

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

PETER VENTURA

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Ventura's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied Mr. Ventura's claims without an evidentiary hearing.

The following symbols will be used to designate references to the record in this instant cause:

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

"PC-R." -- record on 3.850 appeal to this Court;

All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Ventura has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Ventura, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

Mr. Ventura adopts the Statement of the Case contained in his initial brief. Mr. Ventura specifically rejects the Statement of the Case contained in Appellee's Answer Brief as argumentative, misleading, and materially inaccurate.

SUMMARY OF ARGUMENT IN REPLY

1. Appellee's contention the trial court properly denied Mr. Ventura's motion for rehearing and amended motion for rehearing as untimely is not only without merit, it is without a any basis in the record. Appellee's tactics both below and during the instant appeal have wrongfully deprived Mr. Ventura of any meaningful opportunity to be heard on claims which are either patently meritorious or on which he is entitled to an evidentiary hearing. All claims and arguments previously set forth in Mr. Ventura's Initial Brief are hereby reasserted. No claim or argument is waived hereby.

ISSUE I

MR. VENTURA IS ENTITLED TO CONSIDERATION OF THE MERITS OF HIS AMENDED MOTION FOR REHEARING AND, THEREAFTER, AN EVIDENTIARY HEARING ON HIS 3.850 ISSUES. IN THE ALTERNATIVE, MR. VENTURA IS ENTITLED TO CONSIDERATION OF THE RULE 3.850 MOTION PRESENTLY PENDING BEFORE THE CIRCUIT COURT AS IF THE SAME HAD BEEN FILED PRIOR TO THE TWO YEAR LIMIT OF RULE 3.850.

A. INTRODUCTION

For many months, it has been unclear why the State of Florida had followed the course of action it had followed since Mr. Ventura first filed his Rule 3.850 motion in the circuit court. It simply made no sense for the State, which has purported to be the champion of the speedy resolution of postconviction petitions, to unerringly follow a litigation strategy which, even if successful, could do nothing more than delay consideration of Mr. Ventura's postconviction claims. For example, when this Court had time and time again allowed capital defendants to amend Rule 3.850 motions after the two year time limit when state agencies had failed to comply with the provisions of Chapter 119 of the Florida Statutes, see, State v. Kokal, 562 So. 2d 324 (Fla. 1990); Jennings v. State, 583 So. 2d 316 (Fla. 1991); Hoffman v. State, 613 So. 2d 405 (Fla. 1992); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992), it could serve no purpose, other than delay, for the State to seek dismissal of Mr. Ventura's non-record claims before the two year time limit. The State knew full well that the it's obligations under Chapter 119 had not yet been met. Similarly, if the State truly had any

interest in expediting a final ruling on Mr. Ventura's claims, it was nothing short of mysterious why it would ask the circuit court to maintain its earlier order of dismissal without prejudice rather than consider the merits of Mr. Ventura's amended motion for rehearing. Clearly Mr. Ventura had presented the facts which it had obtained during Chapter 119 compliance within his amended motion for rehearing. Surely it would have required far less time to pass on the merits of Mr. Ventura's amended motion for rehearing than it would to have deny that motion and wait for Mr. Ventura to file a new post-conviction motion. Finally, it was completely bewildering when Appellee opposed Mr. Ventura's request that this Court dismiss this matter without prejudice to allow the circuit court to consider the merits of the amended Rule 3.850 motion which Mr. Ventura had filed out of an abundance of caution promptly after the circuit court's denial of his amended motion for rehearing.¹ Mr. Ventura has now spent over two years attempting to fathom the motive behind Appellee's delaying tactics in this case.

With the filing of its Answer Brief, Appellee's purpose, at least its present purpose, becomes clear. Lacking any basis for opposing Mr. Ventura's post-conviction motion on the merits it seeks to create a non-existent, procedural obstacle to its consideration. Mr. Ventura is entitled to not only penalty phase

¹Out of respect for this Court's time, Mr. Ventura will only mention in passing that many of these tactics followed the delay caused when the State took well over a year to trickle out Chapter 119 materials.

