Third District Court of Appeal

State of Florida

Opinion filed October 30, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1717
Lower Tribunal No. 12-19549

Baxter Tisdale,
Appellant,

vs.

The State of Florida,
Appellee.

An appeal from the Circuit Court for Miami-Dade County, Andrea R. Wolfson, Judge.

Baxter Tisdale, in proper person.

Ashley Moody, Attorney General, and Magaly Rodriguez, Assistant Attorney General, for appellee.

Before FERNANDEZ, MILLER, and GORDO, JJ.

MILLER, J.

Appellant, Baxter Tisdale, challenges the lower tribunal's order denying his motions for postconviction relief[1] under Florida Rule of Criminal Procedure 3.850 and for deoxyribonucleic acid ("DNA") testing under Florida Rule of Criminal Procedure 3.853. For the reasons set forth below, we discern no error and affirm.

FACTS AND BACKGROUND

In 1986, S.M., a correctional officer, was forced by an unknown male intruder to engage in vaginal and oral intercourse, at knifepoint, in her bedroom, in the presence of her seven-month-old son. The perpetrator threatened to kill the infant, and placed a pillow over S.M.'s face, before fleeing with purloined monies.

Pursuant to the ensuing criminal probe, law enforcement officers collected cervical and vaginal swabs from S.M. The swabs yielded DNA, thus, forensic analysts created an offender profile in the Combined DNA Index System ("CODIS"). Nonetheless, for well over two decades, the case remained unsolved.

On July 25, 2012, a state database of convicted offender and arrestee profiles yielded a candidate match to Tisdale. Subsequent investigation confirmed the preliminary results, and Tisdale was arrested and charged with one count of armed

[1] The trial court properly treated the petition for writ of error coram nobis as a motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. See Wood v. State, 750 So. 2d 592, 595 (Fla. 1999) ("[B]oth custodial and noncustodial movants may rely on and be governed by . . . rule [3.850], thereby eliminating the need for the writ . . . All claims cognizable under the writ [of error coram nobis] are now available to noncustodial movants under the rule.").

burglary with an assault or battery therein, in violation of sections 810.02(2)(a) and 775.087, Florida Statutes, and two counts of sexual battery while armed with a deadly weapon or firearm, or with the use of actual physical force likely to cause personal injury, in violation of sections 794.011(3) and 775.087, Florida Statutes.

In 2013, the case proceeded to trial. The DNA evidence, consisting of expert findings conclusively opining that Tisdale was the source of the DNA harvested from S.M.'s bodily orifices, along with other inculpatory proof, was presented to the jury. A verdict of guilt was returned on all counts. However, soon after the verdict was announced, the lower tribunal declared a mistrial upon discovering that a clerical error caused the wrong juror to be seated on the venire.

On September 27, 2013, Tisdale entered a negotiated plea of nolo contendere and was sentenced to a stipulated term of nine years of incarceration, concurrent on all counts. Tisdale was released from prison in 2016.

On January 19, 2018, after launching a flurry of fruitless collateral attacks upon his judgment and sentence, Tisdale filed the instant motions in the lower court. He asserted a claim for "newly discovered" evidence, premised upon the failure of the trial court to properly inform him of Florida's sexual offender registration requirement, and further sought postconviction DNA testing pursuant to Florida

Rule of Criminal Procedure 3.853, challenging the chain of custody of the vaginal swabs.[2] The court denied relief and the instant appeal ensued.

STANDARD OF REVIEW

"The standard of review of a summary denial of a rule 3.850 [or 3.853] motion is de novo." Lebron v. State, 100 So. 3d 132, 133 (Fla. 5th DCA 2012) (citing McLin v. State, 827 So. 2d 948, 954 (Fla. 2002) ("To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record.")); see Gonzalez v. State, 905 So. 2d 990 (Fla. 3d DCA 2005) (applying a de novo standard of review to the summary denial of a postconviction motion filed pursuant to rule 3.853).

LEGAL ANALYSIS

I. Motion for Postconviction Relief

Rule 3.850 provides a "two-year time limitation for filing motions for post-conviction relief." Pearson v. State, 141 So. 3d 722, 722 (Fla. 3d DCA 2014); see Fla. R. Crim. P. 3.850(b) ("A motion to vacate a sentence that exceeds the limits

[2] We decline to embrace a final claim of error grounded upon the sufficiency of evidence, without further elaboration. See Mitzenmacher v. Mitzenmacher, 656 So. 2d 178, 179 (Fla. 3d DCA 1995) ("A per curiam decision of the appellate court is the law of the case between the same parties on the same issues and facts, and determines all issues necessarily involved in the appeal, whether mentioned in the court's opinion or not."); Fla. R. Crim. Pro. 3.850(h)(2) ("[A] court may dismiss a second or successive motion if the court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits.").

provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than [two] years after the judgment and sentence become final."); see also Wood v. State, 750 So. 2d 592, 595 (Fla. 1999) ("Given the similarity of purpose between [Florida Rule of Criminal Procedure 3.850] and the writ" the two-year time limitation of the rule is "applicable to petitions for writ of error coram nobis.").

