

IN THE SUPREME COURT OF FLORIDA

MILO A. ROSE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC17-878

Lower Tribunal No. 1982-CF-8683

DEATH PENALTY CASE

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA**

ANSWER BRIEF OF THE APPELLEE

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RECEIVED, 12/08/2017 02:13:26 PM, Clerk, Supreme Court

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STATEMENT OF THE CASE AND FACTS

Rose's death sentence became final on November 14, 1985, ninety days after the motion for rehearing was denied. *Rose v. State*, 472 So. 2d 1155 (Fla. 1985). Rose did not seek certiorari review of the decision affirming his convictions and sentences.

On November 5, 2005, the circuit court granted Milo Rose's motion for self-representation, and the consequent discharge of appointed counsel, Bjorn Brunvand. The circuit court had previously held a hearing, on August 29, 2005, and conducted a full inquiry pursuant to *Faretta v. California*, 422 U.S. 806 (1975). The circuit court found that Mr. Rose was competent and knowingly, intelligently, and freely waived his right to counsel in state court. Since this time, Attorney Brunvand has not been appointed to represent Rose.

On January 11, 2017, Attorney Brunvand, on Rose's behalf, filed a successive 3.851 postconviction motion in the state trial court raising a claim based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). (R. 449-74) On January 31, 2017, the State filed an answer to the successive motion in the postconviction court. (R. 491-507) On February 15, 2017, the postconviction court held a case management conference, at which Attorney

Brunvand informed the court of Mr. Rose's desire to voluntarily dismiss postconviction proceedings and to discharge counsel. (R. 510-17) On April 7, 2017, the postconviction court held a *Durocher*¹ hearing to determine whether Mr. Rose would be permitted to discharge counsel and forego postconviction proceedings in the state court. (R. 519-43)

At the hearing, Mr. Rose appeared telephonically and confirmed that he did not want to go forward with postconviction proceedings. (R. 522-24). The postconviction court made it clear that if he waived postconviction proceedings that there would be no further state litigation, to which Mr. Rose proclaimed, "I waive everything. I'm gonna waive counsel, everything." (R. 529) The postconviction court again sought confirmation that Mr. Rose wanted to voluntarily dismiss postconviction proceedings and discharge counsel. (R. 529-30) Mr. Rose said that he did. (R. 529) The postconviction court inquired whether he understood the consequences of this request, to which Mr. Rose informed the court that he did not and asked for them to be explained. (R. 530) The

¹ *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993).

postconviction court explained that Mr. Rose would be without counsel and there would be no more state postconviction proceedings. (R. 530) Finally, the postconviction court stated,

. . . As it stands right now here today, if the governor - - if you stopped your postconviction proceedings and dismissed your collateral counsel, if tomorrow morning the governor signed a death warrant, there would be nothing standing between you and the death chamber. Do you understand that? Is that clear enough for you?

(R. 535) Mr. Rose responded, “I understand that.” (R. 535) Mr. Rose again confirmed that he wanted to end postconviction proceedings. (R. 536) Mr. Rose was also informed that there was no pro se representation permitted in capital proceedings. (R. 540) Mr. Rose agreed that it was the “end of the road”. (R. 541) The postconviction court granted the voluntary dismissal of postconviction proceedings and the discharge of counsel. (R. 541) The postconviction court noted that Mr. Rose was “alert, intelligent, definitely seemed to know a lot of details”. (R. 541)

Following the hearing, on May 3, 2017, the postconviction court issued a written order discharging counsel and dismissing Mr. Rose’s successive motion to vacate his judgment and sentence based on *Hurst v. Florida* and *Hurst v. State*. (R. 546-48) The order made written findings that Mr. Rose “knowingly, intelligently,

and voluntarily waived his right to pursue postconviction relief and his right to appointed collateral counsel”. (R. 578) On May 10, 2017, Attorney Brunvand filed a notice of appeal. (R. 574-75) On June 8, 2017, this Court stayed the appeal, pending the disposition of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017).

On June 12, 2017, Mr. Rose sent a letter to Mr. John A. Tomasino, Clerk of the Florida Supreme Court, to express his concern that he was not being updated on the status of this appeal, so that he may draft his pro se responses. On July 24, Mr. Rose sent another letter to Mr. Tomasino, moving to reverse the order staying the appeal pending the disposition of *Hitchcock*. Mr. Rose sought a review of Attorney Brunvand’s representation, not the *Hurst* issue. On August 3, 2017, this Court denied the motion.

