Supreme Court of Florida

WEDNESDAY, DECEMBER 16, 2015

CASE NO.: SC15-307
Lower Tribunal No(s).:
481976CF000532000AOX

HENRY PERRY SIRECI vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

This cause is before this Court on appellant's appeal of the denial of a successive motion for postconviction relief. We have considered the issues raised, and affirm the trial court's denial of postconviction relief.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

jat
Served:

MARIA E. DELIBERATO
JULISSA ROSALYN FONTAN
SCOTT ANDREW BROWNE
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HON. TIFFANY MOORE RUSSELL, CLERK
HON. WAYNE COURTNEY WOOTEN
KENNETH NUNELLEY

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA

Plaintiff,

v.

CASE NO. CR 76-532
CAPITAL POST-CONVICTION CASE

HENRY PERRY SIRECI,

Defendant.
_____/

ORDER DENYING "AMENDED SUCCESSIVE 3.851 MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

THIS MATTER came before the court on Defendant Henry Perry Sireci's "Amended Successive 3.851 Motion to Vacate Judgment of Conviction and Sentence" ("Motion") filed on July 28, 2014, which replaced the "Successive Rule 3.851 Motion to Vacation Judgment of Conviction and Sentence" filed on April 21, 2014. Having reviewed the motion, the file, the State's Response, and being otherwise duly advised in the premises, the court finds as follows:

FACTS AND PROCEDURAL HISTORY

The court accepts and adopts the following recitation of the facts and procedural history stated in the State's Response filed May 12, 2014:

In 1976, Henry Perry Sireci was convicted of the first degree murder of Howard Poteet. The trial judge, the Honorable Maurice M. Paul, followed the jury's recommendation and imposed a sentence of death. The Florida Supreme Court affirmed Sireci's conviction and sentence on direct appeal. The court set forth the following summary of the facts in affirming Sireci's conviction and death sentence on direct appeal. Sireci v. State, 399 So. 2d 964 (Fla. 1981) [Sireci I]:

> The defendant, Sireci, went to a used car lot, entered the office, and discussed buying a car with the victim Poteet, the owner of a car lot. Defendant argues that the purpose of his visit was to take some keys from the rack so that he could come

back later and steal an automobile. The state argues that defendant went to the used car lot for the purpose of robbing the owner at that time.

The defendant was armed with a wrench and a knife. A struggle ensued. The victim suffered multiple stab wounds, lacerations, and abrasions. An external examination of the body revealed a total of fifty-five stab wounds, all located on the chest, back, head, and extremities. The stab wounds evoked massive external and internal hemorrhages which were the cause of death. The neck was slit.

The defendant told his girlfriend, Barbara Perkins, that he was talking to the victim about a car, then he hit the victim in the head with the wrench. When the man turned around, the defendant asked where the money was, but the man wouldn't tell the defendant, so he stabbed him. The defendant told Perkins that he killed Poteet. He admitted taking the wallet from the victim.

Harvey Woodall, defendant's cellmate when he was arrested in Illinois, testified that the defendant had described the manner in which he killed the victim. According to Woodall's testimony, the defendant hit the victim with a wrench, then a fight ensued in which the windows were broken, and the defendant stabbed the man over sixty times. The defendant stated that he wasn't going to leave any witnesses to testify against him and that he knew the man was dead when he left. The defendant told Woodall he got around $150.00 plus credit cards.

The defendant also described the crime to Bonnie Arnold. According to Arnold, the defendant stated that the car lot owner and he were talking about selling the defendant a car, when the defendant hit the victim with a tire tool. A fight began and the defendant stabbed the victim. The defendant told Arnold that he was going in to steal some car keys and then come back later to steal a car.

The defendant told David Wilson, his brother-in-law, that he killed the victim with a five or six-inch knife and took credit cards from the victim.

On May 17, 1982, the U.S. Supreme Court denied certiorari. Sireci v. Florida, 456 U.S. 984 (1982), rehearing denied, 458 U.S. 1116 (1982). Sireci subsequently unsuccessfully sought postconviction relief in the trial court pursuant to Florida Rule of Criminal Procedure 3.850, and that decision was affirmed on appeal. Sireci v. State, 469 So. 2d 119 (Fla. 1985) [Sireci II], cert. denied, 478 U.S. 1010 (1986).

On September 19, 1986, the Governor signed a death warrant for Henry Sireci, prompting the filing of a second motion for postconviction relief. A limited evidentiary hearing on this

postconviction motion was granted by the Ninth Judicial Circuit Court, and the State unsuccessfully appealed. State v. Sireci, 502 So. 2d 1221 (Fla. 1987) [Sireci III].

The trial court held an evidentiary hearing on Sireci's second 3.850 motion and ultimately ordered a new sentencing hearing on grounds that two court-appointed psychiatrists conducted incompetent evaluations at the time of the original trial. At the conclusion of the evidentiary hearing, a new penalty phase was granted, and this decision was affirmed on appeal. State v. Sireci, 536 So. 2d 231 (Fla. 1988) [Sireci IV]. Upon resentencing, the jury recommended the death penalty by a vote of eleven to one and the Judge Paul again imposed the death penalty.

Sireci pursued a direct appeal of the resentencing hearing. The Florida Supreme Court affirmed imposition of the death sentence on direct appeal. Sireci v. State, 587 So. 2d 450 (Fla. 1991) [Sireci V]. The U.S. Supreme Court subsequently denied certiorari. Sireci v. Florida, 503 U.S. 946 (1992).