relief, but also to a life sentence under Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), see Issues V and VI, Initial Brief of Appellant, as the lack of any cogent argument to the contrary in Appellee's Answer Brief confirms. Further, Mr. Ventura presented sufficient facts to the circuit court to entitle him to an evidentiary hearing upon his other non-record claims. The claims include, but are not limited to, the claim that the State of Florida had withheld evidence which was not only exculpatory, but directly relevant to Mr. Ventura's attempts at trial to show that the victim in this case, Mr. Clemente, was murdered not for insurance proceeds, but as a result of Mr. Clemente's nefarious drug dealing activities (activities in which Appellee knows Mr. Ventura was not involved). Given the fact that this evidence was directly relevant to the defense presented at trial, Mr. Ventura would have certainly received a new trial had the trial court reached the merits of his claims. Faced with a record which belies any meritorious grounds to oppose Mr. Ventura's Rule 3.850 motion in the court below, or his request on appeal to remand this matter to the circuit court, Appellee has resorted to mischaracterizing that record in a patent attempt to shift the equities in this case away from Mr. Ventura, with whom they clearly lie. After so doing, Appellee asks this court to ignore practically the whole of its Rule 3.850 jurisprudence and deny relief to an individual that is clearly deserving of the same.

B. THE STATE OF FLORIDA, NOT MR. VENTURA, IS THE SOLE CAUSE OF ALL DELAY IN THE PROCEEDINGS BELOW.

Appellee suggests that Mr. Ventura failed to proceed in a timely manner below and that this failure merits affirmance of the decision of the circuit court.

[t]he state has not attempted to deny Ventura due process, but instead has sought to have Ventura present them in a legally sufficient, procedurally correct, and timely manner.

Admittedly, Ventura filed his March 1992 postconviction motion in a timely fashion. However, the filing was pointless because the motion contained absolutely no supporting factual allegations or argument for each claim. This pleading served no purpose other than to list the issue headings for arguments and facts that presumably would be added in the future.

[The Florida Supreme Court] obviously did not contemplate the stalling of postconviction proceedings in the trial court for indefinite time periods while Chapter 119 disclosure occurred. Considering the fact that Ventura had 16 months within which to prepare a sufficient postconviction motion, there is no reasonable explanation why Chapter 119 disclosure was not being vigorously pursued during this 16 month period prior to the filing of the motion.

Appellee's Answer Brief at 19-21.

Appellee fails to point to any portion of the record to support the bald accusation that Mr. Ventura had not "vigorously pursued" Chapter 119 disclosure during the 16 months prior to the filing of his Rule 3.850 motion, much less thereafter when he had a forum in which to present the same. The record is replete with examples where Mr. Ventura timely sought public records while the State arrogantly refused to follow the law of the State of

Florida and the decisions of this Court. The Volusia County State Attorney's Office was sent a Chapter 119 request a full three months prior to the date on which Mr. Ventura filed his Rule 3.850 motion. It was well over two months later before the state attorney even partially complied with that request. (PC-R 370). On June 8, 1992, The Duval County State Attorney's Office was ordered to turn over the file from the prosecution of Mr. Ventura's co-defendant, Jerry Wright, (PC-R 450-456), yet on May 21, 1993, almost a year later, the State was refusing to turn over these public records until it had the opportunity to assert exemptions from Chapter 119. (PC-R 83-85). It was not until March 8, 1994, that Mr. Ventura received a copy of the Volusia County Sheriff's Department's file regarding Marshall Krom's death. These agencies possessed materials which were critical to Mr. Ventura's Rule 3.850 proceedings, yet each withheld those records until after the State had obtained dismissal of Mr. Ventura's Rule 3.850 motion for its failure to plead what these undisclosed records contained. Moreover, they continued to withhold those materials for months after they had been ordered to turn them over.

It is sheer audacity for the State to now claim that its only interest is in seeing Mr. Ventura present his claims in a timely manner. The record demonstrates that Mr. Ventura amended those claims to include supporting factual assertions as soon as reasonably possible after receiving the materials which revealed those facts and/or rendered previously known facts relevant to

Mr. Ventura's claims. The record is clear. This Court should not be misled simply because the State has chanted its mantra of defendant delay in postconviction proceeding when it is contradicted by that record.

C. THE STATE'S ARGUMENT THAT MR. VENTURA'S MOTION FOR REHEARING WAS UNTIMELY WAS NEVER PRESENTED TO THE CIRCUIT COURT AND HAS BEEN WAIVED. THE STATE'S ARGUMENT THAT MR. VENTURA'S AMENDED MOTION FOR REHEARING WAS UNTIMELY WAS REJECTED BY THE CIRCUIT COURT, NO CROSS APPEAL WAS TAKEN, THEREFORE IT HAS BEEN WAIVED. FURTHERMORE, BOTH ARE WITHOUT MERIT.

