

SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
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CASE NO. 86,119

MOTION FOR REHEARING

Petitioner, CARY MICHAEL LAMBRIX, by and through his undersigned counsel, and pursuant to Rule 9.330 of the Florida Rules of Appellate Procedure, files this motion for rehearing of this Court's decision entered herein on September 12, 1996. This Court granted Mr. Lambrix an extension of time in which to file his motion for rehearing until October 28, 1996. Mr. Lambrix respectfully submits that the Court overlooked or misapprehended the following points of law or fact:

I. THIS COURT FAILED TO ADDRESS MR. LAMBRIX'S ARGUMENT THAT NO PROCEDURAL DEFAULT APPLIES BECAUSE HE IS ACTUALLY INNOCENT

This Court held that all of Mr. Lambrix's claims are procedurally barred. Lambrix v. State, 1996 WL 514603, at *2 (Fla., Sept. 12, 1996). Assuming arguendo that his claims were otherwise properly procedurally barred, this Court completely failed to address what was likely the most persuasive reason for overlooking that bar -- his claim that denial on the basis of procedural bar would be a fundamental miscarriage of justice because he is actually innocent of premeditated murder.

The United States Supreme Court has consistently held that no procedural default may be enforced in post-conviction proceedings where failure to consider the defendant's claims would result in a "fundamental miscarriage of justice." Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991); Murray v. Carrier, 477 U.S. 478, 495-96 (1986); Engle v. Isaac, 456 U.S. 107, 135 (1982). In Schlup v. Delo, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), the Court recognized that the "quintessential miscarriage of justice is the execution of a person who is entirely innocent." Id., 115 S. Ct. at 866 (collecting cases). In Schlup, the Court went on to hold that even where a petitioner's claim is otherwise procedurally barred or an abuse of the writ, the merits of the claim must be considered if the petitioner can show that "a constitutional violation probably resulted in the conviction of one who is actually innocent," id. at 867, quoting Carrier, supra, 477 U.S. at 496, or in other words that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Id.

Schlup holds, then, that where such a showing is made, the reviewing court must consider the merits of petitioner's claims -- the showing of innocence acts as a "gateway" to merits consideration of his claims. Id. at 861, quoting Herrera v. Collins, 113 S.Ct. 853, 862 (1993). Here, Mr. Lambrix has made such a showing. As Mr. Lambrix showed in his Initial Brief, at 23-28, and his Reply Brief, at 10-15, Mr. Lambrix's first degree murder convictions were based solely on premeditated, not felony murder, and the evidence of premeditation was entirely circumstantial. Because the evidence of premeditation was circumstantial, the evidence had to exclude "all reasonable hypotheses of innocence" of premeditated murder in order to support the convictions. Barwick v. State, 660 So. 2d 685, 695 (Fla. 1995).

Because the trial court summarily denied Mr. Lambrix's claims without holding any hearing,

this Court was required to accept as true the facts alleged in the Rule 3.850 motion. Cherry v. State, 659 So. 2d 1069, 1074 (Fla. 1995). The evidence presented in support of the Rule 3.850 motion, see Initial Brief, Arguments III-V, at a minimum established a reasonable hypothesis of innocence of premeditated murder.

Perhaps the most significant and far-reaching of the constitutional violations at Mr. Lambrix's trial was the denial of his right to testify in his own defense, as set forth in Argument III of the Initial Brief. Together, Mr. Lambrix's counsel and the trial court coerced Mr. Lambrix into not testifying. Had Mr. Lambrix not been prevented from testifying, he would have offered testimony that directly contradicted the State's theory of premeditated murder. Mr. Lambrix would have testified that Lamberson attacked Bryant and that in attempting to defend Bryant he struck Lamberson with a tire iron, killing him. App. 1, Affidavit of Cary Michael Lambrix. This testimony, which was consistent with the physical evidence, would have required first the judge and then the jury to determine whether the circumstantial evidence relied on by the State was adequate to exclude a "reasonable hypothesis of innocence" of first-degree murder based on Mr. Lambrix's own testimony.

