FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1272

THOMAS PARTLOW,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Bruce Anderson, Judge.

December 20, 2019

ON MOTION TO SUPPLEMENT THE RECORD

PER CURIAM.

Thomas Partlow moved to supplement the record on appeal with documents not included in the postconviction appeal record. We directed Partlow to address whether the requested supplementation was permitted by the rules of procedure. Partlow responded, requesting the motion to supplement be withdrawn. We GRANT this motion to withdraw. Appellant's initial brief shall be filed twenty days from the date of this order.

RAY, C.J., concurs; BILBREY and WINOKUR, JJ., both concur specially with written opinions.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

WINOKUR, J., concurring specially.

While Partlow has asked us to withdraw his motion to supplement the record, it should be noted that he did so because he acknowledged in his response that case law applying the rules of appellate procedure does not permit the requested supplementation. I agree that we should grant the motion to withdraw. However, we requested the additional response because the issue here arises regularly in this Court. Because of Partlow's candid acknowledgment that the rules do not permit the requested supplementation, as well the need for guidance on this issue, I believe we should clarify what an appellate record for a summarily-denied postconviction motion may contain.

Partlow was convicted of first-degree murder and robbery with a deadly weapon for crimes he committed as a juvenile and was sentenced to mandatory life without parole (Count I) to run consecutively with 45 years (Count II). Based on the Supreme Court's holding that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment," *Miller v. Alabama*, 567 U.S. 460, 470 (2012), we reversed the sentence imposed on Count I for resentencing. *Partlow v. State*, 134 So. 3d 1027 (Fla. 1st DCA 2013).

Partlow filed a "Motion to Correct Sentence on Count II," under Florida Rule of Criminal Procedure 3.850. Partlow argued that a then-recent decision by the Fifth District required resentencing on both Counts I and II. *Purdy v. State*, 268 So. 3d 813 (Fla. 5th DCA 2017). The postconviction court denied the motion without an evidentiary hearing, finding that the supreme court had since quashed the Fifth District's decision. *State v. Purdy*, 252 So. 3d 723, 728 (Fla. 2018); *see also Warthen v. State*, 265 So. 3d 695, 697 (Fla. 4th DCA 2019). Partlow appealed the order denying his motion.

Partlow filed a motion to supplement the record with an order setting a hearing and appointing counsel and transcripts of three status hearings. The order was filed, and all hearings occurred, before Partlow filed his postconviction motion, but he did not attach these documents to support his claim. On appeal, he asserts that supplementation was needed because "[r]elevant factors include the appointment of counsel, any concessions made by the state regarding that matter, and any resentencing hearings held to date."

Florida Rule of Appellate Procedure 9.141(b) governs appeals from certain postconviction proceedings and specifies what documents may be included in the record:

> When a motion for postconviction relief under rules 3.800(a), 3.801, 3.802, 3.850, or 3.853 is granted or denied without an evidentiary hearing, the clerk of the lower tribunal shall electronically transmit to the court, *as the record*, the motion, response, reply, order on the motion, motion for rehearing, response, reply, order on the motion for rehearing, and attachments to any of the foregoing, together with the certified copy of the notice of appeal.

Fla. R. App. P. 9.141(b)(2)(A) (emphasis added).[1] In *St. Cyr v. State*, 126 So. 3d 1166, 1166 (Fla. 4th DCA 2012), the State moved

[1] Judge Bilbrey questions whether Rule 9.141(b)(2) should apply to the order under review at all because it concerned a purely legal question for which no evidentiary hearing would ever be required. Rule 9.141(b)(2) does not distinguish between orders that require factual determination and those that do not. In fact, rule 9.141(b)(2)(A) applies to appeals of summarily-denied claims made under rule 3.800(a), which explicitly excludes any claim that requires an evidentiary hearing. *See Brooks v. State*, 969 So. 2d 238, 242 (Fla. 2007) (noting that "no evidentiary hearing is allowed" for a motion under rule 3.800(a)); *Sheely v. State*, 891 So. 2d 599, 599 (Fla. 1st DCA 2005) (rejecting claim under rule 3.800(a) because the claim "would require an evidentiary hearing to resolve"). Rule 9.141(b)(2) plainly applies to postconviction orders addressing a purely legal question and explicitly applies to Rule 3.850 motions denied without an evidentiary hearing.

