

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-23

LOWER TRIBUNAL NO. DCA: 3D09-1269

MARCO NORDELO,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL, THIRD DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Procedural History

The Petitioner, Marco Nordelo, seeks review in this Court following the Third District Court of Appeal's affirmance of the trial court's order denying his post-conviction motion based on newly discovered evidence. The pertinent facts as found by the district court were as follows:

Nineteen years ago, a jury found Marco Nordelo guilty of armed robbery of a convenience store and sentenced him to life in prison as a habitually violent offender. Before Nordelo's trial began, his codefendant entered a plea of no contest and was sentenced to twenty-five years in state prison.

Two years ago, Nordelo filed a Motion for New Trial Based on Newly Discovered Evidence and Prosecutorial Misconduct Pursuant to Rule 3.850. Attached to the motion was an affidavit from Nordelo's codefendant, a nineteen-time convicted felon, alleging that Nordelo had not participated in the robbery and naming a different co-perpetrator. The codefendant claimed that he did not come forward with this information sooner because he was afraid that the State would take away his plea offer.

At a hearing on the motion, the trial court ruled that "[t]he evidence could have been obtained through due diligence simply" and that just because the codefendant's custodial status changed and he "decided to come forward does not render the evidence newly discoverable." The trial court entered a written order "finding that the evidence as to both counts is not newly discovered and could have been obtained through due diligence" and that the allegation of prosecutorial misconduct was successive to one of Nordelo's prior Motions for Post-Conviction relief. The order directed the clerk to attach necessary record excerpts from the file to support the ruling. Nordelo now appeals the part of the trial court's order denying his motion for a new trial based on newly discovered evidence, arguing that the case must be remanded for an evidentiary hearing.

Nordelo v. State, 47 So. 3d 854, 856 (Fla. 3d DCA 2010).

The Third District affirmed the trial court's summary denial, noting that the Petitioner had not satisfied the requirements for newly discovered evidence as set forth in *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998); *see also Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324-25 (Fla. 1994); *McLin v. State*, 827 So. 2d 948, 956 (Fla. 2002). The Third District distinguished the Petitioner's case from those situations involving the prior refusal of a witness to testify or the recantation of a codefendant. Further, under the applicable case law concerning summary denial of post-conviction motions, the Third District held the Petitioner's allegations were facially insufficient and conclusively refuted by the record. 47 So. 3d at 856-58.

Judge Cope filed a dissenting opinion, arguing that the Petitioner's post-conviction motion was legally sufficient and should either have been remanded for an evidentiary hearing or affirmed with leave to amend the motion. *Nordelo*, 47 So. 3d at 858-62. On October 28, 2010, following the Third District's affirmance, the Petitioner filed a motion for rehearing/motion for rehearing en banc, which was denied on November 18, 2010. The Petitioner now seeks discretionary review in this Court on the basis of conflict jurisdiction, and the State has filed this Brief.

SUMMARY OF ARGUMENT

The decision of the Third District Court of Appeal does not expressly and directly conflict with the cases cited by the Petitioner.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT APPEAL BELOW IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE HOLDINGS IN *GATLIN v. STATE*, 24 So. 3d 743 (Fla. 2d DCA 2009); *SPERA v. STATE*, 971 So. 2d 754 (Fla. 2007); *HOFFMAN v. STATE*, 571 So. 2d 449 (Fla. 1990); *FOSTER v. STATE*, 810 So. 2d 910 (Fla. 2002); *PEEDE v. STATE*, 748 So. 2d 253 (Fla. 1999); *JACOBS v. STATE*, 880 So. 2d 548 (Fla. 2004); AND *DAVIS v. STATE*, 26 So. 3d 519 (Fla. 2009).

As a general rule, conflict jurisdiction exists when a decision of a court of appeal expressly and directly conflicts with another court of appeal or the Florida Supreme Court “on the same question of law.” Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). “Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.” *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986); *see also The Florida Bar v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988). A dissenting opinion, even though it represents the opinion of at least one member of the panel, cannot be considered because it is not the opinion of the court and therefore has no precedential value.

