do so during the post conviction hearing. (AB, p. 19.) In other words, the state's position was that what Philmore said at the post conviction hearing must be false if it conflicted with what he said at trial. But this is inconsistent with the argument made by the state in its Answer Brief (AB pp. 33-5 including f. 8) to the effect that Philmore had shown a pattern of modifying his statements over time -- gradually and always getting closer and closer to the truth. That is, according to the state, fairly early in the process of being questioned by law enforcement, Philmore had a change of heart and began telling only that which was true. Mr. Bakkedhal for example was convinced that, beginning with his pretrial grand jury testimony, Philmore was always truthful thereafter. ("From that day forward, he gave -- testified before a Grand Jury, his testimony was virtually consistent."[1] (R2/PCT93.) Mr. Bakkedhal therefore put Philmore on the stand at the original trial and argued for Spann's conviction and for the imposition of the death penalty based largely (admittedly, not totally) upon that testimony. *See Spann v. State*, supra, 857

[1] Philmore's grand jury testimony, the state's Ex. 7 in evidence below, is found at R5/640-668.

So. 2d at 849-50, where this Court notes that Philmore testified against Spann at trial and describes some of what he testified to. If, according to the prosecutor, Philmore's *modis operendi* was to get closer to the truth each time he testified, why could he not be testifying honestly when he recanted?

The state also emphasizes the trial court's version of the time line of events set forth in a footnote on page 17-18 of the Answer Brief for the proposition that Philmore's most recent testimony was false. According to the trial court and the state, the time line was virtually unassailable since it was corroborated by a host of other witnesses. This included the trial court's rejection of Philmore's successive post conviction hearing testimony to the effect that before the offenses, he dropped Spann off in West Palm Beach and picked up Daryl Brooks between 7:00 a.m. and noon. This, according to the trial court, could not have occurred before Philmore and Spann left the motel and delivered their girlfriends to their homes between noon and 12:30 p.m." (Citation to the record by the trial court omitted; AB, p. 18.) Spann argues that this finding assumes that Toya Stevenson and Keyontra Cooper were telling the truth as to this part of the state and the trial court's time line. Their testimony was certainly suspect given their involvement in the case and obvious desire to cooperate with the state in order to avoid punishment as accessories after the fact. Furthermore, the state infers that these two

ladies were able to attest to much more than they actually knew about. The state admits in this regard that "(a)lthough Kiki and Toya were not privy to the criminal plans, they know of the plan to leave town." (AB, p. 30.)

Nevertheless, the state continues to argue that the trial court was correct in rejecting Philmore's post conviction testimony because his trial testimony was "consistent with the eye witness accounts." (AB 28.) This argument fails to acknowledge that the eye witness accounts did not actually identify Spann. For example, no one positively identified Spann at the abduction of Mrs. Perron. Nor was there was an eyewitness to the homicide except for Philmore. *See* Philmore's grand jury testimony, R5/653-58, where he notes that only he and Spann were present when Mrs. Perron was killed. While Spann's vehicle was observed at the scene of the pawnshop robbery, no one could positively identify Spann as being the getaway man during that event. This is because Sophia Hutchins, an alleged accomplice at the pawnshop robbery, did not testify at trial. Only Philmore, who also participated in that robbery, did so. (R6/642-43.) Nor did anyone positively identify Spann as being present at the scene of the abduction of Mrs. Perron. Martha Solis identified Spann's blue Subaru driven by a young, slim, light skinned black male near Mrs. Perron's residence and saw what she described as a woman with yellow skin and short hair in a Lexus

that was following the Subaru, but she could not identify either driver. (R3/246-47; ROA 22/2227-31.) The same is true regarding the bank robbery. Lysle Linsley saw Spann's Subaru near the Indiantown bank at about 2:00 p. m. on November 14, 1997, and Leo Gomez was almost struck by a gold Lexus carrying two black males speeding from the area. But again, neither witness could positively identify Spann. (R3/247; ROA 23/2282-83) Only Philmore testified that Spann participated in that crime. (R6/656-57) Perhaps this is why Mr. Bakkedhal described his supposedly "strong" case against Spann as nevertheless based upon evidence that was "circumstantial." (R2/PCT91.)

The lack of witness corroboration is most evident with regard to Spann's alleged participation in the actual shooting of Mrs. Perron as a basis for the imposition of the death penalty. Only Philmore testified that Spann gave him the go ahead to shoot Mrs. Perron. This established the requisite heightened *mens rea* to expose Spann to the death penalty. That is, even according to Philmore's trial testimony, Spann did not shoot the victim, Philmore did. This Court found in this regard based upon Philmore's trial testimony:

> They drove down an isolated road, and when they stopped, Spann motioned to Philmore, a motion that Philmore understood to mean that he should kill the woman. Philmore told the victim to go to the edge of a canal, but according to

> him, the woman instead came toward him. Philmore testified that he shot her in the forehead using a gun he had stolen the day before from the pawnshop. Philmore picked up the victim's body and threw it into the canal, and in the process got blood on his shirt.

