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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal arises from the denial of Appellant's successor motion for postconviction relief by Circuit Court Judge William Wilkes, Fourth Judicial Circuit, Duval County, Florida, following a summary denial of the motion.

The following abbreviations will be used to cite the record in this cause, with appropriate page number(s) following the abbreviation:

"R" -- record on direct appeal to this Court

“PCR” – Postconviction record on appeal

"SPCR" – successor postconviction record on appeal in this proceeding

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules of Procedure

STATEMENT OF CASE

Andrew Lukehart was tried in Duval County, Florida, and convicted of first-degree felony murder and aggravated child abuse. Jury trial commenced on February 24, 1997 (R 330). On February 27, 1997, the jury found Lukehart guilty as charged (R 1324) and recommended death by a vote of 9-3 (R 1639). On April 4, 1997, the Court imposed the death sentence. On direct appeal Lukehart raised twelve issues. The Court affirmed Lukehart's conviction and death sentence on direct appeal, but remanded for a resentencing on his aggravated child abuse conviction. Lukehart v. State, 776 So.2d 906 (Fla. 2000), *rehearing denied* (January 23, 2001). Petition for Writ of Certiorari was denied on June 25, 2001. Lukehart v. Florida, 533 U.S. 934 (2001).

On September 27, 2001, Lukehart filed a "shell" Motion to Vacate Judgment and Sentence. On November 28, 2001, the State filed a Motion to Dismiss Shell Motion. On January 31, 2002, Lukehart filed a Response to the State's Motion to Dismiss. On June 17, 2002, the trial court granted the Motion to Dismiss, and allowed Lukehart to file, on or before June 25, 2002, an Amended Motion for Postconviction Relief. The Defendant was given leave to supplement the Motion with any additional grounds or to further refine existing grounds based upon public record

disclosures that occurred after June 25, 2002. On June 20, 2002, Lukehart filed a Motion to Vacate Judgment of Conviction and Sentence and Memorandum of Law with Special Request for Leave to Amend, raising a total of seventeen claims. On September 23, 2003, Lukehart filed a First Amended Motion to Vacate Judgment of Conviction and Sentence and Memorandum of Law with Special Request for Leave to Amend, also raising a total of seventeen claims. On October 14, 2003, the State filed an Objection to Motion to Amend the Postconviction Motion. On October 16, 2003, Lukehart filed the Defendant's Response to State's Objection to Motion to Amend the Postconviction Motion. On October 11, 2004, the trial court conducted a Huff hearing and granted Lukehart an evidentiary hearing on Claim Three (ineffectiveness of trial counsel at guilt and penalty phases).

On February 27, 2007, the trial court heard arguments for the Defendant's Motion for Leave to Amend. At that time, the State filed a second objection to the Defendant's Motion to Amend Postconviction Motion. On February 28, 2007, the trial court entered an Order Granting the Defendant's Motion for Leave to Amend, and set the evidentiary hearing for May 9-10, 2007. On June 1, 2007, the Defendant filed the Defendant's Evidentiary

Hearing Closing Arguments and Memorandum in Support of a New Trial and/or New Penalty Phase, and the Defendant's Motion to Amend Pleading to Conform with Evidence. The State filed a Proposed Order on June 20, 2007. On March 27, 2009, the trial court entered its Order Denying Appellant's Postconviction Motion. Appellant filed his Notice of Appeal on April 13, 2009. This Court entered its opinion affirming the trial court on June 23, 2011, Rehearing denied on September 8, 2011. Lukehart v. State, 70 So.3d 503 (Fl. 2011).

Appellant filed a Successive Postconviction Motion on December 19, 2011. The trial court summarily denied the Appellant’s motion on March 16, 2012. Appellant filed his Notice of Appeal on April 5, 2012.

STATEMENT OF FACTS

Lukehart was on three types of medication from the day of his arrest through trial. When Lukehart was interviewed by the public defender's office, he stated he didn't want to take any medication (SPCR 21). Dr. Crown testified that the medications caused Lukehart's memory to be patchy, and this caused Lukehart to confabulate his testimony about how the child was injured.

> **Q. Were you aware of from your records you read that Lukehart at the time that he was in the Duval County Jail and during the trial was on medication?**
>
> **A. Yes, I did read that in the records.**
>
> **Q. What type of medication was he on?**
>
> **A. He was on an antidepressant sleeping medication, he was on a tranquilizer, and he was on an antipsychotic. The drugs specifically were Sinequan, Vistaril, and Mellaril.**

(SPCR 31-35).

Dr. Crown testified at the evidentiary hearing that the side effects of the medications Lukehart was taking causes confusion and confabulation.

> **BY REITER:**
>
> **Q. Is it possible that given the drugs he was on it could have affected Lukehart's memory as to what took place that day?**
>
> **A. Yes.**

Q. Not being on drugs at the time of the offense and the time he gave the statement to the police, would his memory have been more accurate or would his memory be stronger at that time, without drugs?