Here, Tisdale's judgment and sentence became final in 2013. Thus, his motion for postconviction relief was procedurally barred. See Bherviz v. State, 127 So. 3d 575 (Fla. 4th DCA 2012) (holding the trial court properly denied a motion for postconviction relief as it was filed more than two years after the defendant's judgment and sentence became final); Jones v. State, 922 So. 2d 1088, 1090 (Fla. 4th DCA 2006) ("[W]ithout a timely notice of appeal or without the granting of a belated appeal, [the] convictions and sentences became final thirty days after being imposed."); Ramos v. State, 658 So. 2d 169, 170 (Fla. 3d DCA 1995) (finding the defendant's motion under rule 3.850 was timely as it was filed within two years of when the judgment and sentence became final).

Nonetheless, Tisdale asserts his ignorance of the nondiscretionary sexual offender registration requirements sufficiently demonstrated a claim of "newly discovered evidence," thus, he was untethered by the underlying time restraints. See Fla. R. Crim. P. 3.850(b)(1) ("No other motion shall be filed or considered pursuant

to this rule if filed more than [two] years after the judgment and sentence become final unless it alleges that: (1) the facts on which the claim is predicated were unknown to [him] or [his] attorney and could not have been ascertained by the exercise of due diligence."). We disagree.

At the time Tisdale was convicted, governing law imposed sexual offender registration requirements on those individuals adjudicated for violating section 794.011(3), Florida Statutes. See § 943.0435, Fla. Stat. (requiring sexual offenders to register with the Florida Department of Law Enforcement). Accordingly, Tisdale is unable to demonstrate the applicable registration requirements could not have been discerned through the exercise of due diligence. See Wright v. State, 857 So. 2d 861, 870-71 (Fla. 2003) ("In order to qualify as newly discovered evidence, the evidence 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'") (quoting Jones v. State, 591 So. 2d 911, 916 (Fla. 1991)).

II. Motion for Postconviction DNA Testing

Tisdale further maintains the trial court erroneously denied his motion for postconviction DNA testing. Section 925.12(1), Florida Statutes (2019), allows for postconviction DNA testing following the ratification of a negotiated plea under the following circumstances:

> (a) The facts on which the petition is predicated were unknown to the petitioner or the petitioner's attorney at the time the plea was entered and could not have been ascertained by the exercise of due diligence; or
>
> (b) The physical evidence for which DNA testing is sought was not disclosed to the defense by the state prior to the entry of the plea by the petitioner.

Florida Rule of Criminal Procedure 3.853 delineates the procedure for obtaining such testing,[3] and requires a movant to allege the following under oath:

> (1) a statement of the facts relied on 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 was originally obtained;
>
> (2) a statement that the evidence was not previously tested for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques would likely produce a definitive result establishing that the movant is not the person who committed the crime;
>
> (3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;
>
> . . .

Here, Tisdale challenged the chain of custody of the vaginal swabs. In his motion, he contended law enforcement officers framed him by substituting the

[3] "This rule provides procedures for obtaining DNA (deoxyribonucleic acid) testing under sections 925.11 and 925.12, Florida Statutes." Fla. R. Crim. P. 3.853(a).

vaginal swabs harvested from S.M. with his oral standards. Thus, he sought testing to establish the absence of S.M.'s DNA on the vaginal swabs.

As Tisdale moved to retest the very swabs that not only led to his apprehension and arrest but were prominently featured in the jury trial immediately preceding his nolo contendere plea, he was unable to allege in the lower court that the evidence was untested or undisclosed, or that he was relying upon facts unknown prior to the plea.

Additionally, the trial transcript reveals that the cervical swabs yielded a mixture of his and S.M.'s DNA. Thus, it is evident that the technology necessary to test for the presence of S.M.'s DNA on the vaginal swabs existed prior to the ratification of the plea. Consequently, Tisdale did not and could not assert 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 [he] is not the person who committed the crime." Fla. R. Crim. P. 3.853(b)(2); Bates v. State, 3 So. 3d 1091, 1098 (Fla. 2009) ("In order to be entitled to postconviction DNA testing, a defendant's motion must . . . allege that the evidence was not previously tested or that the results of such testing were inconclusive.") (citing Fla. R. Crim. P. 3.853(b)(2)).

Accordingly, we affirm the well-reasoned order of the trial court.

Affirmed.