Indeed, on direct appeal this Court has repeatedly found a lack of evidence of premeditation in cases where the evidence was far stronger. See, e.g., Mungin v. State, 667 So. 2d 751 (Fla. 1995) (conflicting evidence concerning whether shooting was premeditated or "spur of the moment"); Terry v. State, 668 So. 2d 954 (Fla. 1996) (no evidence as to how shooting occurred); Jackson v. State, 575 So. 2d 181, 186 (Fla. 1991) (no evidence of anticipated killing).

With respect to the factors discussed in Mungin, Terry and Jackson, the evidence here failed to exclude the absence of premeditation. There was no evidence that Mr. Lambrix had procured a weapon in advance of the homicides. He had not known the victims prior to the night of the offense,

and there was absolutely no statement or evidence of any prior intent to kill. Indeed, Frances Smith's testimony indicated that all four of the persons present were on good terms. R. 2205. Moreover, Mr. Lambrix could also have presented evidence of his intoxication on the night of the alleged crime. Mr. Lambrix himself would have related the amount of alcohol he consumed. App. 1. Glades County Deputy Sheriff Council -- a State witness at Mr. Lambrix's trial -- could and would have testified that in his opinion as a law enforcement officer, when he saw, confronted and spoke to Mr. Lambrix only hours prior to the time of death, Mr. Lambrix was intoxicated. App. 4, Affidavit of Ron Council; ROA 361 (testimony of Ronald Council). It is clear that had trial counsel presented Deputy Council's observations to the jury, the court would have been required to instruct the jury on the applicable law governing the defense of voluntary intoxication. See Argument V of the Initial Brief. The evidence of voluntary intoxication would also have presented a reasonable hypothesis inconsistent with premeditation, and would have been consistent with Mr. Lambrix's testimony. In addition, the State's key witness, Frances Smith, had given numerous conflicting stories that were improperly kept from the jury. See Argument IV of the Initial Brief. Had this witness been subjected to adequate cross-examination the jury would have questioned her credibility and with it the State's case.

Accordingly, Mr. Lambrix presented to this Court a colorable claim that he is actually innocent of premeditated murder, and thus of first degree murder. Under Schlup, this Court was then required to address the merits of Mr. Lambrix's claims. At a minimum, this Court should have addressed the argument. If this Court is willing to allow the "quintessential miscarriage of justice" entailed in the execution of a man who is innocent of first degree murder, it should at least say so. This Court should grant rehearing to consider and decide Mr. Lambrix's argument that refusal to

consider the merits is a fundamental miscarriage of justice.

II. MR. LAMBRIX'S CLAIM THAT HIS RIGHTS UNDER FARETTA V. CALIFORNIA AND DUROCHER V. SINGLETARY WERE VIOLATED IN THE INITIAL RULE 3.850 PROCEEDINGS IS NOT PROCEDURALLY BARRED

This Court found that it did not need to reach Mr. Lambrix's claim that he was deprived of his right to represent himself in his initial motion for postconviction relief on several grounds. None of these were well taken, as shown below. Because there is no procedural impediment to consideration of that claim, this Court should grant rehearing and consider it on the merits.

First, this Court stated that Mr. Lambrix did not raise his claim under Faretta in his appeal from the denial of the initial Rule 3.850 motion. Lambrix v. State, 1996 WL 514603, at *1. While true, this ignores Mr. Lambrix's circumstances at the time. Mr. Lambrix was sitting on death watch at the time that his initial Rule 3.850 motion was appealed. He had little opportunity even to review CCR's pleadings, let alone to file his own. Mr. Lambrix had been told by his counsel -- CCR -- and by the trial court that he had no right to represent himself. He had no basis on which to question their judgment and no reason to believe that this Court would accept further pro se filings. Since Mr. Lambrix had neither the opportunity nor the ability to raise the issue on his own, and no reason to think that there was any valid claim, the mere fact that he did not file some kind of supplemental pro se pleading raising the issue cannot be held against him.