In this case, the Petitioner’s jurisdictional brief relies on the conclusion in Judge Cope’s dissent, alleging that his case should either have been remanded for an evidentiary hearing or affirmed with leave to amend the motion. The Petitioner alleges that this Court has jurisdiction because the Third District’s majority opinion

conflicts with, or misapplies, the holdings in *Spera*, *Gatlin*, *Hoffman*, *Foster*, and *Peede*.

Under *Spera*, a defendant who files an insufficient motion under Rule 3.850 should be given at least one opportunity to correct the deficiency, unless it is apparent that the defect cannot be corrected. *Spera*, however, explains that an amended post-conviction motion is unnecessary where a defendant's allegations are conclusively refuted by the record. Likewise, a post-conviction motion can be amended but only in good faith. 971 So. 2d at 761-62; *see also Gatlin*, 24 So. 3d at 745 (citing *Spera*).

The holding in *Hoffman* explains that where a defendant's post-conviction motion is summarily denied, without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion. 571 So. 2d at 450. Likewise, *Foster* and *Peede* provide that in order "[t]o uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, [a reviewing court] must accept the defendant's factual allegations to the extent they are not refuted by the record." *Foster*, 810 So. 2d at 914 (citing *Peede*, 748 So. 2d at 257).

In the instant case, the Third District noted that the Petitioner had argued that the trial judge erred in failing to attach portions of the record to her order in

contravention of Rule 3.850(d). However, the majority explained that “that portion of Rule 3.850(d) regards only those instances when the denial is not predicated on the legal insufficiency of the motion on its face.” *Nordelo*, 47 So. 3d at 858.

The majority in *Nordelo* also explained that under *Peede*, the Petitioner’s claims were either facially invalid or conclusively refuted by the record: First, the affidavit provided no information that neither the Petitioner nor his counsel could have discovered at the time of trial through the exercise of due diligence. Second, the State’s evidence at trial included the victim’s identification of both defendants from photo lineups with one hundred percent certainty. Further, the codefendant, Lopez, claimed that he (Lopez) was the driver of the white car in which he and the Petitioner had been stopped, while the record showed that the arresting officer testified – and the Petitioner had never disputed – that the Petitioner was driving at the time of his arrest. *Nordelo*, 47 So. 3d at 858. Thus, as the Petitioner’s claims were invalid or refuted under the applicable standards, and as the majority applied those principles to the Petitioner’s motion, there was no express and direct conflict.

The Petitioner, nevertheless, argues that under *Foster* and *Peede*, the Third District misapplied this Court’s precedent because the court was required to accept as true Lopez’s allegation in the affidavit that he was ignorant of the law and afraid that his plea would be “taken away” by the State if he testified. Here, however, the State notes that *Foster* and *Peede* require a court to accept a defendant’s factual

allegations but only “to the extent they are not refuted by the record.” *Foster*, 810 So. 2d at 914.

In the instant case, the Third District’s majority opinion alluded to the fact that the trial court had already accepted Lopez’s plea and sentenced him before the Petitioner’s trial began. *Nordelo*, 47 So. 3d at 856. The plea neither required Lopez to testify for the State nor to refrain from testifying for the Petitioner. *Id.* at 857. In addition, neither the Petitioner nor his codefendant had alleged in the motion or affidavit that they were coerced or threatened by anyone, including the State. *Id.* Thus, even if it was true that Lopez was a layperson, this did not change the fact that Lopez still could have come forward with his “newly discovered” information at any time, and the State had no authority to withdraw the offer or vacate the plea. In light of the fact that Lopez had already been sentenced, without any threats or coercion from the State and without any requirement which prohibited Lopez from testifying on behalf of the Petitioner, Lopez could not have been afraid that his plea would be in jeopardy. As these allegations were refuted by the record, the Third District’s holding did not misapply the law or conflict with *Foster* and *Peede*.