to supplement the appellate record with sentencing documents to allow the appellate court a fuller understanding of the defendant's claims. The Fourth District denied the State's motion because "the record, as structured by [rule 9.141(b)(2)(A)], does not contain the original sentencing documents, unless they are an attachment to the order."[2] *Id*. Rule 9.141(b)(2)(A) similarly does not contain any of the documents Partlow sought to include in the record.[3]

Nor does Florida Rule of Appellate Procedure 9.200(f) ("Correcting and Supplementing Record") provide a basis for supplementing this record here. Under Rule 9.200(f)(1), an "error or omission in the record" may be "correct[ed]." "This rule is intended to assure that any portion of the record before the lower tribunal which is material to a decision by the court be made available to the court so that appellate proceedings will be decided

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[2] Judge Bilbrey agrees that *St. Cyr* was correctly decided, but believes its holding should apply only to the State as appellee and not the appellant. I reject this distinction. *St. Cyr* correctly ruled that supplementation was improper because Rule 9.141(b)(2)(A) sets forth the record for an appeal of a summarily-denied postconviction claim and the documents the State sought to include were not included in the rule. If supplementing the record with items outside of those permitted by rule 9.141(b)(2)(A) is improper, there is no reason this rule should apply to only one party.

[3] If the record permitted by Rule 9.141(b)(2)(A) does not "show[] conclusively that the appellant is entitled to no relief," then "the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief." Fla. R. App. P. 9.141(b)(2)(D). A lack of an adequate record requires reversal. It is, therefore, not necessarily true that supplementation of the record will benefit appellants. Moreover, while 9.141(b)(2)(D) does list "remand[] for an evidentiary hearing" as a possible remedy of an insufficient order summarily denying relief, it is not the only remedy permitted. The case may be remanded for any "other appropriate relief." I do not suggest—as Judge Bilbrey contends—that we should ever remand an order on a purely legal question for an evidentiary hearing.

on their merits." *Thornber v. City of Walton Beach*, 534 So. 2d 754, 755 (Fla. 1st DCA 1988). This rule is not applicable here as, by all indications, all documents permitted under rule 9.141(b)(2)(A) have been included in the record on appeal; that is, no *correction* to the record is needed. *See Crockett v. State*, 206 So. 3d 742, 752 (Fla. 1st DCA 2016) (on motion for rehearing and supplementing the record) ("Florida Rule of Appellate Procedure 9.200(f), which allows for correcting and supplementing the record, 'is not intended to correct inadequacies in the record which result from a failure of a party to make a record below.'" (quoting *Thornber*, 534 So. 2d at 755)).

The documents Partlow sought were not attached to his motion, any response or reply, nor the order; they were not before the postconviction court when it ruled on the motion and thus may not be before us when we review the order. *See Williams v. State*, 244 So. 3d 1173, 1175 n.1 (Fla. 2d DCA 2018) ("[W]e are precluded from considering the transcripts because they were not considered by the postconviction court and are not otherwise a part of the summary record."). For this reason, the Florida Rules of Appellate Procedure do not permit these documents to be part of the record on appeal.[4] If we had decided Partlow's motion to supplement the record, I would have denied it for these reasons.

BILBREY, J., concurring specially.

I agree that we are correct to grant the request to withdraw the motion to supplement the record. I do not agree, however, that the Florida Rules of Appellate Procedure would not permit the supplementation had the request not been withdrawn. I therefore feel compelled to respond to Judge Winokur.

