

Rec 2/4/94

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT

IN AND FOR PINELLAS COUNTY, FLORIDA

Criminal Division

STATE OF FLORIDA,

Plaintiff,

VS.

CASE NO. CRC 89-11425-CFANO

KEVIN RICHARD HERRICK,

Defendant.

DEFENDANT'S MOTION FOR REHEARING

In accordance with the provisions of Fla.R.Crim.P. 3.850, the defendant, KEVIN RICHARD HERRICK, respectfully moves this Honorable Court for an order granting rehearing. The defendant submits that the Court overlooked controlling points of law and fact, and shows the Court as follows:

Ground One;

The Court must have overlooked the key fact that the video-taped deposition of defense witness Theresa Porrey was perpetuated the day before the trial for the sole purpose of trial testimony for the defense: Theresa Porrey was very ill and could not testify at trial. Brief, 12, 13, 15-18. Obviously, this was not a discovery deposition. Nonetheless, it appears from the Court's order that it has overlooked this crucial fact:

The scope of pre-trial deposition in a criminal case may extend to any matter, not privileged, which is relevant to the subject matter of the pending action.

It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Fla.R.Civ.P. 1.280 (b)(1) and [Fla.R.Crim.P.] 3.190 (j)(5). Therefore, counsel did not act improperly in failing to object to questions posed by the State to a witness during a pre-trial deposition which were within the wide permissible scope of discovery.

Order, 1-2.

The video-taped deposition of defense witness Theresa Porrey, which was perpetuated solely because of her inability to testify at trial due to illness, was played in its entirety before the jury, then erroneously permitted into the jury room. This was error: since Theresa Porrey could not testify at trial, the only reasonable method to exclude the inadmissible information was to make a motion to suppress. Fla.R.Civ.P. 1.330 (6)(b), provides:

Subject to the provisions of Rule 1.300 (b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part of it for any reason that would require the exclusion of the evidence if the witness were then present and testifying.

(emphasis added).

This is exactly what counsel failed to do: move to suppress the inadmissible portions of the video-taped deposition that resulted in the error complained of. Unfortunately, the video-tape was played in its entirety before the jury and erroneously permitted into the jury room. Consequently, defendant was rendered ineffective assistance of counsel by this omission: if not for this error, the sole defense witness, the defendant's alibi witness, would not have been impeached. Thus, the defendant's

alibi would have been unimpeached, and the jury would have rightfully acquitted him.

In sum, this Court's order does not conclusively refute the defendant's allegations to the contrary.

Ground Three;

The Court must have overlooked the fact that the defendant was led to believe by his attorney that elements of this prior record would be used against him at trial to show bad character and a propensity to commit crime in general. Defendant had no idea prior to trial that he would only be questioned in substance: "Have you previously been convicted of crime?" And, if so, "How many times?" If defendant had not been led to believe by this attorney that elements of his prior offenses would be used against him at trial, he would have testified to his innocence. Defendant believes this erroneous advise, which induced him not testify, was error. Further, it was defendant's belief that his attorney had to move to suppress his prior record (due to no similarities) to keep the elements of the offenses from being admitted.

Ground Four;

The Court must have misapprehended Gorham v. State, 521 So.2d 1067 (Fla. 1988), appeal after remand, 597 So.2d 782 (Fla. 1992). In Gorham, the Florida Supreme Court dealt with an allegation that counsel was "ineffective for failing to object to"unconstitutionally deficient instructions on first degree

murder."" This is highly distinguishable from the instant case: Mr. Herrick is not challenging the "constitutionality" of the instructions given--counsel failed to object to approved instructions that were not supported by any evidence advanced at trial. This resulted in the error complained of in Ground Four.

Ground Six;

The Court must have misapprehended State v. Stacy, 482 So.2d 1350 (Fla. 1985), in denying defendant relief on a "clear case of ineffective assistance counsel." In Stacey, the Florida Supreme Court held:

[I]ssues which could have, should have, or were raised on direct appeal cannot normally be raised in a 3.850 proceeding. What [the Court] overlooks is that we have a clear case of ineffective assistance of counsel....

....it is clear that counsel performance was deficient and prejudicial and that respondent is entitled to relief....[due to] ineffective assistance counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Stacey, at 1351.

Counsel was clearly ineffective for his failure to object to the video-taped deposition being erroneously permitted to go into the jury room.

Further, the Court must have overlooked the fact that on October 29, 1992, defendant requested the assistance of counsel in preparing his motion for post-conviction relief. However, the Court made no ruling on this request. Consequently, defendant proceeded and done the best job he could in identifying for the Court grounds that would entitled him to relief. In fact, the

holding in Stacey, which was used by the Court to deny defendant relief, seems to support the proposition that he is entitled to relief for his pro se efforts:

Given the circumstances surrounding this pro se motion, we are not inclined to hold respondent to professional standards of pleading.

Stacey, at 1351.

Thus, defendant is entitled to relief on the clear case of ineffective assistance of counsel for his omission which resulted in the video-taped deposition being erroneously permitted into the jury room.

Ground Seven;

The Court must have overlooked the fact that defendant was erroneously assessed points on his sentencing guidelines scoresheet for prior offenses for which he never pled guilty to. Motion, 14-15 and Brief, 31-34. Thus, with the proper removal of the forty (40) points for the non-existent victim injury, as the Court has correctly conceded was error, the defendant clearly does score within the recommended thirty (30) year cell, absent the erroneously assessed points for the contested prior record.