Spann v. State, 985 So. 2d 1059, 1062 (Fla. 2008).

Without Philmore, there was no evidence to prove that Spann knew and approved of what Philmore intended to do. In *Enmund v. Arizona*, 458 U.S. 782 (1982) and *Tison v. Arizona,* 481 U.S. 137 (1987), the United States Supreme Court held that a codefendant found guilty of assisting the actual killer on a felony murder theory (in Florida, per the provisions of Section 782.04(1)(a), Florida Statutes), cannot be subjected to the death penalty unless the state can prove beyond a reasonable doubt that the codefendant knew about what the actual killer was going to do and approved of it or aided and abetted the actual killing. Philmore has now recanted that damning testimony. The trial court should have accepted the recantation because, unlike his trial testimony, Philmore had nothing to gain by recanting.

The state argues further in its Answer Brief that the trial court was correct in finding that Philmore's post conviction testimony was "evasive" and that he seemed by his demeanor not to take the proceedings seriously. (AB pp. 20-22; R3/320-24.) It is obviously difficult to assess a witness'

testimony based upon his or her demeanor. It would stand to reason that Philmore took the matter seriously enough to execute an affidavit and testify in a situation which would provide him with no benefit whatsoever. Philmore's post conviction hearing testimony was voluntary and unsolicited. The only thing he could gain would be a clear conscious by helping an innocent man. There was nothing in it for Philmore himself. His death sentence is not/will not be affected. Philmore had a reason to lie at trial -- in order to gain favor with the sentencing judge during the *Spencer* hearing that was yet to be held in his case. He had no reason to lie at the September 1, 2009, evidentiary hearing.

In *Johnson v. Singletary*, 647 So. 2d 106 (Fla. 1994), this Court addressed a situation where there was newly discovered evidence from witnesses (prison inmates) that someone other than the defendant was the actual wrongdoer in a homicide. This Court found in that regard at 110:

> Finally, Johnson submits the affidavits of four persons obtained less than a week ago which state that William "Buddy" Pruitt told them that he had actually killed Moulton during the course of a robbery and that Johnson was innocent. Pruitt is an alleged drug kingpin who recently died of a heart attack in federal prison. William Bonds and his ex-wife, Jean D. Corley, say that they stopped by to see Pruitt in 1984 and that he told them in considerable detail how he killed a Pensacola druggist during the course of robbing him. Pruitt said that there was another person on death row for the crime, but observed that it was "better him than me." Both Bonds and Corley said they did not tell anyone because they believed that Pruitt would kill them if

> they did. They have only now come forward because of Pruitt's death.
>
> Kenneth L. Wood and Bill Lawley, inmates in the same prison, say that the two of them talked to Pruitt about the Moulton killing a week before Pruitt died. They were discussing Johnson's impending death warrant, and Pruitt said that Johnson was going to be executed for a murder which Pruitt had committed. When asked what he was going to do about it, Pruitt said he would do nothing or "they will fry me." Both of them claim that they knew they would be killed if they said anything as long as Pruitt was alive.
>
> **********
> Johnson alleges that Pruitt met the description of the killer described by Summitt. (Footnote omitted.) Johnson contends that he is entitled to an evidentiary hearing so that these affiants could testify and at which he could demonstrate the corroborating circumstances sufficient to establish the trustworthiness of Pruitt's statements. In view of the impending death warrant and at least a possibility of factual innocence, we are inclined to agree. Thus, we have concluded to remand the case for an evidentiary hearing limited solely to the claims surrounding Pruitt's alleged confessions.
>
> **********
>
> *In addition, we have reexamined the transcript of the original trial and find that the State's case was based almost entirely upon the eyewitness testimony of Gary Summitt. While Summitt positively identified Johnson as the killer, there was no other evidence effectively tying him to the crime*.

Emphasis added. This Court granted an evidentiary hearing on this newly discovered evidence.

The *Johnson* case is similar to the case at bar where Philmore was clearly the key state witness in the case, and absent his testimony, it would

have been difficult if not impossible to convict Spann and sentence him to death.

CONCLUSION

Wherefore, this Court is asked to:

1. Reverse the trial court's amended final order of December 31, 2009 (R3/312-24) that denied the Rule 3.851(e)(2) successive motion for post conviction relief based upon the Philmore recantation.

2. Vacate and set aside all of Spann's judgments of conviction and sentences, including the death sentence.

3. Grant Spann a new trial.

4. Grant Spann such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been sent by regular United States mail and by electronic mail this 30th day of September, 2010, to counsel referenced below:

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief was prepared using a 14 point Times New Roman font not proportionally spaced in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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