

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1587

STATE OF FLORIDA ex rel.
ROBERT A. BUTTERWORTH, etc.,

Relator,

v.

BILL JENNINGS, etc., et al.,

Respondents.

RESPONDENTS REITER'S AND STRAND'S MOTION TO DISMISS

COME NOW THE RESPONDENTS, MICHAEL P. REITER, CCC-NORTHERN REGION AND BRET B. STRAND, ASSISTANT CCC-NORTHERN REGION and herein move to dismiss Respondents Reiter, Strand and/or the Office of the Capital Collateral Counsel-Northern Region [CCC-North], from the Emergency Petition for Writ of Quo Warranto filed against them and other named parties. In support thereof, Respondents Reiter and Strand would state:

1. On July 24, 2001, Relator filed an Emergency Petition for Writ of Quo Warranto [Petition], naming several parties as Respondents. Two of the parties are Michael P. Reiter, who is the appointed agency head of the CCC-North office and Bret B. Strand, an Assistant CCC for the North office.
2. In his petition, Relator seeks to prevent Respondents Reiter and Strand (as well as the other named parties), from representing clients "in actions to challenge the validity of any judgment and sentence other than the capital judgment and sentence of death that has been imposed for which they are representing the death row inmate" (Petition at 1).
3. As to Respondents Reiter and Strand, Relator's specific "complaint" is set forth as follows:

Relator notes that CCR counsel has sought to engage in representing another death row inmate, Mr. Melton, in challenging not only his capital judgment and sentence but also a non-capital judgment and sentence via Rule 3.850 attack (See App. 6).

(Petition at 2). This brief mention of CCR counsel with regard to Mr. Melton's case and the complaints about this alleged unauthorized practice is set forth in the "Preliminary Statement" of the Relator's pleading. No specific complaints about Respondents Reiter and Strand nor any additional complaints involving the Antonio Melton case are made in the Relator's pleading except for the brief passage set forth in the "Preliminary Statement."¹ Relator merely attaches a copy of Mr. Melton's amended postconviction motion, regarding a non-death case, to his pleading.

4. For the reasons set forth below, Respondents Reiter and Strand submit that the petition should be dismissed as to them and the CCC-North Office. In order to fully understand the position as to the propriety of dismissal, and because Relator did not accurately set forth in his petition the Antonio Melton litigation, a chronology of Mr. Melton's litigation will be first discussed.

A. CHRONOLOGY OF LITIGATION ON BEHALF OF ANTONIO MELTON.

5. On July 5, 1994, this Court affirmed Antonio Melton's conviction for first-degree murder and resulting sentence of death. In October, 1994, the United States Supreme Court denied review. After the Capital Collateral Representative (CCR)², requested additional time to designate counsel and this Court granted that request, designated counsel, Bret B. Strand, was appointed on February 16, 1995.

6. During the penalty phase of Mr. Melton's capital trial, the State introduced evidence of

¹With the exception of the brief mention of the Melton case and a case being litigated out of the CCRC-South Office, the petition essentially is directed to alleged unauthorized litigation arising out of the CCRC-Middle office. This motion does not address the merits of the Relator's legal position as to the statutory authority argument; rather, this motion only seeks dismissal of Respondents Reiter, Strand and CCC-North for the express reasons set forth later in this motion. Should it be necessary, Respondents Reiter, Strand and CCC-North will, in their response to the petition itself, address the legal arguments raised by Relator.

² The Office of the Capital Collateral Representative represented indigent capital defendants in their postconviction appeals and was the predecessor agency to the Capital Collateral Counsel for the Northern Region.

a prior capital conviction in order to establish an aggravator in support of a death sentence.³ See Fla. Stat. §921.141(5)(a). That conviction resulted from Mr. Melton’s trial for another first-degree murder and occurred in September, 1991. Judgments of conviction and sentence were entered on November 6, 1991, at which time Mr. Melton was sentenced to life imprisonment without the possibility of parole for a period of twenty-five (25) years on count one and life imprisonment with three (3) years of said sentence being denominated a minimum mandatory sentence on count two.

