IN THE SUPREME COURT OF FLORIDA

Case No. SC01-829

Third DCA Case No. 3D99-3075
Circuit Court Case No. F94-11235

TRACEY MCLIN
Petitioner,

-vs-

THE STATE OF FLORIDA
Respondent.

RESPONDENT'S AMENDED BRIEF ON THE MERITS

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INTRODUCTION

The Respondent, the State of Florida, was the prosecuting authority in the Circuit Court and the Appellee in the Third District Court of Appeal. The Petitioner, Tracey McLin, was the Defendant in the Circuit Court and the Appellant in the District Court.

In this brief, the following abbreviations may be used:

"T" the transcript on direct appeal in Third DCA Case No. 3D99-3075.

"R" the record on direct appeal in Third DCA Case No. 3D99-3075.

"AB" the Petitioner's brief filed in the District Court.

STATEMENT OF THE CASE AND FACTS

The State of Florida respectfully adopts verbatim the statement of the case and facts recited by the Third District Court of Appeal in *McLin v. State*, 781 So. 2d 475 (Fla. 3rd DCA 2001).

McLin was charged with first-degree murder and armed robbery. Several witnesses testified against him at his trial. Oliver Menzies, the state's main witness, testified that on the night in question, he and Jose Saldana were passengers in a car driven by McLin and were on their way to a night club when McLin spotted a man leaving his car and walking towards his residence. According to Menzies, McLin made a sudden u-turn in front of the residence, got out of the car, shot the man and took his wallet. Menzies claimed that he and Saldana stayed in the car the entire time. Saldana did not testify at the trial. Nadine Sylvester, McLin's girlfriend, testified that McLin admitted to being the shooter while they were watching a television news account of the murder. Ms. Sylvester notified police and told them that McLin kept a picture of a 9mm gun (the kind used in the murder) in a bible he had in his living room. That photograph was found and made part of the evidence against McLin at trial.

A police officer testified that approximately two weeks after the murder, the police stopped a car driven by Menzies in which McLin was a passenger. The police noticed a semi-automatic weapon between the seats while reviewing Menzies' driver's

license. As the officer attempted to arrest Menzies, he struggled and ran away. McLin was released from the scene. A search of the car revealed a second gun, both of which had been reported stolen. One of the guns found was the murder weapon used in this case.

Subsequent to receiving the information from Ms. Sylvester, police visited McLin's home with a search warrant. They recovered from the bible, the photo of a gun that resembled the murder weapon. McLin was later arrested and after a trial, was convicted of both first degree murder and armed robbery. He was sentenced to life imprisonment. His conviction and sentence were affirmed on direct appeal before the Third DCA in *McLin v. State*, 685 So.2d 11 (Fla. 3d DCA 1996). McLin then filed a motion for post-conviction relief that was denied by the trial court. The trial court's order denying relief was affirmed. *See McLin v. State*, 781 So. 2d 475 (Fla. 3rd DCA 2001). This Court accepted the Petitioner's application for discretionary jurisdiction and subsequently ordered the parties to submit briefs on the merits.

ISSUES ON APPEAL

I

WHETHER THE THIRD DISTRICT COURT OF APPEAL DID NOT ERR IN AFFIRMING A CIRCUIT COURT ORDER WHICH HELD THAT THE AFFIDAVIT OF JOSE SALDANA WAS INSUFFICIENT TO SUPPORT THE APPELLANT'S MOTION FOR POST-CONVICTION RELIEF ON GROUNDS OF NEWLY DISCOVERED EVIDENCE.

II

WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THE PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FAILED TO MEET THE REQUIREMENTS OF *STRICKLAND v. WASHINGTON*, 466 U.S. 688 (1994).

SUMMARY OF THE ARGUMENT

The Petitioner contends that the District Court erred in affirming a Circuit Court order denying his motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 based on newly discovered evidence without holding an evidentiary hearing. The Petitioner argues that the trial court made an impermissible credibility determination regarding the veracity of the witness offering the new evidence based solely on the State's proffer of a letter which showed that the Petitioner instructed the witness to create a false affidavit. In the Petitioner's view the trial court should have made a credibility determination only after the witness testified about the affidavit at an evidentiary hearing.

The State submits that it McLin was granted a hearing . It was unnecessary for the affiant to testify in person because the trial court simply needed to evaluate the facts alleged in the witness's affidavit against the facts established during McLin's trial in order to determine whether the facts in the affidavit constituted newly discovered evidence or whether the facts alleged in the affidavit created a probability of acquittal.

