IN THE SUPREME COURT OF FLORIDA

MICHAEL BOYINGTON,

Petitioner,

CIR. CASE NO. 06-514-CF
DCA CASE: 1D12-6131

v.

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION

On Review from the First District Court of Appeal

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Statutes

RULES

STATEMENT OF THE CASE AND FACTS

This case arises from allegations that Petitioner shot Mr. Aprid Balint ("Mr. Balint") with a .44 caliber rifle on October 20, 2006 as Mr. Balint menacingly waived a bush axe and advanced towards Petitioner. Petitioner and Mr. Balint were adjacent property owners. Petitioner witnessed Mr. Balint on the property line acting in a manner consistent with intoxication and advancing towards him. He believed Mr. Balint intended to do him great bodily harm or worse. Petitioner's weak physical condition concerned him, and he feared he would be easily overpowered. After disabling Mr. Balint, he immediately contacted law enforcement, which arrived on scene short thereafter.

On June 5, 2008, a judgment of conviction was entered in the Third Judicial Circuit Court for Suwannee County, Florida, on one count of attempted second-degree murder with a firearm and one count of aggravated assault with a firearm, in violation of Fla. Stat. §§ 777.04(1), 784.021, respectively. Petitioner filed a notice of appeal on October 26, 2009 with the First District Court of Appeal.

On appeal, Petitioner was represented by Mr. Edgar Lee Elzie, Jr., Esq. (Mr. Elzie). Mr. Elzie assigned six (6) errors in his Initial Brief:

1) Whether the trial court erred in denying movant's motion for a new trial.

2) Whether the cumulative effect of the prosecutor's improper questions constituted fundamental error.

3) Whether the prosecutor's improper comments during closing argument constituted fundamental error.

4) Whether the trial court's failure to instruct the jury the State bore the burden to prove beyond a reasonable doubt that attempted killing was not act of justifiable or excusable homicide was fundamental error?

5) Whether the trial court committed fundamental error by instructing the jury in a manner inconsistent with Florida's Stand Your Ground law.

6) Whether the cumulative effect of these five errors constituted fundamental error.

Petitioner's conviction was affirmed, *per curiam*, on August 18, 2011. The mandate was returned on September 6, 2011. Petitioner timely moved for rehearing, which was denied on October 17, 2011.

Petitioner then filed a timely petition for a writ of habeas corpus pursuant to Fla. R. App. P. 9.141(d) to the First District Court of Appeal alleging ineffective assistance of appellate counsel on December 27, 2012. Including several subsequent supplements, Petitioner raised the following grounds for granting the petition:

1) Appellate counsel was ineffective for failing to raise trial counsel's improper concession of guilt without Petitioner's consent.

2) Appellate counsel was ineffective for failing to raise improper imposition of costs by trial court.

3) Appellate counsel was ineffective for failing to raise trial court's failure to conduct a proper *Nelson* inquiry.

4) Appellate counsel was ineffective for failing to raise improper double sentencing.

5) Appellate counsel was ineffective for failing to raise the trial court's refusal to grant a meritorious motion for an enlargement of time prior to sentencing.

6) Appellate counsel was ineffective for failing to raise the trial court's refusal to give jury instruction on lesser included offense to attempted second-degree murder.

7) Appellate counsel failed to raise insufficiency of the evidence as to the aggravated assault with a firearm charge.

His petition was granted in part and denied in part on October 18, 2013. The First District denied his petition in all respects except as to Ground 2. He timely moved for rehearing on October 29, 2013, which was denied on November 22, 2013. The timely petition now follows.

SUMMARY OF THE ARGUMENT

Petitioner seeks to invoke this Court's jurisdiction under Art. V, §3(b)(9) of the Florida Constitution, and concurrent jurisdiction under Art. V, §4(b)(3), §5(b) of the same, to effect direct appellate review of the First Court of Appeal's denial of Petitioner's habeas petition alleging ineffective assistance of appellate counsel. *State ex rel Scaldeferri v. Sandstrom*, 285 So. 2d 409 (Fla. 1973).