7. Mr. Melton timely appealed his judgments of conviction and non-capital sentence to the First District Court of Appeals. In January, 1993, the First District Court of Appeals denied Mr. Melton’s appeal but certified “the same question certified in Downs v. State” to this Court. Melton v. State, 611 So. 2d 116 (Fla. 1st DCA 1993). On July 7, 1993, this Court denied review. Melton v. State, 624 So. 2d 267 (Fla. 1993).

8. On July 5, 1995, Mr. Melton, through counsel filed a Rule 3.850 motion challenging his convictions and non-capital sentences with a request for leave to amend. Bret B. Strand, Mr. Melton’s designated counsel in his death case filed the Rule 3.850 motion on Mr. Melton’s behalf. Following the signature block, Mr. Strand listed his address as the same mailing address for CCR. Subsequently, on January 4, 1996, Mr. Strand, as designated counsel, filed a Rule 3.850 motion challenging Mr. Melton’s judgments of conviction and sentence of death.

9. On July, 10, 2000, the State filed a response to Mr. Melton’s Rule 3.850 motion challenging his non-death judgments of conviction and sentences. (Appendix 1).

10. On July 26, 2000, a hearing was held before the Honorable Kim A. Skievaski, Circuit Judge in and for Escambia County, Florida. At that hearing, Judge Skievaski inquired about the representation of Mr. Melton in his non-death 3.850 proceedings (Appendix 2). Mr. Strand explained that when he filed the Rule 3.850 motion in 1995 he was unsure as to his authority to represent Mr.

³ Mr. Melton’s Rule 3.850 motion regarding Escambia County Case No. 91-1219 will be referred to as his “non-death case” and his conviction regarding Escambia County Case No 91-373, which resulted in a death sentence will be referred to as his “death case”.

Melton in a case where a death sentence had not been imposed. However, Mr. Strand explained that soon after filing the Rule 3.850 motion, as he understood it, the reversal of a conviction used as an aggravator in support of a subsequent death sentence was a viable postconviction claim under Johnson v. Mississippi, 486 U.S. 578 (1988). He also informed Judge Skievaski of the proceedings in State v. Preston, 564 So. 2d 120 (Fla. 1990):

In Mr. Preston's case, a case out of Seminole County, he was sentenced to death. And one of the aggravating circumstances found by the Court was that he had been convicted of a prior crime of violence. Our office filed – CCR filed a rule 3.850 motion on behalf of Mr. Preston in the nondeath case. That motion was litigated in the circuit court and an evidentiary hearing was held. Mr. Preston won that evidentiary hearing and the conviction was thrown out.

Then the Florida Supreme Court got the death case where Mr. Preston filed another 3.850 in his death case saying his death sentence was based on inaccurate information, conviction that had been thrown out, that CCR had gotten thrown out to the 3.850. The Florida Supreme Court addressed this and granted Mr. Preston relief as to his death sentence, contingent upon a retrial – what happened at retrial.

Mr. Preston was tried again, in the prior crime of violence case, and was acquitted. Based on the acquittal the Florida Supreme Court threw out his death sentence. . . . There was no objection by the State Attorney down there in Seminole County, no objection by the Attorney General's Office . . .

11. In addition to the authority CCC-NR had in representing Mr. Melton in a non-death case, the circuit court judge wanted to clarify how Rule 3.852 could be applied to a non-death case. Mr. Strand informed the court that several public agencies had supplied records on both Mr. Melton's capital case and his non-death case. However, Judge Skievaski ordered that any motion to compel under Rule 3.852 would be limited to Mr. Melton's records requests made regarding his death-sentenced case because he believed that Rule 3.852 was restricted to capital cases resulting in a death sentence. This was the only limitation the circuit court held applied to Mr. Melton's non-death case. In fact, at the conclusion of the hearing, Judge Skievaski informed the parties that he was not limiting CCC-NR or Mr. Strand's representation of Mr. Melton.

