

Supreme Court of Florida

No. SC06-1739

IN RE: AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.170 AND 3.172.

[March 29, 2007]

PER CURIAM.

The Court sua sponte amended Florida Rules of Criminal Procedure 3.170 and 3.172 on an emergency basis to ensure consistency between the rules and section 925.12, Florida Statutes (2006). See Amendments to Fla. Rules of Crim. Pro. 3.170 & 3.172, 938 So. 2d 978 (Fla. 2006). Because the amendments were not published for comment prior to adoption, the Court gave interested persons sixty days to file comments. Comments now have been filed. We have jurisdiction. See art. V, § 2(a), Fla. Const.

BACKGROUND

The history of the procedural rules governing DNA testing is set forth in the Court's prior opinions in this area.¹ Originally, subdivision (d) of Florida Rule of Criminal Procedure 3.853 set forth a deadline for filing certain motions for postconviction DNA testing, and that deadline, which was October 1, 2003, was later extended to October 1, 2005. Prior to expiration of the October 1, 2005, deadline, the Criminal Procedure Rules Committee (rules committee) filed in this Court an emergency report, which recommended eliminating the deadline altogether. In order to give the Court time to consider the report and to seek and consider comments, the Court on September 29, 2005, issued an order amending rule 3.853(d) on an interim basis, extending the deadline to July 1, 2006. Because the Legislature was considering the matter, the Court held the rules committee's report in abeyance pending legislative action.

The Legislature ultimately enacted chapter 2006-292, Laws of Florida (the Act), which amended chapter 925, Florida Statutes (2006), in several respects, and the Court responded by amending the corresponding rules. First, the Act removed the deadline for filing postconviction DNA motions, and the Court responded by adopting the rules committee's proposed amendment to rule 3.853(d). See

1. See Amendments to Fla. Rules of Crim. Pro. 3.170 & 3.172, 938 So. 2d 978 (Fla. 2006); Amendments to Fla. Rules of Crim. Pro. 3.853(d), 938 So. 2d 977 (Fla. 2006); Amendments to Fla. Rules of Crim. Pro. 3.853(d)(1)(A), 884 So. 2d 934 (Fla. 2004); Amendments to Fla. Rules of Crim. Pro. 3.853(d)(1)(A), 857 So. 2d 190 (Fla. 2003); Amendment to Fla. Rules of Crim. Pro. Creating Rule 3.853, 807 So. 2d 633 (Fla. 2001).

Amendments to Fla. Rules of Crim. Pro. 3.853(d), 938 So. 2d 977 (Fla. 2006) (hereinafter Amendments I). And second, the Act provided that courts should inquire into the existence of DNA evidence before accepting a plea of guilty or nolo contendere to a felony, and the Court responded by sua sponte adopting emergency amendments to rules 3.170 and 3.172. See Amendments to Fla. Rules of Crim. Pro. 3.170 & 3.172, 938 So. 2d 978 (Fla. 2006) (hereinafter Amendments II). The emergency amendments to rules 3.170 and 3.172 were published for comment in the October 15, 2006, edition of The Florida Bar News, and comments have now been filed by several entities, including the rules committee.²

AMENDMENTS

The Court in Amendments II added subdivision (2) to rule 3.170(k), Responsibility of Court on Pleas, to provide that courts shall inquire into the existence of DNA evidence before accepting a plea of guilty or nolo contendere to a felony. The rules committee now points out that the Court's emergency amendments to this rule are unnecessary in light of the committee's proposed amendments to rule 3.172(d), which are discussed below. After considering the

2. Comments have been filed by the rules committee, the Florida Association of Criminal Defense Lawyers (FACDL), and the Florida Public Defenders Association (FPDA).

various comments,³ we conclude that the committee’s proposed amendments to rule 3.172(d) render the prior emergency amendments to rule 3.170(k) redundant—there is no reason to include the same language in two separate places in the rules. Accordingly, we adopt the committee’s proposed amendments to rule 3.170(k), which have the effect of returning this rule to its original form.

Next, the Court in Amendments II amended rule 3.172(d), Inquiry Concerning DNA Evidence, to do the following: to provide that courts shall inquire into the existence of DNA evidence before accepting a plea of guilty or nolo contendere to a felony, and to set forth a list of issues that the judge must inquire into during the plea proceeding. The committee now proposes that the Court adopt a revised version of this rule; the revised version is an amalgam of both sections 925.12(2) and 925.12(3), Florida Statutes (2006). With regard to the concern raised by Justice Anstead in Amendments II that courts should be required to make a DNA finding during the plea proceeding,⁴ the committee is of the opinion that the detailed colloquy required by subdivision (d) will necessarily cause trial judges to reveal their findings and that no additional explanatory language is necessary in this regard.

3. FACDL agrees with the Court’s emergency amendments, and FPDA objects to the emergency amendments on various grounds.

4. See Amendments II, 938 So. 2d at 979 (Anstead, J., specially concurring) (“I would require that the trial court actually make a finding as to the existence of DNA evidence during the plea proceedings.”).