As the second point of error the Petitioner contends that the District Court erred in affirming the trial court's finding that he failed to meet his burden in support of his claim of ineffective assistance of counsel. The State submits that the District Court properly affirmed the trial court's finding that the Petitioner's claim of ineffective

assistance of counsel failed to meet the requirements of *Strickland v. Washington*, 466 U.S. 688 (1994) because there was no showing that trial counsel's performance was deficient or that the Petitioner suffered prejudice.

ARGUMENT

I

THE THIRD DISTRICT COURT OF APPEAL DID NOT ERR IN AFFIRMING A CIRCUIT COURT ORDER WHICH HELD THAT THE AFFIDAVIT OF JOSE SALDANA WAS INSUFFICIENT TO SUPPORT THE APPELLANT'S MOTION FOR POST-CONVICTION RELIEF ON GROUNDS OF NEWLY DISCOVERED EVIDENCE.

The Petitioner contends that the trial court made a credibility determination regarding the veracity of Jose Saldana's affidavit exonerating him based solely upon the state's proffer that McLin told Saldana to concoct the affidavit. The Petitioner contends that he had a right to have Salanda testify in person at the evidentiary hearing on McLin's, motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 so that the trial court could make a determination about Saldana's credibility. The State submits that it was unnecessary for Saldana to testify as a live witness at the hearing.

In reviewing a trial court's application of law to a rule 3.850 motion following an evidentiary hearing, the following standard of review applies:

> As long as the trial court's findings are supported by competent substantial evidence, [an appellate] Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.

Blanco v. State, 702 So.2d 1250 (Fla. 1997)

Where there is conflicting evidence of a defendant's guilt, the trial court must evaluate the weight of the newly discovered evidence and the evidence which was introduced at the trial to determine whether the new evidence would probably have resulted in an acquittal. *Kendrick v. State*, 708 So.2d 1011 (Fla. 4th DCA 1998). In the instant case Saldana did not testify at trial. Therefore the trial court was required to evaluate the facts alleged in Saldana's affidavit against the facts established during McLin's trial. The trial court was required to do no more than to determine whether the facts alleged in the affidavit were sufficient to create a probability of acquittal in light of all of the evidence adduced against McLin at trial and give McLin an evidentiary hearing. In the instant case the court did both.

It is reasonable to assume that the only purpose for calling Saldana to testify at the evidentiary hearing would have been to have him reiterate the facts alleged in his affidavit. Nothing about such an exercise would have added the trial court in reaching a determination regarding whether the evidence presented was sufficient to warrant

relief. The trial court did not need Saldana's live testimony to determine whether the facts alleged in the affidavit, if true, juxtaposed the facts established at trial would probably result in McLin's acquittal.

The Petitioner's reasoning in support of the idea that Saldana should have testified in person reveals an internal conflict. The Petitoner cites *Roberts v. State*, 678 So. 2d 1232 (Fla. 1996) for the proposition that, "in the case of a recanting witness, an evidentiary hearing is necessary in order for the trial court to determine the witness' credibility." (AB 9) Yet on the very next page the Petitioner concedes that, "Saldana was not truly a recanting witness" because Saldana did not testify at McLin's trial. The Petitoner continues that, "from the point of view of this appeal

. . . , the trial court had nothing . . .upon which to judge Saldana's credibility except from McLin's letter. (AB 11).

The trial court correctly weighed the alleged new evidence in the affidavit against the existing evidence introduced at trial and found that the evidence did not qualify as newly discovered sufficient to produce a different outcome on retrial. Even if Saldana's affidavit did constitute newly discovered evidence as that term is legally defined (*e.g*. Saldana's change in testimony was unknown by the trial court, by the Petitioner, or by defense counsel at the time of trial, and that the Petitioner or his attorney could not have discovered that Saldana intended to testify in a manner

inconsistent with his deposition testimony through the exercise of due diligence) McLin was still not entitled to post-conviction relief. *Hallman v. State*, 371 So.2d 482, 485 (Fla.1979) (The general rule is that the alleged facts must be of such a vital nature that had they been known to the trial court, they conclusively would have prevented the entry of the judgment.).

Saldana's affidavit is not of such a nature that it would probably produce an acquittal on retrial. Had Saldana testified consistent with his affidavit, it would not have affected the very basic facts of this case which are more fully discussed below. At best, it would have only provided a conflict in the evidence. *Preston v. State*, 531 So.2d 154 (Fla.1988) (if newly discovered evidence does not refute an element of the State's case but rather only contradicted evidence that had been introduced at trial, the petition must be denied.). Had Saldana testified in a manner consistent with his affidavit, his credibility would have been severely undermined by his prior inconsistent statement given during deposition. As such, it can hardly be said that this so-called newly discovered evidence would have probably produced an acquittal on retrial.