Second, this Court said that Mr. Lambrix failed to raise the issue within the two year time limit set by Rule 3.850. Lambrix v. State, 1996 WL 514603, at *1. Mr. Lambrix's claim, however, was based on Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993), where this Court first held that the Faretta right of self-representation applies to postconviction proceedings. Because Mr. Lambrix filed his Rule 3.850 motion less than two years after the Durocher decision, his Durocher claim is

not time barred.

Third, this Court stated that after the Rule 3.850 appeal, Mr. Lambrix “has had a number of opportunities to represent himself, including two pro se proceedings considered on their merits by this Court. See Lambrix, 529 So. 2d at 1110; Lambrix, 559 So. 2d at 1137.” Lambrix v. State, 1996 WL 514603, at *1. The first reference is factually inaccurate. Mr. Lambrix did file a pro se state habeas in this Court before his Faretta motion was denied by the trial court. See Initial Brief, App. A (trial court order denying motion to dismiss appellate counsel, dated December 9, 1987). Mr. Lambrix’s pro se petition for writ of habeas corpus was filed in this Court on September 29, 1987. After Mr. Lambrix’s motion to dismiss appellate counsel was denied, CCR also took over his representation on the state habeas petition, and this Court addressed only those claims raised by CCR. See Lambrix v. Dugger, 529 So. 2d 1110 (Fla. 1988). In any event, Mr. Lambrix could not have raised in the state habeas petition his claims of trial error and denial of his right to represent himself in the Rule 3.850 proceedings.

With respect to the second state habeas petition, Mr. Lambrix has alleged that at the time it was filed the Florida State Prison, where Mr. Lambrix was confined, had a policy of confiscating and storing all legal property of death row prisoners and providing access to such property only on court order. Mr. Lambrix has filed a civil suit challenging this policy. See Lambrix v. Singletary, 618 So. 2d 787 (Fla. 1st DCA 1993).¹ Mr. Lambrix has further alleged that by this action the prison,

¹The policy was plainly unconstitutional for the very reason that it denied Mr. Lambrix access to the courts. See, e.g., Procunier v. Martinez, 416 U.S. 396, 419 (1974) (“Regulations and practices that unjustifiably obstruct the . . . right of access to the courts are invalid”); Thomas v. Evans, 880 F.2d 1235, 1241-42 (11th Cir. 1989) (confiscation of legal materials unconstitutional); Straub v. Monge, 815 F.2d 1467, 1469 (11th Cir. 1987) (prison policy of requiring court order as prerequisite to access to legal materials unconstitutional); Wright v.

acting on behalf of the State, effectively prevented Mr. Lambrix from identifying all of his claims at the time that petition was filed. Thus, even if the claim would otherwise be barred because it was not raised in that proceeding, that bar cannot be applied here because it resulted from interference by State officials with Mr. Lambrix's ability to raise the claim. Coleman v. Thompson, 501 U.S. 722, 753 (1991); Murray v. Carrier, 477 U.S. 478, 488 (1986); Brown v. Allen, 344 U.S. 443, 485-86 (1953) (bar cannot be applied if petitioner was "detained without opportunity to appeal because of . . . some interference by officials.").

Finally, this Court asserted that Mr. Lambrix had failed to show what issues he would have raised in the first Rule 3.850 proceeding that have not been raised in subsequent proceedings. Lambrix v. State, 1996 WL 514603, at *1. This assertion is puzzling, since the entire thrust of the Rule 3.850 motion and this appeal has been to present the claims that would and should have been raised in the initial Rule 3.850 proceeding had Mr. Lambrix not been at the same time forced to accept counsel provided by the State and then had that counsel rendered ineffective. See Rule 3.850 Motion, ROA 11-14, 16-17; Initial Brief, at 10-21; Reply Brief, at 9-10. The claims raised here were not raised in subsequent proceedings. Mr. Lambrix has not previously alleged that counsel was ineffective for failing to preserve his right to testify; that counsel was ineffective for failing to adequately cross examine and impeach State witnesses Frances Smith and Deputy Ronald Council; that counsel failed to conduct jury selection in a reasonably competent manner; or that counsel was ineffective for failing to object to the trial court's unconstitutionally vague jury instructions at penalty phase. These are the claims that Mr. Lambrix would have raised in the original Rule 3.850

