IN THE SUPREME COURT OF FLORIDA
CASE NO. SC11-23

MARCO NORDELO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF

On Discretionary Review of a Decision from the Third District Court of Appeal Rendered in an Appeal from the Circuit Court for Miami-Dade County, Florida

L.T. Case Nos. 3D09-1269, 90-25016

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules

INTRODUCTION

Petitioner Marco Nordelo filed a rule 3.850 motion[1] for post-conviction relief based upon a newly-obtained affidavit from Angel Lopez, the admitted perpetrator of the armed robbery for which Petitioner is serving a life term, stating (1) Petitioner was not his accomplice, and (2) he "refused to testify" until he completed his sentence because he feared the State would renege on his plea agreement. This newly-discovered evidence surely would have changed the outcome of Mr. Nordelo's trial. His conviction rested on belated eye-witness identification by the robbery victim who suffered a head injury during the robbery causing a loss of consciousness and memory impairment, together with police testimony (held inadmissible on direct appeal) purporting to link the arrest of Mr. Nordelo and Lopez in a "white car" at some date after the robbery with a "white car" glimpsed by the victim down the street from the robbery.

Lopez's affidavit further establishes that the State's use of proof about Petitioner's arrest in a "white car" constituted prosecutorial misconduct because the affidavit showed that this car could not have been at the crime scene because it was stolen a day after the robbery, which the police would have known.

The State persuaded the trial court and the Third District Court of Appeal, however, to reject Mr. Nordelo's motion without an evidentiary hearing or leave to

[1] Fla. R. Crim. P. 3.850

amend on several grounds: (1) Petitioner previously asserted his claim of prosecutorial misconduct and was legally foreclosed from asserting it again; (2) Petitioner failed to allege Lopez was previously unwilling to testify; (3) Lopez's affidavit was contradicted by overwhelming evidence at trial; and (4) the affidavit was inherently incredible. We showed in our Initial Brief that these arguments are groundless. In its Answer Brief, the State has failed to overcome our showing and has actually confirmed the substance of each one of our arguments.

ARGUMENT

A. The State Committed Prosecutorial Misconduct.

We showed in our Initial Brief that the State's assertion below that Petitioner made the same claim of prosecutorial misconduct before was wrong. His current claim is based on Lopez's recently obtained affidavit.

In its Answer Brief, the State makes no effort whatsoever to defend or substantiate its erroneous statement to the trial court that Mr. Nordelo made the same claim of prosecutorial misconduct before, and there is no record basis whatsoever to support this assertion. Petitioner's claim of prosecutorial misconduct should therefore be taken as conceded.

B. Lopez Was Previously Unavailable as a Witness.

As we discussed in our Initial Brief, Petitioner sufficiently alleged that he could not have obtained Lopez's testimony previously in the exercise of due

diligence because Lopez himself states he refused to testify until he completed his sentence because he feared the State would renege on its plea agreement.

In its Answer Brief, the State admits that the case law treats as newly discovered evidence "the testimony of defendants who were previously unwilling to testify." (AB, p. 6). The State acknowledges that Lopez stated "in his affidavit that he feared coming forward as a witness for the Petitioner" previously due to his concern that this "could adversely affect his sentence." (AB, p. 8). The State goes so far as to concede that what "emerges from the allegations in Nordelo's Rule 3.850 motion and the supporting affidavit from Lopez is that Lopez refused to testify at trial – either for the State or the defense." (AB, pp. 14-15) (emphasis added). The State contends, nonetheless, that Petitioner failed to meet his burden of sufficiently alleging Lopez's previous unavailability because Petitioner did not allege that Lopez was actually "coerced or threatened by anyone into previously withholding his information." (AB, p. 12). This argument is meritless.

As a threshold matter, the State concedes that "where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." (AB, p. 11), quoting *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999). Here, the State persuaded the trial court to deny Petitioner an evidentiary hearing. Therefore, we must accept as true Petitioner's allegations based on Lopez's sworn affidavit that Lopez in fact "refused to testify" at trial.