Appellee contends that Mr. Ventura's initial motion for rehearing was untimely filed. Appellee's Brief at 22-23. While this contention is somewhat irrelevant,² it should be noted that Appellee never made this argument to the circuit court, therefore it has been waived. Moreover, as Appellee also concedes, Appellee's Brief at 23, footnote 4 ("Instead, [Mr. Ventura] waited another two weeks to file his motion for rehearing"), Mr. Ventura's motion for rehearing was filed within fifteen days after Mr. Ventura was properly served with the order of dismissal. Therefore, contrary to Appellee's misrepresentations, the motion for rehearing was timely filed.

As to Mr. Ventura's amended motion for rehearing, the State argued before the circuit court that the amendment was untimely and that an amended motion for rehearing could not be used to raise new issues. Mr. Ventura argued that the amended motion for rehearing was timely filed because it had been filed within a

²Appellee concedes that the trial court may consider a motion for rehearing filed outside of a 15 day period. Appellee's brief at 23.

reasonable amount of time after the State had complied with Chapter 119. (PC-R 362-363). The circuit court rejected the State's argument as to timeliness and held:

The Court accepts the argument of the State that the defendant's motion for rehearing is procedurally barred as there is no authority for filing the same and raising new issues.

(PC-R 924). The State did not cross-appeal the circuit court's decision. Even if it were meritorious, it is not properly before this Court. Further, given the fact that Appellee concedes that the circuit court was free to consider a motion for rehearing regardless of when it is filed, Appellee's similar argument as to the timeliness of the amended motion for rehearing is equally irrelevant and without merit.

Appellee's arguments both as to the timeliness of Mr. Ventura's motion for rehearing and the timeliness of his amended motion for rehearing are not properly before this Court. More importantly, they are patently incorrect. Both have been presented solely to assist Appellee's efforts to delude this Court as to which party is responsible for the delay in a just resolution of Mr. Ventura's claims.

D. UNDER THE CIRCUMSTANCES OF THIS CASE, MR. VENTURA'S AMENDED MOTION FOR REHEARING WAS THE PROPER MANNER IN WHICH TO PRESENT THE FACTS WHICH SUPPORTED HIS POSTCONVICTION MOTION.

The remainder of Appellee's argument rests upon its claim that Mr. Ventura's amended motion for rehearing was not the

proper vehicle for presenting the facts which supported his Rule 3.850 motion.³ Appellee maintains:

Importantly, at no time did the court absolutely preclude Ventura from amending his postconviction motion as he acquired relevant chapter 119 materials. Indeed, implicit in this dismissal without prejudice was Ventura's ability to refile an additional, proper motion.

Appellee's Brief at 21. Based upon this allegation Appellee provides numerous suggestions as to what procedures Mr. Ventura should have followed before the circuit court. Appellee states:

Absent the filing of an initially proper postconviction motion, Ventura should have amended his March 1992 postconviction motion prior to dismissal and within the two year time period of the rule, and not placed his substantive arguments in a rehearing motion which, by its own definition, precluded the presentation of new facts and argument.

Appellee's Brief at 26. Appellee argues that absent these steps the circuit court had no choice but to do as it did. Appellee's Brief at 26. ("Moreover, Ventura has evaded the taxing question of what the trial court was supposed to do.")

While Appellee would have this Court believe that Mr. Ventura had any number of options he could have pursued before the circuit court, it is incorrect. Mr. Ventura could not fully plead his initial Rule 3.850 motion because the State was

³Appellee repeatedly states that Mr. Ventura's amended motion for rehearing raised new claims. That is simply incorrect. The amended motion for rehearing discussed the same 11 claims which were raised in Mr. Ventura's Rule 3.850 motion. What was added were the facts which were either discovered during the State's protracted Chapter 119 compliance or rendered relevant by the discovery of such facts.

concealing the facts necessary to do so by failing to comply with Chapter 119. When the State finally complied with Chapter 119, Mr. Ventura could not amend his Rule 3.850 procedure because his motion for leave to amend had been denied and his Rule 3.850 motion had been dismissed. Mr. Ventura could not file "an additional, proper motion" because his initial motion remained pending while the circuit court took over a year to act on Mr. Ventura's motion for rehearing. Mr. Ventura followed the only course of action open to him.