Next, the Petitioner alleges that the majority opinion in *Nordelo* conflicts with this Court’s decision in *Jacobs*, 880 So. 2d at 549-55, which involved the summary denial of a 3.850 motion alleging ineffective assistance of counsel. Specifically, the Petitioner alleges that in *Nordelo*, the majority relied upon the

overwhelming evidence against the defendant. The Petitioner alleges that this was a “clear indication that the court reviewed not only the facial sufficiency of the claim itself, but also the record of the trial.” (*See* Petitioner’s Initial Brief at 9). Likewise, the Petitioner alleges that the evidence was insufficient to conclusively rebut his claim of newly discovered evidence. *Id.*

In *Jacobs*, this Court distinguished between post-conviction claims that are facially insufficient and those that are facially sufficient but are also conclusively refuted by the record. 880 So. 2d at 550-51. As to claims that are insufficient, this Court explained that “[i]t would logically follow that if no valid claim is alleged, the court may deny the motion outright, and the court need not examine the record.” 880 So. 2d at 550. On the other hand, this Court explained that if the motion is facially sufficient, “the court may then review the record. If the record *conclusively* refutes the alleged claim, the claim may be denied. In doing so, the court is required to attach those portions of the record that conclusively refute the claim to its order of denial.” *Id.*

In the instant case, as noted above, the majority in *Nordelo* cited to *Peede*, holding that in order “[t]o uphold the trial court’s summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record.” *Nordelo*, 47 So. 3d at 858. The Third District provided two separate and alternative reasons for upholding the summary denial. First, in explaining that

the Petitioner's claim was facially invalid, the majority referred to the affidavit, not the entire record, which was permissible under *Jacobs*. Specifically, the majority opinion stated, "the affidavit provides no information that neither Nordelo nor his counsel could have discovered at the time of trial through the exercise of due diligence." *Id.*

The alternative reason for affirmance was that the Petitioner's claim was conclusively refuted by the record. As indicated in *Jacobs*, such a finding requires a court to consider first the facial sufficiency of the motion. If a defendant's motion is facially sufficient, then a court may review the record for relevant portions which support a summary denial. In this case, the *Nordelo* court noted that there was overwhelming evidence in the record, including the fact that the victim had identified both defendants with one hundred percent certainty. Further, the credibility of the affidavit was suspect; Lopez claimed that he was the driver of the car in which he and the Petitioner had been stopped, while the record showed that the arresting officer testified – and the Petitioner had never disputed – that the Petitioner was driving at the time of his arrest. 47 So. 3d at 858. As the majority was permitted to consider the record under *Jacobs*, there was no conflict.

Finally, the Petitioner alleges that an evidentiary hearing should have been held to assess the credibility of Lopez's statements and that the failure to do so conflicted with this Court's decision in *Davis*, a case involving witness recantation.

In *Davis*, this Court explained that “[t]he determination of whether the statements are true and meet the due diligence and probability prongs of *Jones II* usually requires an evidentiary hearing to evaluate credibility *unless* the affidavit is inherently incredible or obviously immaterial to the verdict and sentence.” 26 So. 3d at 527 (emphasis added). There, the post-conviction court erroneously struck a defendant’s motion for failing to properly plead due diligence – i.e., failure to provide specific details about previous efforts undertaken to locate and interview witnesses and failure to provide an explanation as to why the witnesses would be difficult to locate when they resided in the defendant’s home town. 26 So. 3d 528.

In the instant case, unlike *Davis*, the Petitioner’s motion was not denied for a mere pleading deficiency; the majority in *Nordelo* noted that under the first prong of *Jones*, the evidence must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known of it by the use of diligence. Applying those standards to the facts of this case, the *Nordelo* court recognized that the affidavit could not have been newly discovered evidence because the information was either known to or easily discoverable by the Petitioner or his attorney; Lopez was never called as a witness; and the information could have been known by due diligence. As such, *Nordelo* was different from the recantation scenario in *Davis*; the affidavit was inherently incredible or immaterial to the verdict, and there was no conflict.

CONCLUSION

WHEREFORE, the State respectfully requests this Court to decline discretionary jurisdiction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of the Respondent on Jurisdiction was mailed to Marco Nordelo, D.C. # 065315, Mayo Correctional Institution, 8784 West U.S. Highway 27, Mayo, Florida, 32066, this ___ day of January 2011.

NICHOLAS MERLIN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

NICHOLAS MERLIN
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