Moreover, consistent with this affidavit, Petitioner's counsel represented below that Mr. Nordelo's trial counsel asked Lopez to testify at trial, and he refused. (R. 65-66). This should be dispositive of the issue whether the content of Lopez's affidavit should be treated as "newly discovered" evidence, at least for purposes of setting an evidentiary hearing to explore due diligence further, if need be. *See Davis v. State*, 26 So. 3d 519, 528 (Fla. 2010) (determining due diligence sufficiently pleaded by considering statements made by counsel during *Huff*[2] hearing in conjunction with those assertions in the post-conviction motion). Certainly, Petitioner has alleged sufficient grounds to establish his entitlement to a hearing at this stage of the case. *See, e.g.*, *McLin v. State*, 827 So. 2d 948, 956 (Fla. 2002) (remanding for evidentiary hearing based on affidavit of eyewitness stating defendant was not present at the murder scene and holding trial court improperly determined untruthfulness of affidavit by failing to hold evidentiary hearing to evaluate credibility of affiant); *Johnson v. Singletary*, 647 So. 2d 106, 110-11 (Fla. 1994) (finding affidavits identifying someone other than defendant as true perpetrator qualified as newly discovered evidence, where State's case based on testimony of eyewitness, with no corroborating evidence); *Kendrick v. State*, 708 So. 2d 1011 (Fla. 4th DCA 1998) (treating as newly discovered evidence codefendant's sworn testimony that exculpated defendant and resulted in

[2] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

conflicting evidence of defendant's guilt).

Contrary to what the State contends, Petitioner's allegations about Lopez's previous refusal to testify are certainly not "refuted by the record." In fact, the State admits that "the content of any conversation that may have taken place prior to trial between the defendant's counsel and Mr. Lopez would not be included in the record." (AB, p. 4). Despite its representations about what ostensibly is in the record and promising to provide supporting record materials, the State never submitted any record evidence contradicting Lopez's sworn testimony that he had refused to testify for Mr. Nordelo, or contradicting counsel's representation that Petitioners' trial counsel had unsuccessfully sought Lopez's cooperation to testify.

Further, the State admits in its Answer Brief that "Lopez was not called as a witness by either side." (AB, p. 4) (emphasis added). This confirms rather than refutes Petitioner's assertion that Lopez refused to testify at trial about the armed robbery. The State is adamant, of course, that Petitioner robbed the convenience store with Lopez. At the time of trial, the State must have recognized that its reliance on the eyewitness identification by the store clerk who was rendered unconscious during the robbery and suffered a loss of memory stood on shaky ground. This is why the State sought to shore up its case with improper testimony by a police officer calculated to persuade the jury that the white car Petitioner was using at a later date was the same white car that the store clerk saw.

If the State believed that Lopez could offer evidence incriminating Mr. Nordelo, the State would have required him to testify as a State's witness as a condition of his plea agreement. Thus, if anyone knew previously that Lopez might be willing to help Petitioner, it would have been the State, not Mr. Nordelo. The State's decision not to call Lopez at trial is telling proof that Lopez was not willing to testify for either side. Forcing him to take the stand would have been at best a futile act. At worst, it would have been playing with fire, given his recalcitrance, by conveying to the jury that Lopez was not willing or able to help the party who put him on the stand.

The State's argument that a witness should not be deemed unavailable unless the State coerced the witness not to testify is untenable. This may establish independent grounds for relief—prosecutorial misconduct. But it should not be necessary to prove that the State affirmatively suppressed exculpatory evidence as a precondition to using newly obtained evidence of actual innocence.

The State has cited no case imposing this extraordinary requirement. The State merely cites authorities where this condition existed, but the fact that police misconduct was involved in some (but not all) cases does not mean that the due diligence of the defense must be measured in every case by the corruption displayed by the State. In fact, courts have accepted as newly discovered evidence

testimony withheld for reasons sufficient to the witness absent any coercion by the State. *See, e.g., McLin, supra*; *Johnson v. Singletary, supra*.

In the final analysis, the State is left to argue that this Court should not accept as true Lopez's sworn statement that he was unwilling to testify at trial because his stated fear of retaliation by the State was irrational. This is different from the issue whether Petitioner sufficiently alleged the witness's previous refusal to testify. By this argument, the State is contending that Lopez's affidavit was inherently incredible. We address this issue below, but suffice it to say that it is hardly inherently incredible for a criminal defendant to distrust the State, and it is scarcely reasonable to expect a criminal defendant to know or rely upon what the State says it "legally" cannot do when it suits the State's own purposes.

C. There Was No "Overwhelming Evidence" of Guilt.

In its Answer Brief, the State persists in arguing that this Court should reject Petitioner's motion because Lopez's exculpatory testimony is contradicted by "overwhelming evidence" of Mr. Nordelo's guilt. As we showed in our Initial Brief, this argument founders on the procedural impediment that the State failed to submit any record evidence supporting it, and neither the trial court nor the Third District included with their orders any record materials supporting the State's assertion, which is legally required. In its Answer Brief, the State does not deny or

satisfactorily justify this procedural omission. This ground alone provides an independent basis to reverse and remand this case for further proceedings.