The same cannot be said for either the State or the circuit court. The circuit court should have followed the procedure set out in Anderson v. State, 627 So. 2d 1170 (Fla. 1993). Mr. Ventura's initial Rule 3.850 motion contained a Chapter 119 claim. Rather than dismiss Mr. Ventura's Rule 3.850 motion, the circuit court should have assured the State's compliance with Chapter 119 and thereafter allowed Mr. Ventura a reasonable amount of time within which to amend his postconviction motion. Even had the circuit court failed to follow the Anderson procedure, it could have entered an order denying Mr. Ventura's motion for rehearing before the two year date, thus allowing Mr. Ventura to file a new Rule 3.850 motion setting forth the facts available to him at the two year date together with a Chapter 119 claim regarding any materials which had not yet been disclosed. Finally, the circuit court could have recognized that its own failure to act on Mr. Ventura's motion for rehearing prior to the two year date had deprived Mr. Ventura of his right to amend

under Walton v. Dugger, 621 So. 2d 1357 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992); Hoffman v. State, 613 So. 2d 405 (Fla. 1992); State v. Kokal, 562 So. 2d 324 (Fla. 1990); and Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990), and specified a set amount of time within which Mr. Ventura could file Rule 3.850 motion containing the facts and claims discovered, or rendered viable by, the State belated compliance with Chapter 119.

Similarly, the State could have refrained from filing a motion to dismiss with prejudice which it knew to be unfounded in either fact or law and instead moved the circuit court to follow the procedure outlined in Anderson. It could have immediately complied with Chapter 119 and assisted other state agencies in doing so as this Court suggested in Hoffman. Finally, it could have joined in Mr. Ventura's motion to remand this matter to the circuit court for consideration of the Rule 3.850 motion which Mr. Ventura filed less than thirty days after the circuit court denied his amended motion for rehearing rather than opposing the same and seeking to strike that postconviction motion in the circuit court.

E. THE STATE HAS CONCEDED THAT MR. VENTURA'S INITIAL RULE 3.850 MOTION WAS DISMISSED WITHOUT PREJUDICE. THIS MATTER SHOULD BE REMANDED TO THE CIRCUIT COURT WITH DIRECTIONS FOR MR. VENTURA TO FILE A NEW RULE 3.850 MOTION.

Appellee's brief states that, notwithstanding the superfluous language in the circuit court's order to the contrary, the circuit court dismissed Mr. Ventura's Rule 3.850 motion without prejudice. (PC-R 21). Accepting Appellee's concession, this Court should remand this matter to the circuit

court with directions to allow Mr. Ventura a reasonable amount of time to file a facially sufficient postconviction motion. Given this concession, Mr. Ventura is in an identical posture to the defendant in Anderson v. State, 627 So. 2d 1170 (Fla. 1993), where this Court stated:

Next we address Anderson's claim that the trial court erroneously denied an evidentiary hearing and dismissed the motion with prejudice on the merits even though Anderson alleged that various state agencies had failed to comply with his public records request. This court has made it clear that a prisoner whose conviction and sentence has become final on direct review is generally entitled to criminal investigative public records as provided in Chapter 119. . . . Under the circumstances presented in this case, we find it appropriate at this time to remand this matter to the district court to enable Anderson to proceed without prejudice to pursue his requests for public records in a timely manner. The various state agencies must either comply with Anderson's requests or object pursuant to the procedures set forth by this Court and under Chapter 119. We direct that Anderson be granted thirty days to amend his motion, computed from the date the various state agencies deliver to Anderson the records to which he is entitled.

627 So. 2d at 1171-1172. Citations omitted.

Accordingly, this matter should be remanded to the circuit court with instructions to consider an amended Rule 3.850 motion filed upon completion of Chapter 119 disclosure.⁴

⁴Mr. Ventura notes that he filed such an amended motion immediately after the circuit court entered its order on his motion for rehearing. This Court's instructions are required because the State successfully moved the circuit court to strike that motion.

F. CONCLUSION

Appellee's suggestion that Mr. Ventura was anything less than diligent in prosecuting his postconviction motion is belied by the record. Mr. Ventura aggressively pursued Chapter 119 materials both prior to and after the filing, and dismissal, of his Rule 3.850 motion. He presented the facts and claims discovered through, or rendered viable by, Chapter 119 materials even before the State had fully complied with Chapter 119. This matter has been delayed solely by the State's non-compliance with Chapter 119 and its attempts to transform a dismissal without prejudice into a dismissal with prejudice by postponing Chapter 119 compliance until after the two year date had expired. It is a tactic which has become commonplace throughout the State of Florida. This Court should not only remand this matter to the circuit court, it should issue a decision holding that the procedure outlined in Anderson must be followed in every postconviction proceeding in which Chapter 119 disclosure is sought.

CONCLUSION

On the basis of the arguments presented herein, Mr. Ventura respectfully submits that he is entitled to a Huff hearing regarding the claims set forth in his Amended Motion for Rehearing, an evidentiary hearing, a new trial, and a resentencing. Mr. Ventura respectfully urges that this Honorable Court remand to the circuit court for such an evidentiary hearing

so that the circuit court may set aside his unconstitutional conviction and death sentence.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on November 20, 1995.



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