IN THE SUPREME COURT OF FLORIDA

ROBERT BRIAN WATERHOUSE,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.
_____/

CASE NO. SC12-107
L.T. No. CRC80-00192 CFASO-A

DEATH WARRANT SIGNED
EXECUTION SCHEDULED
February 15, 2012

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

CROSS REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

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Cross-Appeal Issue

The trial court erred in finding that Appellant had timely filed his successive postconviction claim pursuant to Florida Rule of Criminal Procedure 3.851(d)(2)(A).

In his Answer Brief of the cross appeal, Appellant claims that the trial court properly found that his newly discovered evidence/*Brady* claim was timely filed pursuant to Florida Rule of Criminal Procedure 3.851(d)(2)(A) because collateral counsel acted with due diligence in ascertaining the facts underlying the claim when he relied on the veracity of Detective Hitchcox's police report containing the statements of ABC Lounge bouncer Leglio Sotolongo. Appellant asserts, however, that if this Court were to find that the lower court erred, the case needs to be remanded for further proceedings so that all collateral counsel, including current collateral counsel, could address the due diligence requirement of the rule. This assertion is without merit as the lower court, at the State's request, gave collateral counsel Norgard numerous opportunities to address the deficiency in his claim during the proceedings below, but counsel failed to do so. Because collateral counsel failed to carry his burden under Rule 3.851(d)(2)(A), the State submits that the lower court erred in finding that counsel met his requirement of establishing due diligence in timely raising the instant claim.

On January 13, 2012, at the *Huff* hearing on Appellant's successive postconviction motion, the State noted that based on this Court's precedent, collateral counsel should be given the opportunity to orally amend the deficiency in his pleading concerning the due diligence requirement. (PCR3 V3/507-10); *see generally Bryant v. State*, 941 So. 2d 810, 819 (Fla. 2005) (stating that a defendant should be allowed to amend any deficiency to satisfy the pleading requirements of a postconviction motion); *Davis v. State*, 26 So. 3d 519, 527 (Fla. 2009) (holding that motion should not be denied as facially insufficient based on an easily curable deficiency without giving the defendant an opportunity to correct the matter). In response Counsel Norgard stated:

> MR. NORGARD: Your Honor, I believe that the motion does deal with the aspect of why the attorneys did not actually contact Mr. Sotolongo. It is my position that the attorneys did exercise due diligence, and that in this instance where they are confronted with the police report that reflects that Mr. Sotolongo would apparently not have any viable information that would be worth following up, that due diligence does not require them to interview that witness and say, Is what you told the police officer true or not or did the police officer get it wrong?
>
> So to that extent I would orally amend the motion. I do feel that the attorneys acted in due diligence based on the information that they were provided and based on what, in fact, would be consistent with what the Florida Supreme Court ordered in *Mungin* in terms of an evidentiary hearing.
>
> (PCR3 V3/508-09)

He did not offer any explanation of what efforts he (or any other counsel) made to investigate this case during the decade he has represented Waterhouse. Because current counsel Norgard has represented Waterhouse since 2002, it was incumbent upon him to establish *his* diligence within the past year (in order to render this claim timely under the rule) in ascertaining the facts supporting this claim.

At the evidentiary hearing on January 17, 2012, after Appellant had presented his case, the State again noted that he had failed to present any evidence in support of his burden of establishing due diligence based on *current* collateral counsel's failure to raise this claim within the one-year time limitation of the rule. (PCR3 V4/633-35) In response, collateral counsel merely represented to the court that he had reviewed Waterhouse's file, did not recall Sotolongo's name but, like the trial attorneys, he would have relied on Detective Hitchcox's report as being accurate. (PCR3 V4/637-39)

Counsel's representation is insufficient to establish due diligence sufficient to render this claim timely filed under the facts of this case. This is not a case where counsel can claim this issue came as a surprise and, therefore, he would have no reason to actually investigate the witnesses from the bar. To the contrary, Waterhouse's entire defense at trial was based on

bouncer Leon Vasquez's testimony, and trial counsel's theory that Detective Hitchcox did not want to listen to Vasquez and failed to record his information. Given that this was a hotly contested issue at trial and in the postconviction litigation, any counsel exercising due diligence would have reviewed Detective Hitchcox's report (which counsel concedes he had) containing Sotolongo's interview (only one of four people at the ABC Lounge that evening discussed in the report) and would have investigated Sotolongo based on Waterhouse's defense theory.