Saldana simply lied in his affidavit. In September 1995, while McLin's appeal was pending, the police obtained a copy of a letter that he sent to Saldana. *See Petitioner's Attachment 4.* In the letter McLin implores Saldana to contact the Petitioner's appellate attorney, to tell the attorney that Menzies had threatened him; that

McLin was not present at the crime scene on the evening of January 25, 1995; and that the prosecutor was aware of this information and thus chose not to call Saldana as a state's witness. *Petitioner's Appendix, Attachment 4, at pages 30-31*. McLin told Saldana that he couldn't get in trouble for lying by following his instructions as evidenced by the following excerpt:

> The only way you could get in trouble is if you would of lied on the stand, and you never got to get on the stand so how could they charge you with perjury. What you said in the deposition don't mean shit as long as you don't lie on the stand. And my lawyer told me that they might attempt to get Junior but they can't fuck with him because he already pleaded guilty for lesser charges, and in the long run they would have to throw it out. Because they can't charge him twice because that's called double jeopardy.

Petitioner's Appendix, Attachment 4, page 31. It is clear that Saldana's affidavit, dated after he received McLin's letter, was merely an attempt to appease the Petitioner. Physical evidence supported the State's assertion that the letter from McLin to Saldana was in fact a letter from the Petitioner. Below the State introduced a Metro-Dade Police Department latent fingerprint evaluation of the letter. Both the McLin's and Saldana's fingerprints were found on the letter.

In light of the trial court's finding that Saldana's affidavit was not sufficient to result in an acquittal on retrial, court correctly ruled that McLin was not entitled to relief.

II

THE TRIAL COURT WAS CORRECT IN FINDING THAT THE PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FAILED TO MEET THE REQUIREMENTS OF *STRICKLAND v. WASHINGTON*, 466 U.S. 688 (1994).

As his second point of error McLin contends that the trial court erred in finding that he failed to meet his burden in support of his claim of ineffective assistance of counsel. McLin complains of two deficiencies: (1) the defense strategy was unreasonable; (2) and that trial counsel failed to preserve issues for appellate review. A claim of ineffective assistance of counsel presents mixed questions of law and fact which this court reviews *de novo*.

It is well settled that when alleging a claim of ineffective assistance of counsel, the defendant bears the burden of showing that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 252, 80 L.Ed.2d 674 (1984). Under the prejudice prong of *Strickland*, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In making the determination of

prejudice, a court hearing the ineffectiveness claim must consider the totality of the evidence before the fact finder. *Id*. at 695. Finally, in assessing an ineffectiveness claim either the performance prong or the prejudice prong can be evaluated first. *Id*. at 697. If either one of these showings is insufficient, a defendant's claim of ineffective assistance of counsel must fail. *Id.*

I. Abandonment of Reverse *Williams* Rule Evidence

First, McLin contends that "the rich drug dealer" defense employed by trial counsel defamed him and was an untenable trial strategy in view of the fact that a "Reverse *Williams* Rule" defense would have been more viable. This claim is without merit.

Prior to trial defense counsel filed a Notice of Intent to Rely on §90.404(2)(a). (R. 23-24). In his motion, the defense argued that evidence relating to a January 24 1995 robbery was relevant "to prove the motive, intent, and the identity of the individual responsible for this crime." (Direct Appeal Record at 24). At a pre-trial hearing the State informed the court that it did not intend to call Jose Saldana as a witness, and the State argued that the reverse *Williams* rule evidence was inappropriate due to the dissimilarities between the January 24, 1995 robbery and the January 25, 1995 murder. (T. 8-11). The trial court ruled that if the defense called Jose Saldana, and if Saldana testified, the defense would be permitted to present the evidence it

sought to introduce. (T. 12-13). During the colloquy it became clear that although Saldana had been subpoenaed by the defense, it was also likely that if called as a witness he would assert his Fifth Amendment privilege. (T. 12-13). Defense counsel acknowledged that this was speculation, however. (T. 13).

Later, in the middle of the trial, the parties announced that the State had dropped its earlier objection to the reverse *Williams* rule evidence. (T. 419). After requesting guidance from the court regarding whether such evidence would be a violation of the court's earlier pretrial ruling, defense counsel said the following:

> Now, I am going to tell the Court that I don't know how I am going to be able to integrate that into my case now because it was a pretrial motion in limine. I had adjusted my opening argument and my cross-examinations to accommodate this motion in limine. So I don't now how I am going to be able to respond to it and put it back into my case.
>
> If I do elect to put it in, I will certainly, just as a matter of courtesy -- and I'd like to get that back from the State and the Court -- tell the Court how I want to put it in and get some type of ruling so I don't prejudice my client.

