

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-628

ANDREW RICHARD LUKEHART,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

Lower Tribunal Case No. 96-2645-CF

REPLY BRIEF OF APPELLANT

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ISSUE I

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S SUCCESSIVE POSTCONVICTION MOTION?

Appellee's Answer Brief argues that Fla.R.Crim.P. 3.850 does not apply. However, their discussion adds no new arguments. Therefore, Appellant will rely upon his initial brief in support of his argument.

The Appellee basically states that the summary denial was proper because Appellant failed to comply with the pleading requirements of Fla.R.Crim.P. 3.851 (e)(2), as well as failing to explain why the information could not have been obtained through due diligence.

In Davis v. State, 26 So.3d 519 (Fla. 2009), this court suggested that (1) pleading requirements can be technical in nature and be fixed by allowing to amend, and (2) due diligence should be established at an evidentiary hearing. In addition, in White v. State, 964 So.2d 1278 (Fla. 2007), this Court agreed with the trial court's conclusion that an amendment to a postconviction motion may satisfy the due diligence requirement:

White, however, has failed to specifically explain why his proposed witness, Frank Marasa, could not have been discovered by diligent efforts either prior to trial, in preparation of his 1983 postconviction motion, or through an amendment to his 1983 postconviction

motion....(emphasis added).

In the instant case, neither the trial court nor the Appellee discusses how the Appellant's previous motion to amend the pleading to conform with the evidence applies to the due diligence requirement. The trial court in White seems to think an amendment does apply, and this court agreed with the trial court in White.

In addition, Appellant contends that the language of this Court in Lukehart v. State, 70 So.3d 503, 514 (Fla. 2011, seems to suggest that the filing of the motion to amend the pleadings to conform with the evidence supported a successive motion. The trial court's failure to consider that motion as an explanation and grant an evidentiary hearing was error.

The State also claims that Appellant's substantive issues are barred because they were not argued to this Court and therefore abandoned. The State cites to Barwick v. State - So.3d -, 2011 WL 2566310, *10 (Fla. 2011), and Hall v. State, 823 So.2d 757,763(Fla. 2002) in support for their argument. However, Appellant is of the belief that in those cases the issues raised to this Court were substantive issues that were not argued. In the instant case, the trial court only ruled on the procedural issues and made no factual or legal findings upon the merits of the claims raised in the successive

postconviction motion. Therefore, Appellant contends that the only issue Appellant could raise or argue before this Court is the procedural findings made by the trial court.

Appellant contends that the trial court erred in summarily denying his successive postconviction motion.

CONCLUSION AND RELIEF SOUGHT

Appellant prays this Honorable Court reverse the trial court's ruling and remand for an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Charlemagne Milsap, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050 on May 29, 2012.

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Undersigned counsel certifies that the type used in this
brief is Courier New 12 point.

_/s/Michael P. Reiter_____
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