Further, the Court's order does not conclusively refute the defendant's allegation that the Court was under the erroneous belief, because the defendant scored "life" under the guidelines, because all everyone ever said was that the defendant scored "life", because the sentencing guidelines scoresheet used at the defendant's sentencing only gives the parties recommended ranges

and clearly omits any permitted ranges, and because on the face of the defendant's sentencing guidelines scoresheet the Court indicated "Guideline Sentence: Life", the Court must have believed that it must impose a "life" sentence. Actually, the sentencing options were much broader than the Court was led to believe: defendant, without correction of any of the alleged scoring errors, could have been sentenced to a term of twenty-seven (27) to forty (40) years in the permitted range (which was excluded from the defendant's scoresheet). The Court's order does not conclusively refute this allegation. Thus, defendant is at least entitled to resentencing on Ground Seven.

Ground Eight;

The Court must have overlooked the fact that defendant was clearly rendered ineffective assistance of counsel by counsel's failure to timely file his motion for new trial. Stacey. Obviously, this omission greatly effected and prejudiced defendant: there were many grounds that would have entitled defendant to a new trial, and the abandonment of the motion for new trial was approximately seven (7) months after it was filed. The utter misconduct of law enforcement in this case alone is sufficient to warrant at least a new trial. Defendant's counsel was clearly ineffective for failing to timely filing the motion for new trial. Counsel did not even attempt to schedule a hearing on matter. Accordingly, this Court should find that defendant was rendered ineffective assistance counsel and grant him a new trial.

Ground Nine;

As stated in the Court's order, defendant alleged ineffective assistance of counsel in his supplemental motion. This motion was not properly sworn to. Thus, the Court could not properly consider the facts alleged therein. Nonetheless, defendant respectfully requests that he be given the opportunity to correct this error: the error was an inadvertant ommision. This ground would entitle defendant to relief since defendant's counsel was under extreme duress during the defendant's trial: he was on probation for cocaine charges, and he was facing suspension from The Florida Bar. Further, defendant's mother, Rita Herrick, complained to The Florida Bar they both could notice the presence of alcohol on counsel's breath. There was no appreciable physical impairment (e.g., stumbling on invisible objects), however, defendant and Mrs. Herrick truly believe that counsel's consumption of alcohol during defendant's trial effected counsel's mental thought process. Many of the errors complained of are resulting from counsel's substance abuse during trial, which otherwise might not have occurred: failure to move to supress inadmissible evidence on video-taped deposition, clearly erroneous advise given to defendant about testifying, allowed video-taped deposition to be erroneously taken into the jury room, did not have any jury instructions to follow along with, did not object to instructions not supported by the evidence, failed to timely file defendant's motion for new trial. There was a general lack of competency by counsel in his handling of defendant's case. None of which was any fault of defendant.

Other Argument;

The Court must have overlooked the numerous errors attributable to defendant's counsel and law enforcement (See Brief, p. 43, n. 7) in denying defendant any relief. The Court would have to overlook these errors, because, when considered on the whole, they are numerous and cumulative in nature. They are prejudicial in nature and not attributable to the defendant himself. The ends of justice dictate that in a case like this, defendant should at least be given one opportunity to have a fair trial. To this date, defendant has been deprived just that: a fair trial.

CONCLUSION

WHEREFORE, based upon the foregoing facts and authorities, defendant urges this Court to enter an order granting rehearing, vacating the order denying defendant's motion for post-conviction relief and appointment of counsel, and granting defendant a new trial, or, alternatively, resentence defendant based upon his correct composite score under the sentencing guidelines.

Respectfully submitted, "

Kevin Richard Herrick #240583
DeSoto Correctional Institution
Post Office Drawer 1072
Arcadia, FL 33821-1072

VERIFICATION OATH

BEFORE ME, the undersigned authority, did this day personally appear KEVIN RICHARD HERRICK, who first produced his Florida Department of Corrections Inmate Identification Card as identification, who then took an oath, did depose and say that he is the defendant in the above-style cause, and that the matters contained herein are true and correct.

DATED this ____ day of December, 1993.

Kevin Richard Herrick

Notary Public - State of Florida

My commission expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to the Office of the State Attorney, 5100 144th Avenue North, Clearwater, FL 34620, this ____ day of December, 1993.

Kevin Richard Herrick #240583
DeSoto Correctional Institution
Post Office Drawer 1072
Arcadia, FL 33821-1072

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Criminal Division

STATE OF FLORIDA,

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Defendant.

AFFIDAVIT IN SUPPORT OF MOTION FOR POST-CONVICTION RELIEF

STATE OF FLORIDA)

)

COUNTY OF DESOTO)

BEFORE ME, the undersigned authority, did this day personally appear KEVIN RICHARD HERRICK, who first produced his Florida Department of Corrections Inmate Identification Card as identification, who then took an oath, did depose and say that he is the defendant in the above style cause, and that:

1. While my case was pending, my attorney, Ed Leinster, was facing and/or was on probation for criminal cocaine charges. As a result of these criminal charges, he was facing suspension from The Florida Bar.

2. During my trial, I personally observed the presense of alcohol on Mr. Leinster's breath, so much so, it appeared as if he had used an alcoholic beverage as mouth wash.

3. My mother, Rita Herrick, noticed the same presence of alcohol on Mr. Leinster's breath that I did. Subsequently, just after the trial, my mother complained about Mr. Leinster drinking during my trial to The Florida Bar.

4. I truly believe that the combined effects of Mr. Leinster consuming intoxicants during my trial coupled with his apparent stress of facing criminal cocaine charges, probation, and impending suspension from the practice of law, caused Mr. Leinster to commit many errors and omissions at my trial which deprived me of a fair trial.

DATED this ____ day of December, 1993.

Kevin Richard Herrick, Affiant

Notary Public - State of Florida

My commission expires: