

O/A 10-30-86

IN THE SUPREME COURT OF FLORIDA

SEP 23 1986  
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CASE NO. 68,320

PHILLIP DYLAN HOLLAND,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

In this Brief, PHILLIP DYLAN HOLLAND, will be referred to as "Petitioner", and the STATE OF FLORIDA, as "Respondent".

This case arises, on discretionary review in this Court, of a ruling by the Fourth District, in Holland v. State, 484 So.2d 596 (Fla. 4th DCA 1986), affirming the denial of Petitioner's post-conviction motion by the Circuit Court, in and for Broward County, Florida.

"R" will refer to the Record of the pleadings, motions and rulings before the Fourth District, as though that Record was conductively numbered, as sent to this Court; "TT" will refer to the original trial transcript, and such references will appear in Respondent's Appendix ("RA") to its brief; and "e.a." will mean emphasis added.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement, to its limited extent, but makes the following additions, clarifications and corrections:

Although the trial court entered an Order, directing the State Attorney's Office and Public Defender's Office to respond to Petitioner's motion for post-conviction relief, on January 17, 1985 (R, 25), no such response was ever filed by the State or Public Defender, according to the Record.

The trial court's order, denying Petitioner's motion for post-conviction relief (R, 37-38)(RA, 2-3), indicated that the trial court had considered Petitioner's motion, and the records and files of the case, in denying relief. (RA, 2). Furthermore, the court's order specifically noted its review of the trial transcripts, including defense counsel's closing argument, in determining that Petitioner's claim of ineffective assistance of counsel had no merit. (RA, 2).

In defense counsel's closing argument during trial, he consistently maintained Petitioner's innocence, and his defenses of justifiable homicide by self-defense. (TR, 771-813; 837-850); (RA 4-59). This reflected Petitioner's testimony, that the stabbing of the victim, was in self-defense. (TR, 653, 669-681, 684, 695-697); (RA, 60-77). Said closing argument specifically focused on the existence of reasonable doubt as to guilt (TA, 792-777); attacking the credibility of a key state witness (TR, 772-781); and focused upon evidence to substantiate Petitioner's version of the events. (TR, 783-805; 843-848).

In response to Petitioner's February 5, 1986 Motion for rehearing or rehearing en banc, before the Fourth District, Respondent filed a

Response in opposition to same, on February 18, 1986. (R, 44-45).

POINT ON APPEAL

WHETHER THE DISTRICT COURT APPROPRIATELY DETERMINED THAT TRIAL COURT'S TECHNICAL VIOLATION OF RULE 3.850, FLA.R.CRIM.P., IN ORDERING STATE TO RESPOND TO POST-CONVICTION MOTION, PREJUDICED PETITIONER SO AS TO REQUIRE A REMAND FOR AN EVIDENTIARY HEARING?

SUMMARY OF ARGUMENT

The Fourth District appropriately and correctly ruled that the trial court's technical violation of Rule 3.850, Fla.R.Crim.P., in ordering the State to respond to Petitioner's post-conviction motion, did not contribute reversible error. Specifically, the Fourth District's opinion did not conflict with Morgan, but merely applied harmless error analysis as authorized by statute, to the trial court's use of a procedure technically unauthorized by Rule 3.850, supra. The Fourth District's ruling appropriately affirmed the trial court's ruling, as supported by the complete motion, files and Record in the case, that such Record conclusively demonstrated that Petitioner was not entitled to relief, on his claim of ineffective assistance of counsel.

ARGUMENT

DISTRICT COURT APPROPRIATELY DETERMINED THAT TRIAL COURT'S TECHNICAL VIOLATION OF RULE 3.850, FLA.R.CRIM.P., IN ORDERING STATE TO RESPOND TO POST-CONVICTION MOTION, DID NOT PREJUDICE PETITIONER SO AS TO REQUIRE A REMAND FOR AN EVIDENTIARY HEARING.

Petitioner has maintained herein that the Fourth District committed reversible error, in affirming the trial court's denial of Petitioner's post-conviction motion without an evidentiary hearing, on a harmless error basis. However, Petitioner's argument is nothing more than an attempt to bootstrap a claim of substantive prejudicial error, from an arguably technical violation of Rule 3.850, Fla.R.Crim.P. (1984), that amounted to a non-prejudicial nullity for all practical purposes. As such, the Fourth District's ruling, and interpretation of this Court's decision in Morgan v. State, 475 So.2d 681 (Fla. 1985), was appropriate and correct.

The Fourth District initially observed, in its opinion, that Petitioner's claim of entitlement to an evidentiary hearing, under Morgan, supra, was "facially ... correct". Holland v. State, 484 So.2d 596 (Fla. 4th DCA 1986)(RA, 1). This evidently reflects a conclusion by the Fourth District that, under Morgan, the trial court's ordering of a response by the State to Petitioner's post-conviction motion, went beyond the limits of the "old" version of Rule 3.850, Fla.R.Crim.P. (1983), which "limits the court's initial consideration to the [post-conviction] motion and the 'files and records of the case'". Morgan, at 582; The Florida Bar re-Amendment to Rules of Criminal Procedure (Rule 3.850), 460 So.2d 907, 908 (Fla. 1984). However, as the Fourth District's appropriate reliance on

harmless error analysis reflects, the State did not file a response, and the trial court's November 1, 1985 Order demonstrates its appropriate reliance on the "motion, files and Records" only, in resolving Petitioner's claims. (R, 37); Rule 3.850 (1983), supra. Thus, the Fourth District's holding reflects the mere technical, non-prejudicial nature of the trial court's ordering of a State response, when such was not the appropriate procedure, under the pre-1984 amendment version of Rule 3.850. Morgan, at 682.

Thus, this crucial distinction between the present proceedings, and Morgan, supra, compels the conclusion that the Fourth District's ruling was appropriate. It should initially be noted that the Morgan decision was predicated on the trial court's ordering of a State response to a post-conviction motion; the State's filing of such a response; and this Court's conclusion that, absent consideration of the State's response, summary denial was not conclusively supported by the Record. Morgan, at 682. The absence of such a response, and the limited consideration by the trial court herein, to those Records and criteria authorized under the old post-conviction rule, are crucial distinctions supporting the Fourth District's ruling.<sup>1</sup> As can be seen from the 1984 Amendment to Rule 3.850, the purpose of said change was to provide an opportunity to the State and the trial court to respond to a post-conviction motion, and present or suggest allegations and arguments enabling the trial court to deny such motions without the necessity for evidentiary hearings. Toler v.

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<sup>1</sup> Such distinctions serve to substantiate Respondent's position, which it now reiterates, that no "actual conflict" was demonstrated by Petitioner on this issue, between this case and Morgan. See Respondent's Brief on Jurisdiction, at 5-6.

State, 11 FLW 1918 (Fla. 1st DCA, September 9, 1986); Rule 3.850, Fla.R.Crim.P. (1985); The Florida Bar re-Amendment to Rule 3.850, supra, at 909; Rule 3.850, supra, 1984 Committee Note. Without the State's filing of a response, the trial court's consideration of the motion, although procedurally and/or technically deficient because of its order directing a State response, was substantively and correctly resolved, by appropriately authorized procedures. Rule 3.850 (1983), supra.

Thus, the mere ordering of a State response, which clearly had no effect on the trial court's denial of Petitioner's post-conviction motion, since not based on review of unauthorized pleadings, was correctly interpreted by the Fourth District as not constituting prejudicial error to Petitioner's substantial rights, or otherwise affecting the trial court's ruling on the motion. Recinos v. State, 420 So.2d 95, 98 (Fla. 3rd DCA 1982)(on rehearing en banc); Palmes v. State, 397 So. 2d 648, 653, 654 (Fla. 1981); §924.33, Fla. Stat. (1970); Holland, 484 So.2d, at 596. Thus, Petitioner's contentions that the Fourth District needed to review an evidentiary hearing, or portions of the Record, in order to characterize the error as harmless, Petitioner's Brief, at 8, appears to misinterpret the nature of the error found by the Court, in view of Morgan, and its resulting effect as a procedural nullity on the outcome of the trial court's order.