FACDL agrees with the Court's emergency amendments to this rule but also agrees with Justice Anstead's position that the trial court should make a DNA finding during the plea proceeding. FPDA, on the other hand, disagrees with the Court's emergency amendments for several reasons. FPDA contends as follows: (a) that the DNA inquiry is a matter that falls outside the Legislature's purview, (b) that the rule places an undue burden on the defendant, and (c) that the DNA inquiry will result in the impermissible waiver of potentially meritorious postconviction claims. We conclude, however, that the matters raised by FPDA are matters that should be addressed in a proper case and controversy, not in this rules case. See In re Amendments to the Fla. Evidence Code, 825 So. 2d 339, 341 (Fla. 2002); In re Amendments to the Fla. Evidence Code, 782 So. 2d 339, 341 (Fla. 2000). Because the rules committee's proposed amendments address the statutory requirements clearly and concisely, we adopt the proposed amendments to this rule.

Finally, the Court in Amendments I adopted the rules committee's proposed amendments to rule 3.853(d), Time Limitations, which eliminated the deadline for filing certain motions for postconviction DNA testing. The rules committee now proposes that the Court further amend the rule by deleting language that provides that certain motions for DNA testing "shall be treated as raising a claim of newly discovered evidence and the time periods set forth in rules 3.850 and 3.851 shall

commence on the date that the written test results are provided,” and by adding the following language: “The motion for postconviction DNA testing may be filed or considered at any time following the date that the judgment and sentence in the case becomes final.” Because these proposals render the rule consistent with the statute, we adopt the rules committee’s proposed amendments to this rule.

We hereby adopt the amendments to the Florida Rules of Criminal Procedure as set forth in the appendix to this opinion.⁵ New language is indicated by underscoring; deletions are indicated by struck-through type. The amendments shall become effective immediately upon the release of this opinion.

It is so ordered.

LEWIS, C.J., and WELLS, PARIENTE, QUINCE, CANTERO, and BELL, JJ.,
concur.

ANSTEAD, J., concurs specially with an opinion, in which PARIENTE and
QUINCE, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND
IF FILED, DETERMINED.

5. In addition to the changes discussed above, there are also several additional amendments—to render the rules consistent with the Act in other regards and to correct grammar and syntax—as reflected in the appendix.

ANSTEAD, J., specially concurring.

I remain convinced that a trial court express finding as to the existence of DNA evidence would bring more clarity and certainty to the plea process, and more importantly, would reduce the need for future litigation on the issue.

PARIENTE and QUINCE, JJ., concur.

Original Proceeding – Florida Rules of Criminal Procedure

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for Petitioner

Paula S. Saunders, Office of the Public Defender, Tallahassee, Florida, and Michael Robert Ufferman, Michael Ufferman Law Firm, P.A., Tallahassee, Florida, Co-Chairs, The Florida Association of Criminal Defense Lawyers Amicus Curiae Committee; Honorable Nancy Daniels, Public Defender, Second Judicial Circuit, Tallahassee, Florida,

Responding with comments

APPENDIX

RULE 3.170. PLEAS

(a) — (j) [No change]

(k) **Responsibility of Court on Pleas.**

(1) No plea of guilty or nolo contendere shall be accepted by a court without the court first determining, in open court, with means of recording the proceedings stenographically or mechanically, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness and that there is a factual basis for the plea of guilty. A complete record of the proceedings at which a defendant pleads shall be kept by the court.

~~(2) — No plea of guilty or nolo contendere to a felony shall be accepted by a court without the court first inquiring of the defendant and of counsel for the defendant and the state as to physical evidence containing DNA known to exist that could exonerate the defendant. If no physical evidence containing DNA that could exonerate the defendant is known to exist, the court may proceed with consideration of accepting the plea. If physical evidence containing DNA that could exonerate the defendant is known to exist, the court may postpone the proceeding on the defendant's behalf and order DNA testing upon motion of counsel specifying the physical evidence to be tested.~~

~~(3) — A complete record of the proceedings at which a defendant pleads shall be kept by the court.~~

(l) [No change]

Committee Notes

[No change]

RULE 3.172. ACCEPTANCE OF GUILTY OR NOLO CONTENDERE PLEA

(a) Voluntariness; Factual Basis. Before accepting a plea of guilty or nolo contendere, the trial judge shall ~~be satisfied~~ determine that the plea is voluntarily entered and that ~~there is~~ a factual basis for ~~it~~ the plea exists. Counsel for the prosecution and the defense shall assist the trial judge in this function.