A. Likely different and likely stronger.

Q. If he could be confused as to his memory at the time of the trial because he was on medication, based upon your evaluation of him, does confabulation mean that -- does that sound like confabulation to you, given the fact there were two separate stories?

A. Yes, it does.

Q. And could he have -- could in your opinion he have believed both of those stories at the time he gave it?

A. Certainly at each individual time, yes.

Q. If Lukehart was told by his lawyer that his original version of events did not comport with the Medical Examiner's Office -- medical examiner's testimony of the events, could it have affected his memory regarding what happened?

A. Yes, it could have affected his memory and his total thought processes.

Q. In what way?

A. In terms of perception, in terms of recollection, in terms of attempting to fill in the gaps in his own thought patterns, in his own memory, and in his own recollections. To the extent that he thought about it and there were gaps, he would have involuntarily chosen things to fill in the gaps, and that's the nature of confabulation.

(SPCR 31-35).

Mr. Edwards, Lukehart's trial counsel, knew Lukehart was on medication, but failed to learn the effects of the medication, notify the court, motion the court to cease the medication and request a continuance, or notify the jury of the medication's effects.

> **Q. No. I mean, his records, like if there were any -- do you know if he had any DRs?**
>
> **A. I don't know.**
>
> **Q. Do you know if he had any medication, any medical problems?**
>
> **A. I know that through Krop.**
>
> **Q. Okay. He was on medication when he was talking to you on three times. Are you aware of that?**
>
> **A. No.**
>
> **Q. So you don't know how that medication would have affected his ability to answer any of your questions or even to talk to you, do you?**
>
> **A. I do not.**

(SPCR 39).

Lukehart provided law enforcement with a written statement that he had dropped the child on her head (SPCR 47-50). Lukehart told trial counsel Buzzell the same thing. At trial Lukehart testified on direct examination to pushing the child's down to the floor but couldn't remember how many times (SPCR 53-54). On cross-examination, Lukehart testified he thought he pushed the child down four

or five times (SPCR 57).

As pointed out by the State during closing at trial, as well as Dr. Daniel's evidentiary hearing testimony, Lukehart could not have performed those actions he testified to. (SPCR 59-61, 63). Mr. Lukehart testified to these actions because he believed them to be true since the medication's effects promotes confabulation. At the evidentiary hearing, Lukehart, while not on medication, testified that his statement to law enforcement was true and not his trial testimony. (SPCR 65-69).

Prior to the evidentiary hearing, Mr. Lukehart's postconviction counsel intended to utilize Dr. Krop to testify at the evidentiary hearing. Months before the evidentiary hearing counsel met with Dr. Krop. At no time did Dr. Krop inform postconviction counsel that Lukehart was on medication. One week before the hearing, Dr. Krop's office called postconviction counsel to inform him that Dr. Krop had entered the hospital and would not be able to attend the hearing. Postconviction counsel immediately contacted Dr. Crown. While preparing for his testimony, Dr. Crown informed postconviction counsel that Lukehart had been taking three medications. Dr. Crown also ascertained that one of the medications was an antipsychotic and Lukehart had been taking it since his arrest and through

trial. Dr. Crown informed postconviction counsel that in his opinion Mr. Lukehart had confabulated his trial testimony about how he injured the child. Dr. Crown testified at the evidentiary hearing that the medication Mr. Lukehart was taking caused confusion, confabulation, and patchy memory. (SPCR 31-35).

At trial, the court questioned Lukehart about his decision to testify. (SPCR 71-75). Neither the court nor counsel asked Lukehart if he was presently taking medication. Undersigned counsel could find no recorded entries that prove counsel had notified the court at any time that Lukehart was on medication.

SUMMARY OF ARGUMENT

First, the trial court's order denying Appellant's Successor Postconviction Motion does not claim that "the motion, files, and records in the case conclusively show that the movant is entitled to no relief, [and therefore], the motion shall be denied without a hearing," pursuant to either 3.850(d) or 3.851(f)(5)(B).

Second, the basis of the trial court's order is "due diligence." However, if Rule 3.851 applies, 3.851(d)(2)(c) states that a motion may be filed after one year if: "postconviction counsel, through neglect, failed to file the motion." The purpose of a motion is to raise issues. If an issue isn't raised through due diligence, it is tantamount to failure to file a motion through neglect. Clearly lack of due diligence may constitution neglect.

Third, Appellant's successor motion was not filed as an abuse of procedure in accordance with Fla.R.Crim.P. 3.850(f).

Lastly, it is completely unfair for the trial court to hear the evidence on the issue, not rule on Appellant's Motion to Amend the Pleadings to Conform With the Evidence, and then in its order denying the successor motion state: "It is unacceptable that such a readily-ascertainable fact is being raised for the first time in a successive

postconviction motion…" While perhaps legally correct, it is not factually correct.

ISSUE I

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

Appellant's successor postconviction motion contained three claims: (1) Trial counsel was ineffective by failing to learn the effects of the medication Lukehart was taking, informing the court and the jury that Lukehart was on medication and explaining its effects, motioning the court for the medications to cease, and requesting a continuance; (2) Lukehart was incompetent at trial due to medication, and (3) Lukehart was involuntarily required to take medication.

