IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

EUGENE SMITH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

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

CASE NO. 1D14-3232

Opinion filed September 11, 2015.

Petition for Writ of Certiorari – Original Jurisdiction.

Eugene Smith, pro se, Petitioner.

Pamela Jo Bondi, Attorney General, and Bryan Jordan, Assistant Attorney General, Tallahassee, for Respondent.

PER CURIAM.

By petition for writ of certiorari, Eugene Smith seeks relief from a circuit court order affirming summary denial of the motion for postconviction relief he filed in county court. We grant the petition, quash the circuit court's order, and remand for further proceedings.

Mr. Smith filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, challenging his conviction based on newly discovered evidence. After the county court summarily denied his motion for postconviction relief, he appealed to the circuit court. The county court's order recites that the court denied "Defendant's Motion to Dismiss," and does not explain the reason for its summary denial. The circuit court affirmed the decision of the lower court, acknowledging its peculiarity and without reaching the merits, finding the postconviction motion (filed more than two years after Mr. Smith's conviction became final) to be untimely because "the alleged statement could have been discovered with due diligence. Russell v. State, 100 So. 3d 202 (Fla. 2d DCA 2012)."

Certiorari relief is warranted because the circuit court failed to apply the correct law. See Slater v. State, 543 So. 2d 869, 870–71 (Fla. 2d DCA 1989); see also O'Brien v. State, 80 So. 3d 459, 461 (Fla. 1st DCA 2012) ("The scope of our certiorari review in this case is limited to determining whether the circuit court observed the essential requirements of law by affording procedural due process and applying the correct law."). The circuit court, acting in its appellate capacity, was required to reverse and remand for an evidentiary hearing unless the record showed conclusively that Mr. Smith was entitled to no relief. Fla. R. App. P. 9.141(b)(2)(D). The record in the present case does not refute the movant's

allegation that he was first put on notice of the existence of newly discovered evidence in January of 2013. Russell, the case cited by the circuit court, does not support its conclusion that the facts alleged in Mr. Smith's motion for postconviction relief could have been discovered with the exercise of due diligence within two years of his judgment and sentence becoming final. See Fla. R. Crim. P. 3.850(b)(1).

The petition for writ of certiorari is granted, and the circuit court's order affirming the county court's summary denial is quashed.

BENTON and LEWIS, JJ., CONCUR; THOMAS, J., DISSENTS WITH OPINION.

THOMAS, J., DISSENTS.

I respectfully dissent, because Petitioner is attempting to challenge a misdemeanor battery conviction and sentence imposed *twelve years ago*. There must come a time in which judicial labor in a case must end, if there is to be a reasonable and rationale application of the rule of law. This does not mean that colorable claims of actual innocence cannot be raised appropriately, but it does mean that courts are not inexhaustible reservoirs of resources to reconsider every decision in a criminal case years later. No branch of government can long enjoy public confidence if it repeatedly allows challenges to prior legal decisions *ad infinitum*. To allow stale claims such as this to compel further judicial review diverts judicial consideration of legitimate claims, in both civil and criminal cases.

Just as importantly, it is fundamentally unfair to require the State to respond to a claim more than a decade later, when memories and documents are lost or destroyed.

Here, Appellant pled guilty to a domestic misdemeanor battery charge in October 2003. The State responded to Appellant's public records request filed in 2013, by noting that the "case was closed on October 10, 2003 and [in accord with section 119.021(2)(a), Florida Statutes] the physical file was destroyed on December 15, 2003." The State did reference a note to the file indicating the victim wished to avoid testifying, she had declined to honor a subpoena, and was

informed by the State that she would be subject to contempt charges if she failed to appear.

In Appellant's motion for relief filed under Florida Rule of Criminal Procedure 3.850, he asserts that a decade after he pled nolo contendere to this misdemeanor, the victim allegedly informed him that she had told the State Attorney "two months prior to Movant's nolo contendere plea [that she requested the State to drop] the charge against Movant." According to the allegations, again filed a decade after his plea, the "State Attorney Office failed to disclose to the defense that the victim had dropped the charge against the movant." Appellant claimed he had "no prior knowledge that the victim dropped the charge two months prior to his plea date." He acknowledged that he had legal representation at his plea hearing.

According to the State, Appellant has failed to demonstrate that he exercised due diligence in this case, because Appellant could have obtained this information by a public records request. (Appellant claimed he filed a discovery demand, but alleged that the State failed to disclose the exculpatory evidence.) I agree with the State's position, but in addition, I find that the State will be put in an impossible position in an evidentiary hearing, where a defendant attempts to challenge a 2003 plea and the State has destroyed the file.

No prosecutor will recollect this misdemeanor case resolved in 2003, and no prosecutor will be able to testify under oath whether the victim's phone call or request was provided to the defense. Thus, on remand, the evidentiary hearing cannot produce any reliable result based on competent evidence. Therefore, I would deny the petition on the basis of laches, as Appellant has not shown he exercised due diligence, and the State will be prejudiced by the lengthy delay in this case. McCray v. State, 699 So. 2d 1366, 1368 (Fla. 1997). Thus, I respectfully dissent.