IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

JESSIE JAMES BORDERS,

Appellant,

v. Case No. 5D20-1331

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed December 31, 2020

3.850 Appeal from the Circuit Court for Orange County,
Elaine A. Barbour, Judge.

Jessie James Borders, Lowell, pro se.

Ashley Moody, Attorney General, Tallahassee, and Bonnie Jean Parrish, Assistant Attorney General, Daytona Beach, for Appellee.

EVANDER, C.J.

Jessie James Borders appeals the summary denial of his Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. Because the record does not conclusively show that Borders is not entitled to relief, we reverse.

Borders is serving a life sentence after being convicted in 1994 of various violent felonies stemming from a single incident. In his motion, he alleged that his three co-

defendants all testified at his trial. Co-defendants Anthony Richardson and Phillip Jenkins testified that Borders participated in the charged crimes, while co-defendant Corey McMiller testified that Borders was not involved in any way. Borders' convictions became final in 1995.

In December 2017, Borders filed a motion for postconviction relief based on newly discovered evidence, to-wit: Phillip Jenkins' recantation. In a sworn affidavit dated August 18, 2017, Jenkins averred that, as a result of police coercion, he falsely testified to Borders' involvement in the charged offenses. The postconviction court granted an evidentiary hearing and appointed counsel for Borders in January 2018. However, Jenkins failed to appear for three scheduled hearings and, on September 9, 2019, the postconviction court entered an order denying the motion for postconviction relief.

In February 2020, Borders filed the instant motion for postconviction relief based on newly discovered evidence, to-wit: Anthony Richardson's recantation. Richardson's affidavit, dated October 25, 2019, was attached to the motion. Richardson similarly averred that his false statement regarding Borders' alleged involvement in the charged crimes was the result of police coercion.

In summarily denying Borders' motion, the postconviction court found that, with the exercise of due diligence, Borders could have learned of Richardson's intent to recant his trial testimony while he was preparing for the hearing on his prior motion for postconviction relief. Specifically, the resulting order stated:

> The Court finds that this information regarding Mr. Richardson's testimony would not have been unknown to Defendant at the time of the evidentiary hearing on Defendant's previous motion, particularly in light of his previous claim regarding Mr. Jenkins' recantation, and that it could have been discovered with due diligence prior to the

> final evidentiary hearings. Defendant had the benefit of counsel and a private investigator at the public expense for over nine months and could have attempted to contact Mr. Richardson to see if he was standing by his trial testimony. At no time in the months leading up to the final evidentiary hearings, did Defendant mention Mr. Richardson in any of the many continuances that were granted. Consequently, the Court finds that Defendant is not entitled to relief.

The decision of a postconviction court to deny an evidentiary hearing on a Rule 3.850 motion based on newly discovered evidence is subject to de novo review. *Grays v. State*, 246 So. 3d 520, 521 (Fla. 5th DCA 2018). Furthermore, although an affidavit produced by a co-defendant many years after the alleged crime(s) is inherently suspicious, that suspicion alone does not automatically support summary denial. *Simpson v. State*, 100 So. 3d 1258, 1260 (Fla. 4th DCA 2012).

In the instant case, Richardson's affidavit was executed approximately one and one-half months after the postconviction court entered an order denying Borders' prior motion for postconviction relief. The record is devoid of any evidence to support the postconviction court's determination that, with the exercise of due diligence, Borders could have learned at an earlier date of Richardson's intent to recant his trial testimony. Additionally, the postconviction court did not find Richardson's affidavit to be "inherently incredible," nor would it have been appropriate for the court to have done so. *See Simpson*, 100 So. 3d at 1260 (finding that characterizing exculpatory affidavit as inherently incredible merely due to contradictory trial testimony is improper basis for summary denial of postconviction claim, as this requires credibility determinations that only evidentiary hearing can resolve.).

Accordingly, we reverse the postconviction court's summary denial order and remand for an evidentiary hearing.

REVERSED and REMANDED for evidentiary hearing.

HARRIS, J., concurs.
EDWARDS, J., concurs in part, dissents in part, with opinion.

EDWARDS, J., concurring in part and dissenting in part.