Moreover, the State admits that a rule 3.850 motion may be rejected without a hearing only if it is "inherently incredible" or "obviously immaterial to the verdict and sentence." (AB, p. 17). Each of the cases and examples the State discusses (at AB, pp. 17-20) fits these criteria. Specifically, in each case the newly discovered evidence did not contradict the core evidence the State used at trial and therefore could have been credited by the jury without diminishing the force of the evidence used to convict. *See, e.g., Rutherford v. State*, 926 So. 2d 1100 (Fla. 2006) (finding no probability that witness' affidavit suggesting she was involved in the murder for which defendant was convicted would produce an acquittal on retrial when considered along with evidence at trial consisting of testimony of multiple witnesses that overheard incriminating statements made by defendant and defendant's fingerprints and palm prints where victim was found). That is not the situation here, as Lopez's affidavit contradicts the only admissible evidence used to convict—the eyewitness identification by the store clerk who was struck from behind during the robbery, rendering him unconscious and impairing his memory.

Further, the State acknowledges that "where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." (AB, p. 11), quoting *Peede*, 748 So. 2d at 257. In this case,

however, the State induced the lower courts to deny an evidentiary hearing by using a different and erroneous legal standard—a standard that preempts the very purpose of the hearing Petitioner requested. In the State's own words, "by reviewing the totality of the evidence that had been presented at trial, the Third District compared it to the new evidence, and concluded, by weighing the two, as did the lower court, that the Petitioner did not demonstrate that the new evidence, if presented to the jury, would probably have affected the outcome of the trial." (AB, pp. 16-17) (emphasis added). The State thus admits that the lower courts did not employ a facial sufficiency standard. Rather, the State induced them to become immersed in all the evidence, to engage in the weighing of conflicting evidence, and to make fact findings.

To justify this standard, the State relies upon this Court's directive in *Jones v. State*, 591 So. 2d 911 (Fla. 1991) ("*Jones I*"), that "in determining whether [newly discovered] evidence compels a new trial, the trial court must 'consider all newly discovered evidence which would be admissible,' and must 'evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial.'" *Id*. at 916. What the State fails to disclose is that this Court made clear in *Jones I* that the foregoing standard applies to the trial court's evaluation of newly discovered evidence after a full evidentiary hearing. In *Jones I* itself, the Court concluded that it was unable to determine whether the

moving party's newly discovered evidence warranted a new trial without an evidentiary hearing. Here is the full context of what the State quotes only selectively:

> [W]e cannot be sure whether Jones' motion should be denied. On the face of the pleadings, we cannot determine whether some of the evidence can properly be said to be newly discovered. Moreover, we cannot fully evaluate the quality of the evidence which demonstrably meets the definition of newly discovered evidence. Therefore, we believe it necessary to have an evidentiary hearing on the claims that are based on newly discovered evidence. At the hearing, the trial judge should consider all newly discovered evidence which would be admissible and determine whether such evidence, had it been introduced at trial, would have probably resulted in an acquittal. In reaching this conclusion, the judge will necessarily have to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial.

Id. at 916 (emphasis added). Use of the wrong legal standard by the Third District and the trial court compels reversal of the decisions below and a remand so that the trial court can conduct a full evidentiary hearing, as this Court directed in *Jones I*.

As we have described, having encouraged the trial court and the Third District to consider and "weigh" the totality of the evidence adduced at trial against Petitioner's newly discovered evidence, the State failed to submit the full record from Mr. Nordelo's trial. Instead, the State presented its one-sided characterization of the evidence without supporting materials it promised to file.

In any event, the State cannot prevail even under the improper standard it proposes, and even based on the limited information in this record about the trial.

In arguing that the evidence of guilt is "overwhelming," the State argues that "if there were 75 witnesses at the scene, and at trial, all 75 witnesses identified the perpetrators . . . and there was overwhelming evidence of fingerprints and DNA, an evidentiary hearing would be unnecessary, where years later a single witness comes forward with a 'newly discovered' affidavit that says that the defendant was with him many miles away." (AB, p. 17). Whether this argument is valid or not (perhaps in these extreme circumstances, the newly discovered evidence might be deemed "inherently incredible"), the State's hypothetical is a far cry from this case.

Turning to the actual facts of this case, the State admits there was only one eyewitness, namely, the robbery victim, who "lost consciousness momentarily" after he was struck from behind by the assailant. (AB, p. 21). In fact, the victim admitted he suffered memory loss afterwards. (R. 37). He was first asked to identify Mr. Nordelo "[a]pproximately one month after the robbery" from a photo lineup. (AB, p. 21). There was no fingerprint evidence, no DNA evidence, and no other evidence linking Mr. Nordelo to this crime.

Faced with this paltry proof of guilt, the State again attempts to shore up its case with the testimony of the police officer about the stolen "white car" that the Third District held on direct appeal should never have been admitted. The State argues that this improperly admitted evidence should be considered part of the totality of evidence constituting "overwhelming" evidence of guilt. (AB, pp. 21-

22). On this basis, the State leaps to the fantastic conclusion that "it cannot be said that the outcome of the trial or proceedings would have been any different" with the benefit of Lopez's testimony. (AB, p. 22).