(b) [No change]

(c) Determination of Voluntariness. Except when a defendant is not present for a plea, pursuant to the provisions of rule 3.180(d), the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he or she understands:

(1) the nature of the charge to which the plea is offered, the maximum possible penalty, and any mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law;

(2) if ~~the defendant is~~ not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding ~~against him or her~~ and, if necessary, ~~one~~ an attorney will be appointed to represent him or her;

(3) ~~that the defendant has~~ the right to plead not guilty or to persist in that plea if it has already been made, ~~and that the defendant has~~ the right to be tried by a jury, and at that trial a defendant has the right to the assistance of counsel, the right to compel attendance of witnesses on his or her behalf, the right to confront and cross-examine witnesses against him or her, and the right not to testify or be compelled to incriminate himself or herself;

(4) that ~~if the defendant pleads~~ upon a plea of guilty, or nolo contendere without express reservation of the right to appeal, he or she gives up the right to appeal all matters relating to the judgment, including the issue of guilt or innocence, but does not impair the right to review by appropriate collateral attack;

(5) — (7) [No change]

(8) that if he or she pleads guilty or nolo contendere ~~the trial judge must inform him or her that~~, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization

Service. It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases; and

(9) that if the defendant pleads guilty or nolo contendere, and the offense to which the defendant is pleading is a sexually violent offense or a sexually motivated offense, or if the defendant has been previously convicted of such an offense, the plea may subject the defendant to involuntary civil commitment as a sexually violent predator upon completion of his or her sentence. It shall not be necessary for the trial judge to determine whether the present or prior offenses were sexually motivated ~~in this respect~~, as this admonition shall be given to all defendants in all cases.

~~**(d) Inquiry Concerning DNA Evidence.** Before accepting a plea of guilty or nolo contendere to a felony, the trial judge must inquire of the defendant and of counsel for the defendant and the state as to physical evidence containing DNA known to exist that could exonerate the defendant. The judge must inquire into the following:~~

~~(1) whether counsel for the defense has reviewed the discovery disclosed by the state and whether such discovery included a listing or description of physical items of evidence;~~

~~(2) whether the nature of the evidence against the defendant disclosed through discovery has been reviewed with the defendant;~~

~~(3) whether the defendant or counsel for the defendant is aware of any physical evidence disclosed by the state for which DNA testing may exonerate the defendant; and~~

~~(4) whether the state is aware of any physical evidence for which DNA testing may exonerate the defendant.~~

(d) DNA Evidence Inquiry. Before accepting a defendant's plea of guilty or nolo contendere to a felony, the judge must inquire whether counsel for the defense has reviewed the discovery disclosed by the state, whether such discovery included a listing or description of physical items of evidence, and whether counsel has reviewed the nature of the evidence with the defendant. The judge must then

inquire of the defendant and counsel for the defendant and the state whether physical evidence containing DNA is known to exist that could exonerate the defendant. If no such physical evidence is known to exist, the court may accept the defendant's plea and impose sentence. If such physical evidence is known to exist, upon motion of counsel the court may postpone the proceeding and order DNA testing.

(e) — (j) [No change]

Committee Notes

[No change]

RULE 3.853. MOTION FOR POSTCONVICTION DNA TESTING

(a) **Purpose.** This rule provides procedures for obtaining DNA (deoxyribonucleic acid) testing under sections 925.11 and 925.12, Florida Statutes.

(b) **Contents of Motion.** The motion for postconviction DNA testing must be under oath and must include the following:

(1) a statement of the facts relied upon in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained;

(2) a statement that the evidence was not previously tested ~~previously~~ for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result establishing that the movant is not the person who committed the crime;

(3) — (6) [No change]

(c) **Procedure.**

(1) Upon ~~On~~ receipt of the motion, the clerk of the court shall file it and deliver the court file to the assigned judge.

(2) The court shall review the motion and deny it if it is facially insufficient. If the motion is facially sufficient, the prosecuting authority shall be ordered to respond to the motion within 30 days or such other time as may be ordered by the court.

(3) Upon ~~On~~ receipt of the response of the prosecuting authority, the court shall review the response and enter an order on the merits of the motion or set the motion for hearing.

(4) In the event that the motion shall proceed to a hearing, the court may appoint counsel to assist the movant if the court determines that assistance of counsel is necessary and upon making the appropriate finding of indigence.

(5) — (6) [No change]

(7) The court-ordered DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee, as provided by statute. However, the court, upon a showing of good cause, may order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors or the National Forensic Science Training Center ~~when~~ if requested by a movant who can bear the cost of such testing.

(8) [No change]

(d) Time Limitations. ~~A motion to vacate filed under rule 3.850 or a motion for postconviction or collateral relief filed under rule 3.851, which is based solely on the results of the court-ordered DNA testing obtained under this rule, shall be treated as raising a claim of newly discovered evidence and the time periods set forth in rules 3.850 and 3.851 shall commence on the date that the written test results are provided to the court, the movant, and the prosecuting authority pursuant to subsection (e)(8). The motion for postconviction DNA testing may be filed or considered at any time following the date that the judgment and sentence in the case becomes final.~~

(e) — (f) [No change]