Third District Court of Appeal

State of Florida

Opinion filed July 29, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-2286
Lower Tribunal No. 03-10458

Dedrick Ferguson,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Lisa Walsh, Judge.

Law Office of Thomas G. Neusom, and Thomas G. Neusom (Fort Lauderdale), for appellant.

Ashley Moody, Attorney General, and Sandra Lipman, Assistant Attorney General, for appellee.

Before EMAS, C.J., and HENDON and GORDO, JJ.

EMAS, C.J.

Dedrick Ferguson appeals the trial court's order denying various motions seeking postconviction relief from his 2003 and 2006 convictions, and to correct an illegal sentence stemming from those convictions. We affirm the trial court's thorough and well-reasoned order, which denied each of the claims raised.[1]

To the extent Ferguson asserted claims of ineffective assistance of counsel, those claims are either time-barred, see Florida Rule of Criminal Procedure 3.850(b) (providing that motions for postconviction relief must be filed within two years after the judgment and sentence become final), successive, or otherwise procedurally barred as claims that either should have been raised on direct appeal, or were already raised unsuccessfully in a prior postconviction proceeding motion and appeal.[2] See Downs v. State, 740 So. 2d 506, 518 (Fla. 1999) (recognizing that a claim raised in an earlier postconviction motion is barred in a subsequent postconviction motion even if based on different facts); Johnson v. State, 769 So. 2d 990 (Fla. 2000)

[1] In that same order, the trial court clarified a 2012 sanctions order which had barred Ferguson from proceeding pro se or filing pleadings unless signed by a member in good standing of the Florida Bar. We affirm that aspect of the order without discussion.

[2] See, e.g., Ferguson v. State, 3D06-3201; 3D08-3240; Ferguson v. State, 3D10-1885; Ferguson v. State, 3D10-1895; Ferguson v. State, 3D10-2102; Ferguson v. State, 3D10-2572; Ferguson v. State, 3D11-852; Ferguson v. State, 3D11-3061; Ferguson v. State, 3D11-3361; Ferguson v. State, 3D12-559; Ferguson v. State, 3D12-1949; Ferguson v. State, 3D12-2077; Ferguson v. State, 3D12-3421; Ferguson v. State, 3D13-984; Ferguson v. State, 3D14-249; and Ferguson v. State, 3D17-2785.

(holding a movant is procedurally barred from seeking postconviction relief on a substantive claim that was or should have been raised on direct appeal).

Ferguson's attempts to characterize some of these claims as an attack on the legality of his sentence pursuant to rule 3.800(a) (thereby avoiding the time bar imposed under rule 3.850) are unavailing. See Kuiken v. State, 127 So. 3d 629, 630 (Fla. 3d DCA 2013) (noting that claims of ineffective assistance of counsel are generally not cognizable under Rule 3.800(a)); Tatum v. State, 27 So. 3d 700 (Fla. 3d DCA 2010); Maddox v. State, 673 So. 2d 198 (Fla. 5th DCA 1996); Wiley v. State, 632 So. 2d 721 (Fla. 1st DCA 1994). See also Fla. R. Crim. P. 3.800(a) (providing that a motion to correct illegal sentence must "affirmatively allege[] that the court records demonstrate on their face an entitlement to that relief"); State v. Mancino, 714 So. 2d 429 (Fla. 1998) (holding that motions to correct illegal sentence under rule 3.800(a) are limited to sentencing issues which can be resolved without an evidentiary hearing).

To the extent Ferguson asserted claims challenging the legality of his sentence, those claims were previously raised, denied, and affirmed on appeal on the merits and thus Ferguson is collaterally estopped from relitigating these claims absent a showing of manifest injustice. See State v. McBride, 848 So. 2d 287 (Fla. 2003); Harvey v. State, 78 So. 3d 11 (Fla. 3d DCA 2011); Tatum, 27 So. 3d 704. Ferguson has failed to demonstrate any manifest injustice.

Ferguson's final claim was based on newly discovered evidence and was brought pursuant to rule 3.850(b)(1). The trial court determined that the claim was untimely because it was not "made within two years of the time the new facts were or could have been discovered with the exercise of due diligence. . . ."[3] Notwithstanding the conclusion that the claim was procedurally barred, the trial court held an evidentiary hearing and made a determination of this claim on the merits. Here is the background necessary to place this claim in its proper context:

In 2003, Ferguson entered a negotiated guilty plea to the crimes of arson, aggravated assault, possession of a firearm by a convicted felon, and use of a firearm in the commission of a felony. Ferguson committed these crimes at the home of his former girlfriend, Doris Windom, when Ferguson poured gasoline inside Ms. Windom's house and started a fire. He was placed on five years' probation as a

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[3] The court determined that the motion was not filed within the two-year time limitation which one must file a motion for postconviction relief under rule 3.850(b)(1), which provides an exception for claims of newly discovered evidence:

> A motion to vacate a sentence that exceeds the limits 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 2 years after the judgment and sentence become final unless it alleges that:
>
> (1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, and the claim is made within 2 years of the time the new facts were or could have been discovered with the exercise of due diligence. . . .

habitual felony offender. As special conditions of his probation, he was ordered to have no contact with Ms. Windom, and no unsupervised contact with the two minor children he and Ms. Windom shared in common.