Current collateral counsel's representation that he would have simply relied on the veracity of Detective Hitchcox's report is unavailing given the defense theory presented at trial when compared to the efforts of collateral counsel in other cases.[1] For example, in *Davis v. State*, 26 So. 3d 519, 528 (Fla. 2009), this Court found that collateral counsel's representations that her investigator conducted computer searches and traveled to Illinois looking for the witnesses were

[1] Collateral counsel faults the State for failing to attach police reports in this case to its brief or introduce them in evidence at the evidentiary hearing. Attaching these items to a brief would clearly be improper under the Rules of Appellate Procedure as the reports are not part of the instant record on appeal. Likewise, the State did not introduce any of these reports at the evidentiary hearing because the State did not have the burden of proof. However, it should be noted that these reports have previously been provided to counsel at trial and during the postconviction proceedings. (DAR V1/69, 86; PCR2 V3/419, 560; PCR2 V4/640)

sufficient, at the pleading stage, to establish due diligence to warrant an evidentiary hearing. This Court stated that the lower court erroneously applied the "heightened requirements" of establishing due diligence at an evidentiary hearing when evaluating the allegations at the pleading stage.

Similarly, in *Swafford v. State*, 828 So. 2d 966 (Fla. 2002), (after remanding for an evidentiary hearing on the specific threshold question of due diligence, *Swafford v. State*, 679 So. 2d 736 (Fla. 1996)), this Court affirmed the lower court's denial of the successive postconviction newly discovered evidence claim as untimely despite collateral counsel presenting numerous witnesses in support of his efforts to locate a witness. In her dissenting opinion, Justice Quince noted that collateral counsel had searched for the witness by "checking with Florida and federal prison systems, Florida and other likely states' departments of motor vehicles, credit computer checks, and a national tracking organization called Global Tracking. At that time, Global Tracking was the best method for finding individuals who did not want to be found." *Id.* at 981. Despite these efforts, this Court affirmed the trial court's finding that collateral counsel had not utilized due diligence because counsel had failed to locate the witness despite

possessing his former address and his probation officer's name. *Swafford*, 828 So. 2d at 973-78.

In the instant case, collateral counsel vaguely stated that he had reviewed the files in this case and had access to an investigator, but counsel never made any effort to locate and interview Sotolongo. (PCR3 V4/637-39) He admitted that Sotolongo's name was contained in the police reports, but he did not recall seeing his name. Although he asserted that he had an investigator "see if they could track down some" people, he made no effort to present *any evidence* in support of what efforts were actually made. This barebones assertion may be sufficient to obtain an evidentiary hearing but it is not sufficient to establish that he exercised due diligence in ascertaining the facts underlying this claim. Accordingly, this Court should find that the lower court erred in finding that Appellant met his threshold requirement of establishing due diligence in timely raising the instant claim.

In finding that Appellant's successive motion was timely, the lower court erred in finding that Sotolongo's testimony could not have been ascertained by Appellant or his counsel with the use of due diligence. Again it should be noted that the lower court made no findings as to the efforts of collateral counsel and instead relied solely on those of trial counsel.

Relying on dicta from this Court's opinion in *Mungin v. State*, ___ So. 3d ___, 36 Fla. L. Weekly S610 (Fla. Oct. 27, 2011), the lower court stated "due diligence surely does not require that counsel allocate limited pre-trial resources in investigating a witness that is reported by police to have said something contrary to what the witness now claims." This finding does not address collateral counsel's unsupported claim of diligence.

As the court conducted an evidentiary hearing on Appellant's claim and gave collateral counsel the opportunity to meet his burden to establish diligence and he failed to do so, this Court should reverse the lower court's finding of diligence.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, the State of Florida, respectfully urges this Court to affirm the order of the lower court denying Waterhouse's successive motion for postconviction relief and deny the request for a stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic transmission and U.S. mail to Robert A. Norgard, Esquire, Norgard and Norgard, P.O. Box 811, Bartow, Florida 33831-0811 (norgardlaw@verizon.net), on this 3rd day of February, 2012.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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