Rule 9.141(d) of Florida Rules of Appellate Procedure treats petitions alleging ineffective assistance of appellate counsel as original proceedings to be initiated in the court to which the appeal was taken. A petition for a common law writ of habeas corpus is the proper vehicle for raising such claims. *Rutherford v. Moore*, 774 So. 2d 637 (Fla. 2000); *Whipple v. State*, 112 So. 3d 540 (Fla. 3d DCA 2013). As explained further herein, the Florida Rules of Appellate Procedure provide no meaningful avenue of appellate review for an original proceeding in the District Court of Appeals and thus is an unconstitutional violation of Petitioner's rights to due process and access to courts guaranteed by the Florida and U.S. Constitutions.

ARGUMENT

II. IN THE ABSENCE OF RULES OF PROCEDURE TO PERMIT MEANINGFUL APPELLATE REVIEW OF THE DENIAL OF A PETITION FOR HABEAS CORPUS ALLEGING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, PETITIONER IS DENIED HIS RIGHTS TO FUNDAMENTAL DUE PROCESS AND ACCESS TO COURTS GRANTED BY THE FLORIDA AND U.S. CONSTITUTIONS

The Sixth Amendment guarantees the right to effective assistance of counsel at the trial and appellate stages of a criminal case. U.S. Const. Amend. VI; *Evitts v. Lucey*, 469 U.S. 387 (1985); *Strickland v. Washington,* 466 U.S. 668 (1984). With regard to the latter, this axiom applies to appeals pursued as a matter of right. *Sims v. State*, 998 So. 2d 494, 498-99 (Fla. 2008) (citing *Evitts*, 469 U.S. at 396).

A petition for a common law writ of habeas corpus is the proper vehicle to allege deficiencies in appellate counsel's performance which prejudiced the appeal and precluded a just result. *Whipple, supra.* Pursuant to 9.141(d) of the Florida Rules of Appellate Procedure, such petitions are original proceedings to be initiated in the court to which the appeal was taken. This is consistent with the nature of habeas proceedings generally, which are independent, civil proceedings available in criminal cases. Commonly associated with inquiring into the legality of individual detention, the petition, pursuant to Fla. R. App. P. Rule 9.141 is the exclusive vehicle in Florida for raising ineffective assistance of appellate counsel.

However, Rule 9.141 provides no express guidance as the propriety or means of appealing a petition's denial. Fla. R. App. P. 9.141(d) (2013).

Petitions for ineffective assistance of trial counsel, filed pursuant to Fla. R. Crim. Proc. 3.850, are original actions brought in the circuit court in which the challenged conviction and sentence were entered. Upon denial, pursuant to Fla. R. App. Proc. 9.100, appellate jurisdiction may be invoked for purposes of meaningful appellate review in the District Court of Appeal. Florida's Rules of Appellate Procedure provide extensive guidance for appealing a denial of a decision from the trial court level. No such guidance exists for original proceedings in the District Court of Appeal.

A petition filed in the District Court of Appeal pursuant to 9.141(d) is considered an original proceeding within the meaning of 9.100, which provides rules and procedures for review of final orders and certain non-final orders issued at the trial court level. It follows, then, an original proceeding in the District Court of Appeal is akin to an original proceeding at the trial level where meaningful appellate review is fundamental to a petitioner's rights to due process and access to the state's courts. And while the instant matter does not invoke one of the enumerated matters set out in Fla. R. App. P. 9.030(a)(1). Petitioner here is seeking review of an original order of the District Court and the principles and commands

of due process require at least one level of direct appeal on any such original, final order. This one level is a direct appeal to this Court.