(T. 420-21). The defense ultimately did not call Saldana as a witness.

Defense counsel was not ineffective for choosing not to pursue reverse *Williams* rule evidence because under the prejudice prong of *Strickland*, there is no reasonable probability that the result of the trial would have been different had the

defense presented the evidence. According to the defense proffer, the reverse *Williams* rule evidence would have consisted of evidence regarding the "police interrogation of Saldana during which he denied culpability and gave a conflicting account as to his involvement [as to the January 24, 1995 robbery]." (R. 24; T. 6-7). This evidence would not have negated Oliver Menzies' testimony that McLin was the shooter. (T. 320-23). Nor would reverse *Williams* rule evidence have neutralized the testimony of Nadine Sylvester who testified that McLin told her that he committed the murder. (T. 512).

Reverse *Williams* rule evidence would not have changed the fact that Sylvester testified that McLin kept a photograph of a Smith and Wesson .45 caliber automatic pistol in a bible on his table. (T. 515). It also would not have altered the fact that the police found the photograph in McLin's bible as stated by Sylvester. (T. 552). Reverse *Williams* rule evidence would not have changed the fact that the police recovered a Smith and Wesson .45 caliber automatic pistol from a car in which McLin was a passenger (T. 471-76). And reverse *Williams* rule evidence would not have eliminated the fact that the .45 automatic recovered by the police was the same firearm shown in the picture found in McLin's bible (T. 632-34). Moreover, the evidence is uncontradicted that the photograph of the firearm in McLin's bible was the same firearm that discharged the bullet that police recovered at the crime scene. (T. 288-89).

In short, the State's case was overwhelming and even if defense counsel had pursued a reverse *Williams* rule strategy, there is no reasonable possibility that the result of the trial would have been different. Hence, McLin's claim for post-conviction relief was properly denied.

II. "Urging" McLin to Testify on his own Behalf

McLin's next claim, that his attorney was ineffective for urging him to testify on his own behalf, is also without merit. Below McLin argued that his trial attorney urged him to testify that, "he was a wealthy drug dealer who would never rob and kill someone because he made plenty of money selling drugs." *Petitioner's Motion for Post-conviction Relief at page 7*. The law is clear that bare allegations of ineffective assistance of counsel are insufficient to warrant relief. *Williams v. State*, 553 So. 2d 309 (Fla. 1st DCA 1989). Relief should not be granted where a defendant's claims of ineffective assistance of counsel are mere conclusions. *Mitchell v. State*, 581 So. 2d 990, 991 (Fla. 1st DCA 1991); *Flint v. State*, 561 So. 2d 1343, 1344 (Fla. 1st DCA 1990). McLin, offered no evidentiary support for his bare bones assertion the he was "urged" to testify against his will. By failing to present anything other than a conclusory claim, McLin failed to meet his burden of establishing that he was forced to testify and thus this claim was properly rejected.

If McLin had not testified, based upon the overwhelming weight of the evidence,

it cannot be said that but for counsel's so-called urging (even assuming it to be true), the result of the trial would have been different.

III. Failure to Object to the Testimony of Menzies' Attorney

McLin has also alleged that his trial attorney was ineffective for failing to preserve issues for appellate review. Specifically, McLin urges that the issue of whether the trial court erred in permitting Menzies' attorney to testify about Menzies' plea arrangement with the State was not preserved. This claim too is without merit because even if the issue had been preserved for appellate review, there is no chance that it would have resulted in a reversal.

The law on this issue is well established:

> The defendant is entitled to attack the credibility of an accusing witness by showing that he has entered into a plea bargain. However, if in so doing the defense infers that the state entered into the plea agreement in order to frame the defendant, the state is entitled to present evidence concerning its plea bargain policy.

Oliver v. State, 442 So. 2d 317 (Fla. 2d DCA 1983); *see also Tosh v. State*, 424 So. 2d 97 (Fla. 1st DCA 1982). In the instant case, the defense attacked the credibility of Menzies by claiming during opening statements that Menzies would testify for the State to avoid the consequences of his own actions in McLin's case. (T. 250-51).

During cross examination defense counsel questioned Menzies about his

motivation for testifying for the prosecution. (T. 384-85). In response to the defense's questions the State was entitled to bring forth Menzies' attorney for the purpose of rebutting McLin's assertions of bias and self-interest on Menzies' part. *Oliver, supra*; *Tosh, supra*. In particular, Menzies' attorney testified that his client's sentence was within the recommended sentencing guidelines. (T. 449). Additionally, Menzies' attorney stated that before Menzies testified for the State, there had been no discussions with the prosecutor about whether his plea was contingent on any cooperation with the State. (T. 454). Hence, Menzies' attorney's testimony was proper even if the issue was not preserved for appellate review.