Newsome, 795 F.2d 964, 968 (11th Cir. 1986) (confiscation of prisoner's legal files and records unconstitutional because it denies access to courts).

motion, if given the opportunity. This Court should consider them on the merits now.

III. IN THE CIRCUMSTANCES OF THE PRIOR RULE 3.850 PROCEEDINGS, MR. LAMBRIX WAS ENTITLED TO EFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL

This Court denied Mr. Lambrix's claim of ineffective assistance of post-conviction counsel with a cursory statement that such claims "do not present a valid basis for relief," Lambrix v. State, 1996 WL 514603 at *2, citing Murray v. Giarratano, 492 U.S. 1 (1989), and Pennsylvania v. Finley, 481 U.S. 551 (1987). That statement completely fails to recognize the unique circumstances of Mr. Lambrix's claim. Mr. Lambrix does not just contend that post-conviction counsel failed to perform adequately in one or more respects. Rather, he alleges that the State (1) refused to allow him to represent himself; (2) forced him to accept representation by CCR, a State agency; and then (3) made it impossible for CCR to provide adequate representation for him. By forcing Mr. Lambrix to accept State counsel, the State undertook the obligation at a minimum to provide effective counsel. Otherwise, the State could use its power to force ineffective counsel upon an unwitting defendant as a way of insuring he did not obtain relief. In fact, that is exactly what Mr. Lambrix alleges happened here. This claim cannot properly be dismissed with a simple citation to Giarratano and Finley, neither of which involved anything like these facts.

In addition, regardless of whether these facts created a right to effective post-conviction counsel under the United States Constitution, they clearly created such a right under Florida law. This Court and at least one district court of appeal have recognized that when counsel is appointed or provided by the State in post-conviction proceedings, that counsel must be effective. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988); Jones v. State, 642 So. 2d 121 (Fla. 5th DCA 1994). Indeed, this Court has recognized that this requirement applies even when counsel is appointed in clemency

proceedings. In Remeta v. State, 559 So. 2d 1132 (Fla. 1990), the appellant challenged the application of a fee cap to clemency proceedings. This Court noted that such a cap may not be applied in situations where a defendant has a right to effective representation, such as in criminal trials. See, e.g., Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), cert. denied, 479 U.S. 1043 (1987). It held that the same reasoning applies in the context of clemency, at least where a lawyer is appointed, because the appointment of counsel necessarily implies the requirement that such counsel be effective:

The appointment of counsel in any setting would be meaningless without some assurance that counsel give *effective* representation. As we said in Makemson, our focus must be on “the defendant’s right to *effective representation* rather than the attorney’s right to fair compensation.” Makemson, 491 So. 2d at 1112 (emphasis supplied). Unfortunately, the link between compensation and the quality of representation remains too clear.” Id. at 1114. Trial courts must have the authority to ensure effective representation. It is the only way to ensure effective representation and give effect to the right to counsel in these death penalty clemency proceedings.

Remeta, 559 So. 2d at 1135.

If, as this Court held in Remeta, capital defendants have a right to effective appointed counsel in clemency proceedings, where regardless of the showing made by the petitioner, clemency remains an act of grace that is never required, it is all the more clear that State-provided counsel must be effective in collateral post-conviction proceedings, which involve an extremely complex jurisprudence, McFarland v. Scott, 114 S. Ct. 2568, 2572 (1994), and in which relief is required upon a proper showing that the defendant’s conviction and/or sentence are unconstitutional. That is all the more true in the context of the instant case, where the State not only provided Mr. Lambrix counsel, but also forced that counsel on him against his will.