Petitioner here recognizes the Court's "all writs" authority does not confer a separate source of appellate jurisdiction. *Williams v. State*, 913 So.2d 541, 543 (2005); Art. V, § 3(b)(7), Fla. Const. Further, Petitioner here recognizes the limited jurisdictional review of this Court as confined and proscribed by the Florida Constitution. However, this Court does have the authority to issue writs of habeas corpus (Art. V, § 3(b)(9)(the writ of habeas corpus an extraordinary writ this Court is empowered to issue), among other writs, and this authority pre-supposes first, this Court can act in a fact-finding review of a challenged sentence and conviction, second, is authorized to correct and conviction or sentence which was entered in violation of the defendant's rights, and third, implies at least some authority to consider a petition for habeas corpus independent of a necessity to invoke specific jurisdiction.

The Court clearly has jurisdiction to entertain review of challenges by collateral attack of a sentence of death, in fact, stating it has "exclusive jurisdiction" to review these petitions. *State v. Fourth Dist. Ct. of Appeal*, 697 So.2d 70, 71 (Fla. 1997). No such "exclusive jurisdiction" or even discretionary jurisdiction permits this Court to review a denial of a petition alleging ineffective assistance of appellate counsel. Fundamental fairness and due process require at

least some procedure, even if limited and discretionary, to the denial by the District Court of Appeals of an original proceeding collateral attack petition.

And while the "all writs" authority does not confer an independent basis for jurisdiction, the implication at least is that appellate review authority rests with this Court to review decisions denying post-conviction collateral relief. If there is no independent basis for jurisdiction in the present matter, Petitioner is effectively denied any meaningful review of his claims presented for the first time and in the first instance to a District Court of Appeal. Making matters worse, a decision denying his petition, *per curiam*, offers no guidance or other means to evaluate the reasoning for the denial which may provide the means to invoke this Court's discretionary review under other provisions.

This Court's ruling in *Persaud v. State*, 838 So.2d 529, 531-32 (Fla. 2003), enunciates a bright-line rule that "this Court does not have jurisdiction to review *per curiam* decisions of the district courts of appeal that merely affirm with citations to cases not pending review in this Court." Further, this Court has ruled that use of an extraordinary writ petition is inappropriate and outside the Court's jurisdiction to "seek review of an appellate decision issued without an opinion." *Persaud*, 838 So.2d at 533, *citing Grate v. State*, 750 So.2d 625, 626 (Fla. 1999).

However, the instant matter is not merely a decision from a District Court of Appeal affirming, *per curium*, a decision from the trial court. Here, the District

Court of Appeal was the original "trial court" and the decision to deny Petitioner's motion for relief, where it is brought pursuant to the rules adopted by this Court to govern such proceedings, was done without opinion and without explanation. This Court has held that the absence of sufficient findings of fact at the trial court level made meaningful review impossible and has routinely returned these matters to the Circuit Court. *Strickler v. Strickler*, 548 So.2d 740 (1st DCA, 1989)("…neither does it contain findings of fact or conclusions of law which would permit any kind of meaningful appellate review…"). Without sufficient findings of fact or even a reasonable avenue for review, the affirmance of Petitioner's petition in the first instance by the District Court of Appeal, *per curium*, stands without explanation or opportunity for meaningful review.

Fundamental fairness and due process require at least some meaningful appellate review of the decision in an original proceeding. Because the Rules of Appellate Procedure fail to provide even a limited avenue of review of the denial of an original proceeding in the District Court of Appeal, the rules are an unconstitutional denial of fundamental due process and access to courts guaranteed by the Florida and U.S. constitutions.

CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction to review the district court's decision and allow full briefing on the merits.

Respectfully Submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 18th day of December, 2013 to:

Office of the Attorney General
The Capitol PL-01
Tallahassee, Florida 32399-1050

/s/ Mark K. McCulloch
Mark K. McCulloch, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Jurisdictional Brief complies with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ Mark K. McCulloch
Mark K. McCulloch, Esquire