It should be noted that when the District Court affirmed the Circuit Court's judgment of conviction and sentence on direct appeal the Court cited *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986) which is the seminal harmless error case. Consequently, it appears that the court looked to the merits of McLin's argument of ineffective assistance and found the alleged errors harmless beyond a reasonable doubt. *McLin v. State*, 685 So. 2d 11 (Fla. 3d DCA 1996).

IV. Failure to Object to the Testimony of Detective Ann Bogen

McLin's final claim is that his attorney was ineffective for failing to preserve for appellate review the issue of whether the trial court abused its discretion in permitting

Detective Ann Bogen to testify as a state's witness even though she was present in the courtroom at the prosecution's table for the entire trial. This issue is governed by § 90.616, Fla. Stat. . Section 90.616(1) states that witnesses should normally be excluded during trial. However, the rule provides four exceptions to the rule of sequestration and permits certain witnesses to remain in the courtroom and also to testify during trial. Charles W. Ehrhardt, Florida Evidence §616.1 (1999 Edition). Section 90.616(2)(c), Fla. Stat. provides that a judge is not required to exclude "[a] person whose presence is shown by the party's attorney to be essential to the presentation to the party's cause.". The trial court has wide discretion in determining whether a witness is essential. *Id*.

In this regard, Professor Ehrhardt states:

> Occasionally, it may be possible in a criminal case for the state to convince the court to permit a law enforcement officer to remain in the courtroom under section 90.616(2)(c) even though the officer cannot be appointed as a representative under section 90.616(2)(b). A showing that the officer's presence is essential to the prosecutor's case would be necessary.

Id. In the instant case, the requisite showing was made as the following pre-trail colloquy illustrates:

> [PROSECUTOR]: ... I am also asking for the assistance from the case agent, Detective Ann Bogen, the lead detective in the case. I don't have co-counsel here.

THE COURT: You are not going to have co-counsel?

[PROSECUTOR]: No, I am not.

THE COURT: You want the case agent here?

[PROSECUTOR]: Yes.

THE COURT: Is she going to be the first witness?

[PROSECUTOR]: I don't believe I am going to call her. If I do, her testimony is going to be very short and narrow because I am not bringing in statements.

THE COURT: Mr. Saul [defense counsel], what's your -- are you objecting?

[DEFENSE COUNSEL]: I would object. I have filed a defense witness list where I said I would adopt all the law enforcement officers that the State has, and I may be -- she was a detective for only one and a half years, and I may be attacking her thoroughness on the case. I think it would be an unfair advantage for the State.

THE COURT: Why do you need her?

[PROSECUTOR]: To assist me with the trial. There were several witnesses interviewed. Generally, we have two co-counsel.

THE COURT: I am aware of that, but what does she know -- what is she going to testify if she testifies?

[PROSECUTOR]: At this point, I don't know because everything that she would testify to can come in through other witnesses.

> THE COURT: You are not planning on using her?
>
> [PROSECUTOR]: At this point, no, I am not planning on using her. I don't want to foreclose on that, but in good faith --
>
> THE COURT: You are not planning on using her. Over defense objection, overruled. You can have her sit in here.

(T. 17-19). Since the trial court engaged in a lengthy hearing on this issue, it cannot be said that the court abused its discretion. This is especially so given that the situation that occurred fits squarely within one of the sequestration exceptions. Again it is noteworthy that when the State argued that the issue of Det. Bogan's testimony had not been preserved for appellate review, the District Court cited *DiGuilio*, *supra*, when it issued a *per curiam affirmed* opinion in McLin's direct appeal. Thus, it is clear that the Court did not accept the State's argument that the issue had not been preserved. Instead, the Court reached the merits of McLin's claim and found any error, particularly in light of the overwhelming evidence of McLin's guilt, to have been harmless beyond a reasonable doubt.

CONCLUSION

Based upon the foregoing argument and authority and such other basis as the Court sees fit, the State respectfully requests that this Court affirm the judgment and sentence entered against Tracey McLin by the Circuit Court and affirm the holding set forth in the opinion of the Third District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief was mailed on the 3rd day of January 2002, to the attorney for the Petitioner, Charles G. White, Esq., 2250 S.W. Third Avenue, Suite 150, Miami, Florida 33129.

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FREDERICKA SANDS

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief was typed using a 14 point Times New Roman font in conformity with Florida Rule of Appellate Procedure 9.210.

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FREDERICKA SANDS