"It is elemental that an appellate court may not consider matters outside the record, and when a party refers to such matters in its brief, it is proper for the court to strike same." *Ullah v. State*, 679 So. 2d 1242, 1244 (Fla. 1st DCA 1996). Appellant

[4] I note that the weight we give to the rules of procedure is not determined by the number of keystrokes it would take to disregard them.

sought to supplement the record on appeal so he could refer to purportedly pertinent matters from the trial court in his initial brief yet to be filed with this court. Appellant's motion to supplement the record was filed without reference to a rule but is permitted by rule 9.200(f)(1), Florida Rules of Appellate Procedure.[1] His motion claimed that relevant issues for consideration on appeal "include the appointment of counsel, any concessions made by the state regarding the matter, and any resentencing hearings held to date." Appellant therefore sought to add to the 59-page record on appeal the following:

> (1) the order setting status hearing and scheduled resentencing held on November 17, 2016; (2) the transcript of the status hearing and scheduled resentencing held on November 17, 2016; (3) the transcript of the status hearing and scheduled resentencing held on December 5, 2016; and (4) the transcript of the status hearing held on February 7, 2017.

Judge Winokur contends that rule 9.141(b)(2)(A), Florida Rules of Appellate Procedure, sets forth everything that can be in the record.[2] I respectfully disagree. Rule 9.200(f)(1) states, "If there is an error or omission in the record, the parties by stipulation, the lower tribunal before the record is transmitted, or the court may correct the record." Other courts have permitted

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[1] Since this was a motion from a party, rule 9.200(f)(2), Florida Rules of Appellate Procedure, that allows the appellate court to supplement the record when "the record is incomplete" does not apply. The record, as defined by rule 9.141(b)(2)(A), is apparently complete, but there is purportedly a material omission so that rule 9.200(f)(1) permits supplementation.

[2] I am not convinced that rule 9.141(b)(2) was meant to apply to cases like this. The issue Appellant raised below was a claim of a constitutional violation. Such a claim would not normally be subject to an evidentiary hearing since legal and constitutional issues, not factual questions, are involved. The denial of an evidentiary hearing seems immaterial to our disposition of the case.

supplementation of the record with matters that are generally excluded (such as notices of hearing) when such matters are "germane to an issue on appeal." *Elegele v. Halbert*, 890 So. 2d 1272, 1274 n.4 (Fla. 5th DCA 2005). *See also* Philip J. Padovano, *Florida Appellate Practice* § 12:9 at 255 (2018 ed.) ("The appellate courts are required to allow the parties to supplement the record if it appears that material portions were omitted.").

Under Judge Winokur's view, supplementation is only allowed if the clerk of the lower tribunal commits an error or omission rendering the "record" — as strictly defined by another rule — incomplete. I do not read rule 9.200(f) to be so limited that it applies only if the clerk of the lower tribunal makes an error, and it seems odd to have a rule of procedure that only applies if a clerk does not do what other rules require.

The unopposed motion, now withdrawn, claimed that the above documents were omitted from the record, and it was necessary for supplementation so that Appellant could best argue his case. A review of the committee notes to rule 9.200 shows supplementation could have been allowed here. The committee notes state, "This rule is intended to ensure that any portion of the record in the lower tribunal that is material to a decision by the court will be available to the court." The committee notes further state, "The purpose of the rule is to give the parties an opportunity to have the appellate proceedings decided on the record developed in the lower tribunal."

Normally on appeal, the "burden to ensure that the record is prepared and transmitted in accordance with" the Florida Rules of Appellate Procedure is on an appellant. Fla. R. App. P. 9.200(e). This is understandable because normally the burden is on an appellant to demonstrate error. *See Applegate v. Barnette Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979).[3] But if a motion for