To the contrary, Petitioner adduced facially sufficient grounds that his newly discovered evidence probably would have changed the outcome of trial. As we have discussed, the State's case against was flimsily based on the testimony of only one eye-witness who was struck from behind and rendered unconscious, impairing his memory; no other corroborating evidence; and use by the State of false and misleading evidence and arguments linking a "white car" Mr. Nordelo was using on some later date with a different white car glimpsed down the road from the crime scene. *See also* Interim Report of the Florida Innocence Commission to the Florida Supreme Court at 10 (reporting that eyewitness misidentification is the "single greatest cause of wrongful convictions" in Florida).

Surely, there is every reason to conclude at this stage that the outcome of trial probably would have been different if Petitioner had available testimony by the actual perpetrator that he used a different accomplice, that Mr. Nordelo was not involved in the robbery, and that the "white car" he and Mr. Nordelo were using when arrested had been stolen the day after the robbery and thus could not have been the car the store clerk thought he saw near the scene. At a minimum, trial

counsel could have used the newly discovered evidence of prosecutorial misconduct to discredit the testifying police offer and the State's entire case.

D. Lopez's Affidavit Was Not Inherently Incredible.

Finally, the State argues that Lopez's affidavit was inherently incredible because (1) Lopez says he was driving the "white car" he and Mr. Nordelo were using when arrested while nobody disputed at trial that Mr. Nordelo was driving the car then, and (2) Lopez's assertion that he was afraid to testify previously for fear that the State would renege on his plea agreement is ludicrous because the State was not "legally" able to retaliate against Lopez.

In the first place, who was driving the "white car" when the two men were arrested would have been the last thing on Mr. Nordelo's mind during his trial for the unrelated armed robbery committed at another date and place, and he had no reason to dispute it. Instead, defense counsel appropriately objected to the admission of the officer's testimony about the "white car" on the broader grounds that it was irrelevant and constituted impermissible evidence of "other crimes," and this objection was upheld on appeal. *Nordelo v. State*, 603 So. 2d 36, 38 (Fla. 3d DCA 1992) ("The trial court erred in admitting the officer's testimony.").

Who was driving that car at any particular time 17 years earlier was equally immaterial to Lopez's affidavit. The only material aspect of Lopez's affidavit relating to the "white car" was his statement that the car was stolen a day after the

armed robbery, and it is telling that the State has not disputed this assertion at any time during this litigation. Under the State's logic (and under the controlling legal standard) we must accept that statement by Petitioner's affiant as true.

As for whether Lopez's fear of State retaliation was unfounded, what the State could have done "legally" has nothing to do with what a lay person caught up in the justice system might rationally believe. In fact, we have evidence in this case that the State used inadmissible testimony about a "white car" to convict Petitioner, and we have reason to believe that the State's use of that testimony constituted willful prosecutorial misconduct. In its Answer Brief, the State continues to use this evidence to convince this Court that Mr. Nordelo is guilty.

Further, the State's Answer Brief discusses case after case where the State apparently took coercive action against witnesses or criminal defendants corrupting the outcomes of trials. This was Lopez's world and certainly the world as he perceived it, and neither the State nor the courts may proclaim authoritatively without an evidentiary hearing that his fears were so irrational as to make his candid admission of them "inherently incredible." *See, e.g.*, *Barrow v. State*, 940 So. 2d 1235, 1236-37 (Fla. 5th DCA 2006) (codefendant unwilling to testify even "after his judgment and sentence became final"); *Kendrick*, 708 So. 2d at 1012 (codefendant concerned his testifying would increase his own sentence).

CONCLUSION

For the foregoing reasons, and for the reasons provided in our Initial Brief, we respectfully request that this Court quash the decision of the district court, reverse the decision of the trial court, and remand this case for an evidentiary hearing, or, at a minimum, that the Court permit Mr. Nordelo an opportunity to amend his motion to correct any perceived deficiencies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this eighteenth day of October, 2011, true copies of the foregoing brief have been served by first-class mail to Nicholas Merlin, Assistant Attorney General, **Counsel for Respondent**, Criminal Appeals Unit, 444 Brickell Avenue, # 650, Miami, Florida 33131; and Marco Nordelo, **Petitioner**, Charlotte Correctional Institute, 33123 Oil Well Road, Punta Gorda, Florida 33955-9701.

CERTIFICATE OF FONT AND TYPE-SIZE

I hereby certify that the foregoing brief was generated by computer using Microsoft Word with Times New Roman 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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