Additionally, Petitioner's misconception of the nature and effect of the trial court's error, as determined by the District Court, has led to his erroneous conclusion that the Fourth District's ruling constituted a finding that Petitioner was entitled to an evidentiary hearing. Petitioner's Brief, at 8. This position is at odds with Morgan, upon

which Petitioner relies for its challenge of the ruling by the District Court. In Morgan, this Court, faced with the denial of a post-conviction motion, without an evidentiary hearing, under unauthorized consideration of a state response, did not conclude that such a denial was tantamount to a finding that an evidentiary hearing was required. Morgan, at 682. Instead, this Court concluded that, "without reference to the State's response", the motion and Records did not warrant a summary denial. Id. Thus, this Court's independent evaluation of whether the defendant therein was conclusively not entitled to relief, without regard to the offending procedural error, Id., contradicts Petitioner's position that Holland stands for the fact that improper consideration of a State response automatically amounted to a finding that an evidentiary hearing must be held on a post-conviction motion.<sup>2</sup> The result in Morgan, and the Fourth District's adoption of Morgan in Holland, leads to the conclusion that an evidentiary hearing cannot be denied on the basis of the particular procedural error involved. Petitioner's erroneous conclusion, that an evidentiary hearing must necessarily be held, on the basis of a necessary conclusion that the claim is not conclusively susceptible to denial, on the merits, is an overbroad and incorrect interpretation of Morgan.

Applying the Morgan analysis, and its interpretation of the former version of Rule 3.850, it is clear that, without reference to the direction of a response from the State, Petitioner's motion, and the Records and files in this case, does conclusively demonstrate that Petitioner was not entitled to relief. Morgan, at 682; Mann v. State, 482

<sup>2</sup> In fact, there would not in Morgan have been any need for this Court to conduct such an analysis, which is essentially in the nature of review for harmless or reversible error, if Petitioner's argument was tenable.

So.2d 1360, 1361-1362 (Fla. 1986); Porter v. State, 478 So.2d 33 (Fla. 1985); Middleton v. State, 465 So.2d 1218 (Fla. 1985). Petitioner's initial contention was that his trial counsel was ineffective, by virtue of allegedly conceding his guilt during closing argument. Contrary to Petitioner's present position, there is clear, unequivocal Record support for the District Court's affirmance of the trial court's conclusion, that no ineffectiveness was shown on this ground. (RA, at 1).

As shown by the entirety of defense counsel's closing argument, as specifically examined and referred to by the trial court, defense counsel did not concede his client's guilt. (TR, 771-813; 837-850). Said argument consistently reflected defense counsel's strategy to pursue a defense of justifiable homicide, based on self-defense, from opening argument on. (TR, 649-653). Defense counsel placed Petitioner on the stand, and elicited testimony, relative to self-defense, that the stabbing occurred during a fight with the victim. (TR, 663; 669-681, 684, 695-697). Defense counsel's closing argument focused on the presence of reasonable doubt created in the State's evidence. (TR, 732-777); the lack of credibility of a key State witness (TR, 772-782); and the evidence which purportedly substantiated Petitioner's innocence and/or alleged defenses of self-defense and justifiable homicide, and was allegedly consistent with his testimony. (TR, 783-805, 843-848). Counsel also challenged the circumstances of Petitioner's interrogation (TR, 805-807). Throughout his argument, counsel referred to Petitioner's innocence, and the reasonableness of his actions in self-defense. (TR, 783-813). There is very little question that defense counsel did anything but concede Petitioner's guilt.