[3] Of course, appellate courts have correctly refused requests to supplement the record with extraneous matters not considered by the trial court. But the proposed supplementation here was "'not intended to correct inadequacies in the record which result from a failure of a party to make a record below.'" *Crockett v. State*, 206 So. 3d 742, 752 (Fla. 1st DCA 2016) (on motions for rehearing

postconviction relief is "conclusively resolved by the [trial] court record" then the trial court shall attach "a copy of that portion of the files and records that conclusively shows that the defendant is entitled to no relief" to the order denying the motion. Fla. R. Civ. P. 3.850(f)(5). When a trial court has denied postconviction relief without an evidentiary hearing, we are to reverse and remand for an evidentiary hearing "unless the records shows conclusively that the appellant is entitled to no relief." Fla. R. App. P. 9.141(b)(2)(D).[4]

It seems to me that the purpose of these rules is to support due process by ensuring that the record supports affirmance when a movant has not been provided an evidentiary hearing by the trial court. *See Jackson v. Leon County Elections Canvassing Bd.*, 204 So. 3d 571 (Fla. 1st DCA 2016) (noting that procedural due process requires notice and an opportunity to be heard). In certain cases, as cited by Judge Winokur, appellate courts have denied a request from **the State**, appearing as appellee or respondent, to supplement the record to provide support for an order denying postconviction relief without a hearing. *See Williams v. State*, 244 So. 3d 1173 (Fla. 2d DCA 2018); *St. Cyr v. State*, 126 So. 3d 1166 (Fla. 4th DCA 2012); *Bean v. State*, 949 So. 2d 1207 (Fla. 4th DCA 2007). That is understandable since rule 3.850(f)(6) puts the burden on the trial court, not the State, to attach records to the order denying postconviction relief without a hearing. The appellate court, reviewing a trial court's denial of postconviction

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and supplementing the record) (quoting *Thornber v. City of Fort Walton Beach*, 534 So. 2d 754, 755 (Fla. 1st DCA 1988)). The proposed supplementation here concerned an order issued by the trial court and transcripts of hearings held by the trial court.

[4] As mentioned above, since the issues here appear to be purely legal and constitutional questions, I do not understand why, if Appellant is correct, we would remand for an evidentiary hearing rather than grant the relief Appellant sought in the motion to correct sentence. Rule 9.141(b)(2)(D) was not made for this situation.

relief without an evidentiary hearing, needs to be clear as to the basis for the trial court's decision.[5] However, the rationale for not allowing the State to supplement does not apply to an appellant requesting supplementation to put forth the best argument for reversal.

Finally, the rules should not be read in isolation but in harmony with each other. *See United Bank v. Estate of Frazee*, 197 So. 3d 1190 (Fla. 4th DCA 2016). "While our procedural rules provide for an orderly and expeditious administration of justice, we must take care to administer them in a manner conducive to the ends of justice." *Rogers v. First Nat. Bank at Winter Park*, 232 So. 2d 377, 378 (Fla. 1970). If Judge Winokur's position were adopted in a future case, it would preclude Appellant from referring to the purportedly relevant past. A few keystrokes on the computer by someone with the Duval Clerk of Court's office and a few keystrokes by our Clerk's office would be all it would take to make sure the supplement to the record is transmitted and Appellant can set forth his best argument. We need access to any purportedly pertinent documents in the records to make sure we have all the facts necessary to further the ends of justice. We should not prevent a party from making his or her best argument by hyper-technical application of procedural rules. I therefore respectfully disagree with Judge Winokur's discussion regarding the merits of the now withdrawn motion and if the issue remained before me would allow Appellant to supplement the record.

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[5] In fact, in reviewing the denial of a postconviction motion an appellate court is permitted to go outside the record on appeal from that case and consider relevant records in the appellate court's file from the direct appeal. *See Loren v. State*, 601 So. 2d 271 (Fla. 1st DCA 1992); *Mauldin v. State*, 382 So. 2d 844 (Fla. 1st DCA 1980). It strikes me as odd that we can look beyond the record before the postconviction court if it helps us decide the case, but under Judge Winokur's rationale an appellant is unable to supplement the record with relevant matters that occurred in the trial court.

Andy Thomas, Public Defender, and Danielle Jorden, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Tabitha Herrera, Assistant Attorney General, Tallahassee, for Appellee.