On September 25, 2017, this Court issued an order for Rose to show cause why *Hitchcock* does not control. On October 12, 2017, Attorneys J. Jervis Wise and Bjorn E. Brunvand filed a response on behalf of Mr. Rose. On October 24, 2017, the State filed a motion to strike the *Hitchcock* response due to Mr. Rose’s waiver of counsel and postconviction proceedings. On October 27, 2017, this Court vacated its September 25, 2017 order and granted briefing consistent with Rule 3.851(i)(8)(B). The initial brief was filed on November 21, 2017.

SUMMARY OF THE ARGUMENT

This Court should affirm the circuit court's order granting Rose's motion to waive his postconviction proceedings and discharge his collateral counsel. Collateral counsel's argument that the trial court did not conduct an adequate inquiry is without merit. Under well-established precedent, a competent defendant is entitled to waive his postconviction proceedings and discharge his counsel. In this case, there are no reasonable grounds to question Rose's competency, and the record establishes that Rose knowingly, intelligently, and voluntarily waived his rights to postconviction counsel and proceedings.

ARGUMENT

ISSUE

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN FINDING THAT ROSE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHTS TO POSTCONVICTION COUNSEL AND PROCEEDINGS.

Rose's discharged collateral counsel has filed a brief with this Court pursuant to Florida Rule of Criminal Procedure 3.851(i)(8), and argues that the lower court failed to conduct an adequate colloquy in compliance with the procedural requirements of rule 3.851(i). This Court applies an abuse of discretion standard when reviewing a trial court's order regarding a defendant's competency to waive postconviction counsel and proceedings. *Trease v. State*, 41 So. 3d 119 (Fla. 2010). The State asserts that, in the instant case, the lower court properly followed the requirements of rule 3.851(i), and after conducting a *Durocher* hearing with Rose, acted within its discretion in finding that Rose knowingly, intelligently, and voluntarily waived his postconviction proceedings and discharged his counsel.

This Court has long held that a competent capital defendant may waive his postconviction proceedings. *See generally Alston v. State*, 894 So. 2d 46 (Fla. 2004); *Slawson v. State*, 796 So. 2d 491 (Fla. 2001), *supra*; *Castro v. State*, 744 So. 2d 986 (Fla. 1999); *Sanchez-Velasco v. State*, 702 So. 2d 224 (Fla. 1997);

Durocher, supra. “The criteria for determining competence to proceed is whether the prisoner ‘has sufficient present ability to consult with counsel with a reasonable degree of rational understanding-and whether he has a rational as well as a factual understanding of the pending collateral proceedings.’” *Alston v. State*, 894 So. 2d 46, 57 (Fla. 2004); *Robertson v. State*, 2016 WL 7043020 (Fla. December 1, 2016). Discharged counsel has the burden to prove incompetency. *Trease v. State*, 41 So. 3d 119, 125 (Fla. 2010), *citing Slawson*.

During postconviction proceedings in 2005, Rose requested to discharge appointed counsel, Bjorn Brunvand, and to self-represent. Following a full *Faretta* inquiry, Rose was granted self-representation, and had, in fact, been representing himself in state court. Attorney Brunvand did not get reappointed to Rose’s state proceedings. However, as explained in the initial brief, because Rose was no longer allowed to represent himself, pursuant to Rule 3.851 (b)(6), Fla. R. Crim. P., on January 11, 2017, Attorney Brunvand filed the motion to preserve the *Hurst* issue for federal proceedings², in which Rose was represented by counsel. (IB, p. 8)

² Despite Attorney Brunvand’s attempt to preserve the *Hurst* issue, since Rose’s conviction was final on November 14, 1985, he is not entitled to *Hurst* relief. *See Asay v. State*, 210 So. 3d 1 (Fla. 2016); *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017).

Because of Rose's expressed desire to waive the *Hurst* motion, and all future state postconviction proceedings, and to again discharge Attorney Brunvand, the postconviction court held a *Durocher* hearing.

On appeal, counsel questions whether Rose understood the implications of his waiver because Rose believed his sentence should have been vacated based on Justice Pariente's opinion that *Hurst* relief should be considered on all capital cases, regardless of the date the conviction was made final. However, the court did explain that Justice Pariente's opinion did not reflect the current state of the law, that Rose's sentence had not been vacated, and that Justice Pariente did not unlock his cell and release him from prison. (R. 534-7) Rose's dissatisfaction with the state of the law and counsel's unwillingness to advance his actual innocence claim should not be mistaken for a lack of understanding as to the ramifications of his waiver.

Moreover, at the *Durocher* hearing, discharged counsel did not question Rose's competency to waive postconviction proceedings and discharge counsel; and, at no point did counsel request a competency evaluation. This is because there is simply no reason to question competency. Mr. Rose had a vivid recollection and understanding of the thirty-four (34) years of history of his case, and, after the postconviction court's explanation of the consequences of waiving his rights to postconviction counsel and proceedings, Rose did express a complete understanding

that he would not be able to self-represent in state court any longer, that state postconviction proceedings would permanently cease, and he would immediately become warrant eligible, without the assistance of state counsel. In granting the voluntary dismissal of postconviction proceedings and the discharge of counsel, the postconviction court noted that Mr. Rose was “alert, intelligent, definitely seemed to know a lot of details”. (R. 541) Following the *Durocher* hearing, the postconviction court granted the motion and found that Rose “knowingly, intelligently, and voluntarily waived his right to pursue postconviction relief and his right to appointed collateral counsel”.

Collateral counsel claims that the lower court failed to follow the requirements of rule 3.851(i), because the court did not effectively state the risks and consequences resulting from the dismissal of postconviction proceedings and discharge of counsel. Counsel heavily relies on *McGirth v. State*, 209 So. 3d 1146 (Fla. 2017), to suggest that the court did not conduct a full and complete *Faretta* hearing. However, the *McGirth* court was not considering the issue of whether a defendant was competent to dismiss postconviction proceedings and discharge counsel, which only requires a *Durocher*, or *Faretta*-like hearing. Arguably, since Attorney Brunvand was not appointed counsel on Rose’s case, there should not

have been a need for a *Durocher* hearing as the pleading was unauthorized. Additionally, in 2005, when Rose was granted self-representation, the postconviction court did conduct a full *Faretta* inquiry. Nevertheless, the postconviction court did adequately explain the risks and consequences of dismissing postconviction proceedings and discharging counsel. The postconviction court did, in fact, inform Rose of the specific disadvantages of waiving postconviction proceedings and discharging counsel. Without obfuscation, the postconviction court stated,

. . . As it stands right now here today, if the governor - - if you stopped your postconviction proceedings and dismissed your collateral counsel, if tomorrow morning the governor signed a death warrant, there would be nothing standing between you and the death chamber. Do you understand that? Is that clear enough for you?

(R. 535)

At no time during those prior proceedings, or more importantly, at no time during the instant proceedings, has there ever been “reasonable grounds” to conclude that Rose is not competent. In fact, collateral counsel does not allege, much less establish, that Rose is incompetent to waive the instant proceedings. *See Slawson v. State*, 796 So. 2d 491, 502 (Fla. 2001) (stating that “we made clear in *Durocher* that the party challenging the defendant’s waiver request bears the burden of proving that

the defendant is incompetent”), citing *Durocher v. Singletary*, 623 So. 2d 482, 485 (Fla. 1993). Significantly, following the colloquy with Rose and hearing from counsel, the trial court did not find any reasonable grounds to believe the defendant was not mentally competent to waive the postconviction proceedings and discharge counsel. Rather, the colloquy established that Rose knowingly, intelligently, and voluntarily waived his rights to postconviction proceedings and counsel. The lower court’s colloquy with Rose clearly indicated that Rose understood that if he waived the postconviction proceedings, it would be the “end of the road”. (R. 541); that he would be waiving any rights to challenge his sentence in state court; and that the governor could sign a death warrant in his case and nothing would stand in the way of the State carrying out that sentence.

Given the colloquy at the *Durocher* hearing, as well as the complete lack of any allegations of incompetency, the State urges this Court to affirm the lower court’s order finding Rose competent to discharge his counsel and waive the postconviction proceedings.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court’s order granting Appellant’s motion to waive postconviction proceedings and counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 8th day of December, 2017, I filed the foregoing with the Clerk of Court by using the E-Portal Filing System which will send a notice of electronic filing to the following: J. Jervis Wise, and Bjorn E. Brunvand, Brunvand Wise, P.A., 615 Turner Street, Clearwater, Florida 33756, **jervis@acquitter.com** and **bjorn@acquitter.com**; and to Milo Rose, DC # 090411, Union Correctional Institution, Post Office Box 1000 P2128, Raiford, Florida 32083.

/s/ Lisa Martin

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Lisa Martin
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