In 2005, Ferguson was charged with violating his probation by committing, inter alia, attempted murder, violation of a stay-away order, and possession of a firearm by a convicted felon. These charges arose out of a 2005 incident in which Ferguson went to the home of Ms. Windom. Ferguson and Windom got into a dispute, which ultimately led to Ferguson shooting Windom in the leg. Ferguson committed the crime in the presence of their then-eleven-year-old daughter, Aptiva Ferguson.

At the 2006 probation violation hearing, Ms. Windom testified, as did the lead detective and others. Although Aptiva Ferguson did not testify at the probation violation hearing, the lead detective testified to Aptiva's eyewitness account of the shooting, which Aptiva provided to police in an interview conducted at Kristi House shortly following the incident. Aptiva told police that she saw her father shoot her mother in the leg with a gun. The trial court found Ferguson violated his probation by committing the crimes of attempted murder, violation of a stay-away order, and possession of a firearm by a convicted felon. The trial court noted that the State proved these violations of probation even without consideration of the statements

Aptiva Ferguson gave to police during the Kristi House interview. The trial court sentenced Ferguson to thirty years in prison as a habitual felony offender.

The newly discovered evidence came eleven years later, in the form of a 2016 affidavit from Aptiva Ferguson. Now 22 years old, Aptiva recanted her 2005 statements to police. Aptiva's affidavit stated that she lied in 2005, and that what really happened was her mother accidentally shot herself in the leg while trying to unload a gun which her mother found in their yard. She further averred that her father was not even present at the time her mother accidentally shot herself, and that her mother "instructed me to say that my dad was there and that he shot my mother in the leg one time" and that her mother "told me to say this so that D.C.F. would not take my little brother and I away from our family."

At the evidentiary hearing, Aptiva testified and stood by her recantation, asserting that her mother shot herself by accident and that her father was not present. However, Aptiva acknowledged she could not recall any details surrounding the event itself, beyond the statement that the mother somehow shot herself in the leg and that her father was not present. This testimony was in sharp contrast to the testimony and evidence presented at the 2006 probation violation hearing, which included the 2005 eyewitness account of the incident provided by Aptiva to police during her Kristi House interview.

Ferguson contended that if Aptiva's newly discovered testimony was presented at a new probation violation hearing, he would be found not to have violated his probation. The trial court disagreed, concluding that Ferguson failed to establish any probability of a different outcome if this newly discovered testimony was admitted at a new probation violation hearing. The trial court denied this claim on the merits, and we find no error in that determination.

It is well established under Florida law that a defendant must meet two requirements before a conviction may be set aside on the basis of newly discovered evidence:

> First, in order to be considered newly discovered, 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 [of it] by the use of diligence.
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> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. To reach this conclusion the trial court is required to consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial.

Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (citations and quotations omitted).

Recanted testimony is a form of newly discovered evidence, and postconviction relief predicated upon recanted testimony will not entitle a defendant to a new trial unless (1) the trial court is satisfied that the recantation is true; and (2) the witness' testimony will change to such an extent as to render probable a different verdict. Armstrong v. State, 642 So. 2d 730, 735 (Fla.1994). This additional

requirement recognizes the fact that "recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true." Id.; Brown v. State, 381 So. 2d 690, 705 (Fla. 1990). See also John v. State, 98 So. 3d 1257, 1261 (Fla. 3d DCA 2012).

Here, the trial court expressly concluded it did not believe the recantation testimony Aptiva gave at the evidentiary hearing, and found it was inconsistent with the physical evidence and with the testimony given by Ms. Windom and testimony given by the police officer at the 2005 probation violation hearing. And, as the trial court correctly noted, if a new probation violation hearing was held, Aptiva would be subject to impeachment with her own prior statements made to police in 2005 following the incident.

There is competent substantial evidence to support the trial court's determination. Where a newly discovered evidence claim is based on an admission of an act of perjury or false statement, the issue of witness credibility generally predominates, and we must be highly deferential to a trial court's determinations in that regard. Archer v. State, 934 So. 2d 1187, 1196 (Fla. 2006). We will not substitute our judgment for that of the trial court, recognizing the trial court's "superior vantage point in assessing the credibility of witnesses and in making findings of fact." Porter v. State, 788 So. 2d 917, 923 (Fla. 2001).

Finally, it should be noted that the proceeding at which Ferguson sought to present this newly discovered evidence was not a new trial, but rather a new probation violation hearing, where the evidentiary rules are relaxed and the State must meet a significantly less demanding standard of proof. State v. Queior, 191 So. 3d 388 (Fla. 2016); Lane v. State, 761 So. 2d 476 (Fla. 3d DCA 2000); Walker v. State, 966 So. 2d 1004, 1006 (Fla. 5th DCA 2007); Hernandez v. State, 723 So. 2d 886 (Fla. 4th DCA 1998); Van Wagner v. State, 677 So. 2d 314 (Fla. 1st DCA 1996); Salzano v. State, 664 So. 2d 23 (Fla. 2d DCA 1995). Therefore, in attempting to establish a basis for postconviction relief, Ferguson's burden was correspondingly higher: Ferguson would have to establish that this newly discovered evidence would render probable a different outcome at the new probation violation hearing. In other words, Ferguson had to prove that, if Aptiva Ferguson's testimony were presented at a new probation violation hearing, it is probable that the trial court would find the State failed to meet its relatively low burden of proving by a preponderance of the evidence that Ferguson violation his probation. We find no error in the trial court's determination that Ferguson failed to do so.

Affirmed.