The substance of these claims was heard at the evidentiary hearing and a subsequent motion to amend the pleadings to conform with the evidence was filed. The trial court did not rule on the motion. On appeal, Appellant raised the first issue to this Court. This Court found that the trial court's denial to amend was not an abuse of discretion. However, as to the issue of ineffective assistance of counsel, this court stated in its opinion:

> **Pursuant to rule 3.850(f), evidence revealed after the conclusion of an evidentiary hearing is proper in a successive motion for postconviction relief, not in a motion to amend the initial motion for postconviction relief.**

Lukehart v. State, 70 So.3d 503, 514 (Fla. 2011).

The State, apparently also believing that this Court directed that rule 3.850(f) be applied to Appellant's successive motion, filed a motion to clarify on the very question of whether rule 3.850 or rule 3.851 applied. This Court denied the Motion to Clarify.

In its order denying Appellant's successive postconviction, the order states that rule 3.851 and not rule 3.850 applied. Appellant contends that this Court's opinion indicated that rule 3.850(f) applies and the trial court is bound by this Court's ruling.

It should be noted that the trial court's order denying the successive motion did so on the basis of due diligence and not because: the motion, files, and records in the case conclusively show that the movant is entitled to no relief; or that the motion is legally insufficient; pursuant to both rule 3.850(d) and rule 3.851(f)(5)(B).

While the court's order states that neither rule relieves the defendant from the pleading rules, the order fails to state how the successive motion's pleading is legally insufficient.

If rule 3.850(f) applies, Appellant contends that his successive motion does not constitute an abuse of the procedures governed by the rules and that the motion is sufficiently pled. Appellant contends that postconviction

counsel produced evidence at the evidentiary hearing to support Appellant's claims and subsequently attempted to amend the pleadings to include the evidence produced at the hearing. The filing of the successive postconviction motion was not an abuse of the rule because postconviction counsel attempted previously to amend the original motion to include the evidence presented to the court for its consideration. It was only by this Court's ruling that the trial court did not abuse its discretion by denying the amendment that led to postconviction counsel to have to file the successive motion.

If rule 3.851 applies, the trial court's order denying the successive motion erred for three reasons. First, rule 3.851(d)(2)(c) states that a motion may be filed after one year if: "postconviction counsel, through neglect, failed to file the motion." Obviously the tone of the language utilized by the trial court in denying the motion contextually considers postconviction counsel's failure to file the issues in the initial postconviction motion as neglect, even though it utilizes the words due diligence:

> **The Court finds that counsel could have, through the use of due diligence, i.e., conversations with the Defendant, his mental health experts or a review of the Defendant's medical records, ascertained the Defendant was on medication with possible mind altering side-effects. It is unacceptable that such a readily-**

> **ascertainable fact is being raised for the first time in a successive postconviction motion, especially considering the length of time the Defendant's initial postconviction motion was pending. (SPCR 110).**

Postconviction counsel acknowledges that either his inadvertence and/or ignorance constituted the neglect in failing to raise these issues in the initial postconviction motion.

The second reason the trial court erred in denying the successive motion is that postconviction counsel did raise the facts of ineffective assistance of counsel at the evidentiary hearing and subsequently requested the trial court to allow an amendment to the motion for the court to consider the issue. It was only this Court's opinion that relieved the trial court from ruling on the issue. For the trial court to suggest that "a readily-ascertainable fact is being raised for the first time in a successive postconviction motion," is disingenuous. The trial court had that information before it and chose not to rule.

It would be unfair to deny Appellant the opportunity to have his successive motion issues go on deaf ears merely because his counsel was negligent in failing to strictly follow the rule. Especially since the evidence was already before the trial court.

The third reason the trial court erred in denying Appellant's motion is the court failed to follow the rule it says controls the successive motion rule 3.851(f)(5)(B): "Within 30 days after the state files its answer to a successive motion for postconviction relief, the trial court shall hold a case management conference." No case management conference was held.

In denying Appellant's Motion for Rehearing, the trial court stated that failure to conduct case management was harmless error pursuant to Marek v. State, 14 So.3d 985 (Fla. 2009) and Groover v. State, 703 So.2d 1035 (Fla. 1997). However, in both those cases the court found either the motion was legally insufficient, or the motion, files, and records in the case conclusively show that the movant is entitled to no relief.

In Marek's case he filed a fourth0 successive motion during a warrant. Although the Court in Groover found that failure to conduct a Huff hearing was harmless, it stressed that the better practice was to conduct the hearing. Appellant contends that his failure to allege his successive motion claims in his initial postconviction motion was harmless error, given that the trial court had the opportunity to hear the evidence. As a result, the trial court should have conducted an evidentiary hearing.

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 Charlemane Milsap, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050 on April 30, 2012.

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CERTIFICATE OF COMPLIANCE

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

_/s/Michael Reiter__
Michael Reiter