IV. MR. LAMBRIX WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BECAUSE COUNSEL'S ACTIONS DEPRIVED MR. LAMBRIX OF HIS RIGHT TO TESTIFY

For all of the reasons set forth above, there was no procedural bar to consideration of the merits of Mr. Lambrix's claims. Mr. Lambrix will not attempt to reargue the merits of all of those claims, but does wish to call this Court's attention again to the extremely serious violation of his right to effective assistance of counsel that took place when his counsel coerced him not to exercise his right to testify.

At Mr. Lambrix's first trial, trial counsel approached the court concerning his desire to testify and both the court and counsel forced Mr. Lambrix to choose between exercising his right to testify and his right to the assistance of counsel. Counsel told the court that they would withdraw if Mr. Lambrix testified, and the court warned Mr. Lambrix in no uncertain terms that if he insisted on testifying in his own behalf, the court would allow counsel to withdraw and Mr. Lambrix would be forced to represent himself. See App. 2.

Although the original trial ended in a mistrial when the jury was unable to reach a verdict, the case was set for retrial only two months later. At retrial, Mr. Lambrix was represented by the same counsel. As is supported by Mr. Lambrix's affidavit, see App. 1, and as trial counsel Kinley Engvalson would testify, Mr. Lambrix consistently expressed his desire to testify in his own behalf at and throughout his second trial. Mr. Engvalson would also testify that counsel never reviewed with Mr. Lambrix what his testimony would have been had he been allowed to take the stand. Rule 3.850 Motion, ROA 24. Thus, trial counsel's actions both prior to and during the second trial forced Mr. Lambrix to choose between his right to counsel and his right to testify. Furthermore, throughout their representation, counsel failed to inform Mr. Lambrix that the right to testify is a fundamental

right that must be personally waived by the defendant. These facts establish that Mr. Lambrix was deprived of effective assistance of counsel both prior to and throughout his second trial.

Under United States v. Teague, 953 F.2d 1525 (11th Cir.) (en banc), cert. denied, 113 S. Ct. 27 (1992), and its progeny, it is clear that if counsel fails to inform a defendant of his fundamental right to testify and to decide whether or not to testify, or if counsel coerces a defendant to give up his right to testify, the defendant is deprived of his right to effective assistance of counsel. Where counsel threatens to withdraw from his representation of the defendant if the defendant takes the stand, and prejudice to the defendant results, counsel has rendered ineffective assistance. Nichols v. Butler, 953 F.2d 1550, 1553 (11th Cir. 1992) (en banc).

Here, Mr. Lambrix has alleged that counsel threatened to withdraw from representing him on his capital murder charges if he exercised his right to testify, and that counsel maintained that threat throughout both trials. Those allegations clearly establish deficient performance under Teague and Nichols. Where counsel's ineffectiveness deprives a defendant of his right to testify, prejudice should be presumed. Gill v. State, 632 So. 2d 660, 661-62 (Fla. 2d DCA 1994).

If a showing of prejudice is required, however, it can easily be established. If Mr. Lambrix had been allowed to testify, there is much more than a reasonable probability that he would not have been convicted of first degree murder. As set forth in Part I above, if Mr. Lambrix had been allowed to testify, the circumstantial evidence would have been insufficient to support a conviction of premeditated murder in the face of his testimony.

Therefore, the prejudice resulting from counsel's deficient performance in failing to adequately protect Mr. Lambrix's fundamental right to testify is clear. As a result of counsel's ineffective assistance, Mr. Lambrix now stands wrongly convicted of two counts of premeditated

first degree murder and sentenced to death. This case should be remanded for an evidentiary hearing, and on proof of counsel's ineffectiveness Mr. Lambrix will be entitled to a new trial.

CONCLUSION

For all of the foregoing reasons, this Court should grant rehearing, and grant Mr. Lambrix a new trial and/or sentencing proceeding, or remand this matter for an evidentiary hearing.

Respectfully submitted,

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