12. On December 1, 2000, another hearing was held. At that hearing, Judge Skievaski stated: "I believe that if Mr. Strand and collateral counsel wishes to represent Mr. Melton on [his non-

death 3.850], that – and that’s within their charter, that’s something I’m not going to interfere with.” (Appendix 3 at p. 43-44). Thereafter, Judge Skievaski entered a written order granting Mr. Melton’s leave to amend his non-death Rule 3.850 motion (Appendix 4). The circuit court directed the order to Bret B. Strand in his capacity as an Assistant CCC-NR. Throughout the proceeding the State never objected to CCC-NR representation of Mr. Melton.

13. On July 3, 2001, CCC-NR file an amended Rule 3.850 motion in Mr. Melton’s non-death case.

B. RESPONDENTS REITER, STRAND AND CCC-NORTH SHOULD BE DISMISSED FROM THE INSTANT QUO WARRANTO PROCEEDING.

(i) Respondents Reiter, Strand and CCC-North are proceeding with full legal authority of the court.

14. With the complete chronology of the Melton situation now clarified, it is quite apparent that Relator has no justiciable actual controversy against Respondents Reiter, Strand and CCC-North, and they should therefore be dismissed from the instant action. The fact that the circuit court permitted amendment of the postconviction motion in question by order dated December 4, 2000, belies the "emergency" nature of the relief sought by the Relator.

15. There is no actual controversy as to Respondents Reiter, Strand and CCC-North. It remains to be seen how Respondents Reiter, Strand and CCC-North can be engaging in "unpermitted practice" when a court has in fact permitted the office to proceed as Mr. Melton's counsel. Because Respondents Reiter, Strand and CCC-North are representing Mr. Melton with the full authority of an order of a court of competent jurisdiction, Respondents should be dismissed from the Relator's action.

(ii) Procedural Default bars any action against Respondents Reiter, Strand and CCC-North.

16. As noted above, the State never filed a motion to discharge Mr. Melton's collateral counsel. NO appeal was perfected by the State, or was attempted to be perfected by the State. NO attempt was made by the State to seek any type of mandamus, prohibition, or other extraordinary relief. Now, Relator, has asserted a complaint about Mr. Melton's collateral counsel.

17. Respondents Reiter and Strand submit that the Relator's complaints as to them and the CCC-North office are barred by procedural default.

18. Procedural default applies to the State as well as to defendants. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). Here, Relator's instant action is seemingly an attempt to now seek appellate review of an issue which was never preserved by the State in the circuit court, nor timely appealed. No matter how generously one reads the applicable rules of procedure, the State's present attempt to have CCRC-North removed from Mr. Melton's case is procedurally defaulted.

19. As the Court recently noted, "there is a history of the Supreme Court of Florida accepting jurisdiction" in interlocutory appeals in capital cases, be they initiated by a defendant or the State. Trepal v. State, 754 So. 2d 702, 706 (Fla. 2000). Certainly, the State of Florida is aware of both its ability to seek interlocutory review and what procedures to follow. See, e.g. State v. Kokal, 562 So. 2d 324 (Fla. 1990); State v. Lewis, 656 So. 2d 1248 (Fla. 1994). Obviously the State was aware that it could appeal, and it was aware of the procedures necessary to perfect that appeal. For whatever reason, it made a decision not to do so, and Relator's attempt to circumvent the applicable time provisions for filing appeals should not be countenanced. If the State of Florida is permitted to belatedly seek review of clearly time-barred issues, surely then a defendant must be allowed to follow the same procedures. Yet time and again, the Court has ruled that defendants are procedurally barred from raising issues in an untimely fashion, even when the cause for the untimeliness is borne from ineffective assistance of collateral counsel.⁴ The State of Florida should not be permitted to reap the benefit of sitting on its hands.

WHEREFORE, Respondents Michael P. Reiter, Bret B. Strand and/or the CCC-North office move that they be dismissed from the above-captioned action.

I HEREBY CERTIFY that the foregoing has been sent to opposing counsel via first class mail this 8th day of August, 2001.

⁴See, e.g. Lambrix v. State, 698 So. 2d 247 (Fla. 1996).

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