

Third District Court of Appeal

State of Florida

Opinion filed January 15, 2014.
Not final until disposition of timely filed motion for rehearing.

No. 3D13-1799
Lower Tribunal No. 09-195

William Skinner,
Appellant/Petitioner,

vs.

The State of Florida,
Appellee/Respondent.

A case of Original Jurisdiction-Habeas Corpus.

Deana K. Marshall (Riverview), for appellant/petitioner.

Pamela Jo Bondi, Attorney General, and Michael W. Mervine, Assistant Attorney General, for appellee/respondent.

Before LAGOA, EMAS and FERNANDEZ, JJ.

FERNANDEZ, J.

William Skinner seeks habeas corpus relief on various grounds, one of which warrants reversal. We grant the petition and remand the cause for a new

trial because (1) the attempted manslaughter by act instruction read to the jury was the pre-Williams instruction¹ that the Florida Supreme Court determined to be per se fundamental error for which Skinner's trial counsel raised no objection below, and because (2) Skinner's appellate counsel failed to raise the issue on appeal.

A jury convicted Skinner of attempted second-degree murder with a firearm, one step removed from the lesser included offense of attempted manslaughter by act. Skinner filed a direct appeal, and this Court affirmed Skinner's conviction and sentence.²

To grant habeas relief based on ineffective assistance of appellate counsel grounds, this Court must apply a two-prong analysis. First, the petitioner must show that the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance. See Connor v. State, 979 So. 2d 852, 869 (Fla. 2007). Second, the petitioner must show that the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Id.

This Court recognizes that appellate counsel is not required to anticipate changes in the law, however "there are cases that hold that appellate counsel is

¹ Williams v. State, 123 So. 3d 23 (Fla. 2013).

² Skinner v. State, 100 So. 3d 192 (Fla. 3d DCA 2012).

ineffective for failing to raise favorable cases decided by other jurisdictions during the pendency of an appeal, which could result in a reversal.” Granberry v. State, 919 So. 2d 699, 701 (Fla. 5th DCA 2006). See also Dill v. State, 79 So. 3d 849, 851 (Fla. 5th DCA 2012); Lopez v. State, 68 So. 3d 332, 334 (Fla. 5th DCA 2011). During the pendency of Skinner’s appeal in this Court, the issue of whether the Florida jury instruction on attempted manslaughter constituted fundamental error had not yet been decided. The Florida Supreme Court ultimately decided the issue on review of Lamb v. State, 18 So. 3d 734 (Fla. 1st DCA 2009) and Williams v. State, 40 So. 3d 72 (Fla. 4th DCA 2010), quashed, 123 So. 3d 23 (Fla. 2013), both of which were in direct conflict. The Florida Supreme Court approved the First District’s decision in Lamb, and quashed Williams, 40 So. 3d at 72.

Skinner correctly argues that he is entitled to relief on the attempted manslaughter jury instruction issue. The trial court committed fundamental error when it gave the standard jury instruction on attempted manslaughter by act. See Williams v. State, 123 So. 3d 23 (Fla. 2013). Furthermore, Skinner’s appellate counsel’s performance was deficient because he failed to raise the jury instruction issue and failed to provide this Court with notice of the conflict between the Florida District Courts of Appeal. Lopez, 68 So. 3d at 334; Dill, 79 So. 3d at 851. This constituted a serious error and a substantial deficiency that fell outside the range of professionally acceptable performance. Appellate counsel’s failure

compromised the appellate process to such extent that it undermined this Court's confidence in the correctness of this Court's decision in Skinner's direct appeal.

We therefore grant Skinner's petition for writ of habeas corpus on this basis, decline to address all other issues raised in the petition, and remand this case for a new trial.

Petition granted; case remanded.