Furthermore, Petitioner's sole reference to counsel's alleged concession of his client's guilt, is not borne out by the Record. In referring to the possibility of crimes other than first-degree murder, which were to be given to the jury in the trial court's instructions, defense counsel argued that, assuming the State's evidence in its best possible light, a crime other than first-degree murder might have been shown, but additionally was not actually proven because of Petitioner's acts in self-defense. (TR, 811). In his subsequent argument, defense counsel reiterated that Petitioner was not guilty of felony murder, because he did not intend to commit a robbery. (TR, 843, 849). Because defense counsel focused upon Petitioner's lack of intent to rob or steal, Petitioner's notations cannot be reasonably read, in isolation let alone in the context of the entire closing argument as properly placed in perspective by the trial court, as concessions of guilt. (TR, 811, 843, 849).

Thus, Petitioner's argument before this Court, challenging the sufficiency of the Record to support the District Court's affirmance of trial court's denial of relief, is baseless. Petitioner's reliance on out-of-state authorities, to support a legal conclusion not supported by the facts as considered by both the trial court and District Court, appears to constitute a selective ignorance of the entirety of defense counsel's argument, which conclusively demonstrates that Petitioner is not entitled to relief. Strickland v. Washington, 468 U.S. 668 (1984); Porter; Middleton, supra.

Petitioner has maintained that there was an insufficient Record, upon which the trial court or District Court could properly base their rulings. It is evident that the trial court reviewed all trial tran-

scripts of Petitioner's trial, including defense counsel's closing argument, in denying the claim, since this fact is expressly stated in the trial court's order. (R, at 37). Nevertheless, Petitioner suggests that the Fourth District's review was necessarily incomplete, without attachments of those aspects of the Record which rebutted his claim, or resort to the transcript of an evidentiary hearing. Since the trial court's order clearly reflected review of the trial transcript, and a conclusion based on same that Petitioner was not entitled to relief, such review and resolution by the Fourth District was based on a sufficient Record. Rule 3.850 (1983), supra; Middleton.<sup>3</sup>

While this case appears to present an initial application of harmless error analysis to a Morgan-type technical procedural error, the same public policy considerations supporting the application of harmless error in other factual contexts, support the use of such analysis herein. As in Palmes and Recinos, supra, and by state statute (§924.33), the effect of the trial court's direction of a state collateral response herein should not result in reversal or remand, when it is evident that this procedural error had no prejudicial impact on the trial court's resolution of Petitioner's post-conviction motion. §924.33; Palmes, at 654; Recinos, at 98. Because the trial court's order denying relief was not based upon or affected at all by any improper consideration of the State's position on Petitioner's post-conviction motion, because such response was

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<sup>3</sup> Respondent will not address the merits of the Fourth District's ruling, as to the trial court's denial of Petitioner's second ground for post-conviction relief, on sequestration of the jury, because Petitioner has not raised same.

non-existent, despite being ordered, harmless error analysis is as appropriate in this context, as in the context of improper prosecutorial comments. State v. DiGuilio, 491 So.2d 1129, 1135-1138 (Fla. 1986); State v. Murray, 443 So.2d 955 (Fla. 1984); United States v. Hasting, 461 U.S. 499 (1983); Chapman v. California, 386 U.S. 18 (1967). Thus, the Fourth District's application of harmless error analysis, as authorized by §924.33, supra, was appropriate and correct, in determining that, in the context of the entire post-conviction and trial proceedings, Petitioner's rights to a fair trial were not violated. DiGuilio, supra, at 1135; Hasting, supra.

CONCLUSION

Based on the Record, and the foregoing arguments and authorities, Respondent respectfully requests that this Court AFFIRM the Fourth District's ruling, in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent has been furnished, by courier delivery, to MARGARET GOOD, ESQUIRE, Assistant Public Defender, 15th Judicial Circuit, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401, on this 22nd day of September, 1986.

Richard G. Bartmon  
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