I agree with the majority that the postconviction court reached the conclusion that Richardson's affidavit was not newly discovered evidence for the wrong reason. However, because the postconviction court reached the right result in denying Borders' postconviction motion, albeit for the wrong reason, I would affirm.[1]

Borders relied upon the affidavit of Phillip Jenkins who actually said three different times in his short 2017 affidavit that Borders is innocent. Jenkins also swore under oath that Borders did not commit the crime for which he is imprisoned. Keep that in mind when considering Anthony Richardson's affidavit. I agree with the majority that Jenkins' credibility and his affidavit vaporized when Jenkins' failed to testify at the earlier evidentiary hearings in 2019.

The majority opinion suggests, incorrectly, that Anthony Richardson stated in an affidavit under oath "that he gave false testimony regarding Borders' alleged involvement in the charged crimes." However, that quotation comes from Borders' motion, not from Richardson's Affidavit. Had Richardson actually said that, I would concur in the reversal for an evidentiary hearing.

Richardson did not say in his affidavit that he gave false testimony about Borders' involvement. In fact, Richardson's affidavit refers to a "statement" he gave to police in

[1] Under the "tipsy coachman doctrine," if the lower court reaches the right result even if for the wrong reason, the result will by upheld on appeal if there is any basis in the record to support the outcome. *Taylor v. State*, 146 So. 3d 113, 115 n.3 (Fla. 5th DCA 2014).

1993. Nor does Richardson say in his affidavit that Borders was not involved in the crimes for which Borders was convicted or otherwise so much as hint that Borders was not guilty.

The narrative portion of Richardson's affidavit is set forth below in its entirety:

> I am recanting my statement I made in 1993 concerning Jessie Borders and his association with the crime I was charged with. During the whole interrogation process, I was placed under extreme duress and given promises by the police. I was sincerely afraid. I am coming forward now because I have been dealing with the guilt, which has been eating me up inside. I also was afraid of going back to jail if I were to expose what the police did and coerced me to do.
>
> Even though the exact details of the crime might be unclear, I do remember what the police said to me. They told me that they would make sure I receive the electric chair and also threatened to take my child from me and my wife. They also threatened me with physical violence.
>
> The police left the interrogation room and when they came back in, they promised to protect me from the prosecutor if I worked with them. They specifically offered me leniency if I added Jessie Border's [sic] name to the crime. They specifically wanted me to say that he was involved.

I agree that if Richardson is using the term "recanting" as it is usually understood, it means that he is withdrawing whatever statement he made to the police in 1993. However, Borders was not convicted as a result of a statement Richardson made to the police; he was convicted based upon evidence presented to the jury in open court. Furthermore, because Richardson has nothing concrete to say in his affidavit about Borders' innocence or that he was not involved in the criminal acts, then I do not see the point of conducting an evidentiary hearing. We cannot tell from Richardson's affidavit whether Borders was involved in and guilty of the crimes, while Richardson was simply reluctant to share that information with police, absent police threats. If Richardson wanted to say that Borders was not involved and is innocent, he could have, but did not say so.

While Borders is free to make good faith, factual statements in his motion; he lacks the power to rewrite or reword Richardson's affidavit. Importantly, Borders does not

independently allege that Richardson gave false testimony implicating Borders in the crime. Instead, Borders inaccurately paraphrases what he wished Richardson's affidavit did, but does not, say. We should rely upon the affidavit itself, not Borders' inaccurate, overstated expansion of what is actually contained therein. Borders is as bound by the exact wording of Richardson's affidavit as a civil litigant would be bound by the exact wording of a contract attached to a complaint. We should not rely upon Borders' poetic license to grant an evidentiary hearing. Thus, considering the sworn affidavit testimony of Richardson, rather than Borders' interpretation of that affidavit, the postconviction court properly denied the motion.

While not suggested by the parties or the majority, if the issue is whether Richardson's affidavit is legally insufficient, Borders should be permitted one opportunity to submit an amended motion with a more relevant, material affidavit from Richardson, if possible, that actually discusses whether or not Borders was involved in or innocent of the crimes for which he was convicted. *Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007