On or about August 21, 1997, Sireci filed his Third Amended Motion for Postconviction Relief challenging his conviction and resentencing. This motion was 147 pages in length and presented 33 claims for relief. On February 9, 1999, the state postconviction court summarily denied Sireci's motion for postconviction relief. Sireci appealed the denial of his motion to the Florida Supreme Court. On September 7, 2000, the court affirmed the lower court's denial of postconviction relief in Sireci v. State, 773 So. 2d 34 (Fla. 2000) [Sireci VI].

Sireci embarked on a series of motions seeking release of various items of evidence for DNA testing. Ultimately, Sireci filed a third amended motion for DNA testing. On July 15, 2003, the trial court denied Sireci's third amended motion for DNA testing. The court stated that Sireci failed to meet the technical requirements of Florida Rule of Criminal Procedure 3.853 and failed to show a reasonable probability of acquittal or that he would receive a lesser sentence on retrial. After briefing in the Florida Supreme Court, the court issued an opinion, holding that the trial court erred in finding that the technical requirements of the rule were not met, but affirming the

trial court's finding that such testing carried no "reasonable probability" of a different result. The court stated:

> Sireci also contends that the circuit court erred in ruling that his motion failed to meet the "reasonable probability" standard in rule 3.853(c)(5)(C). He contends that DNA testing would show the following: (a) that the hair on Poteet's sock was not Sireci's hair; (b) that the blood on the denim jacket found in the motel room was not Poteet's blood; and (c) that hairs found on towels in the motel room were Perkins's hairs. Sireci contends that this proposed DNA evidence satisfies the "reasonable probability" standard. We disagree.
>
> First, if DNA testing had shown that the hair on Poteet's sock was not Sireci's hair, the State would not have introduced that hair into evidence at his trial. Second, the testing of blood on the denim jacket was not asserted by Sireci as an issue in his present rule 3.853 motion and is procedurally barred at this point. [n5] Third, the Court has already addressed the testing of hairs on the towels and has decided this issue adversely to Sireci. [n6] Finally, we conclude that, in light of the other evidence of guilt, there is no reasonable probability that Sireci would have been acquitted or received a lesser sentence if the State had not introduced into evidence the hair on Poteet's sock. As we have noted, seven witnesses testified that Sireci admitted to them that he killed Poteet. We find no error in this regard. See generally Cole v. State, 895 So. 2d 398 (Fla. 2004); Tompkins v. State, 872 So. 2d 230 (Fla. 2004); Hitchcock v. State, 866 So. 2d 23 (Fla. 2004); Robinson v. State, 865 So. 2d 1259 (Fla. 2004); King v. State, 808 So. 2d 1237 (Fla. 2002). Sireci's remaining claims are without merit. [n7]

Sireci v. State, 908 So. 2d 321, 325 (Fla. 2005) [Sireci VIII] (footnotes mitted)(emphasis added). Sireci filed a petition for writ of certiorari in the United States Supreme Court, which was denied December 12, 2005. Sireci v. Florida, 546 U.S. 1077 (2005).

Sireci filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida, on October 3, 2002, which was held in abeyance pending resolution of state court litigation. Sireci ultimately filed an amended petition and memorandum of law in support thereof on July 24, 2006, to which the State filed its response on November 29, 2007. The District Court, the Honorable Mary S. Scriven, denied the Petition on March 12, 2009. Sireci's motion to alter or amend the judgment was denied on July 28, 2009. On October 15, 2009, the District Court granted a certificate of appealability on Sireci's claim that the prosecutor asked a question from which the jurors could infer Sireci had been previously sentenced to death,

the denial of a motion for mistrial on that basis, and, the denial of his attempt to interview the jurors. The 11th Circuit Court of Appeals affirmed the district court's decision. Sireci v. Attorney General, 406 Fed. Appx. 348, 351-352 (11th Cir. 2010) (unpublished). Sireci filed a petition for writ of certiorari in the United States Supreme Court, which was denied October 3, 2011.1 Sireci v. Bondi, 132 S. Ct. 223 (2011).

CLAIM, STATE RESPONSE, AND FINDINGS

Defendant now argues that his conviction and sentence should be set aside because newly discovered evidence shows that the expert testimony of the State's witness regarding hair comparison results exceeded the limits of science at the time of trial, and the prosecutor's closing argument relied on that improper testimony.

Defendant first takes issue with the testimony of the State's crime laboratory analyst, William Munroe, who tested hair evidence from the crime scene and testified that the hair found on the victim's sock was "consistent with" Defendant's hair. He further testified that, "consistent with means that of all the characteristics of the hair I examined, I found no significant difference, that in all probability, this hair came from that individual."

Defendant's other complaint involves the prosecutor stating, in closing argument, "one of those clothing items became very important later on and that was Mr. Poteet's socks…The socks became relevant because on the socks was a hair… Bill Munroe…the expert chemist…who did comparison tests on the evidence submitted to him and came to the finding on the socks, that on the socks of Howard Poteet, there was a hair that matched the hair of [Defendant]."

Defendant alleges "[t]he main piece of physical evidence linking Sireci to the scene was the hair on Mr. Poteet's sock and blood typing evidence. Newly discovered evidence demonstrates that the argument that the hair 'matched' Sireci is not reliable."

Defendant's claim of newly discovered evidence relies on the Notification issued by the American Society of Crime Laboratory Directors (ASCLD/LAB) on April 21, 2013, wherein the

ASCLD/LAB calls into question the manner in which the results of microscopic hair comparisons were explained to juries in certain cases. Several convictions were overturned in 2012 as a result of DNA testing, and the ASCLD opined that there may be a need for a review of reports and testimony provided to juries regarding microscopic hair comparisons prior to the routine use of DNA technology in hair comparisons. The ASCLD suggested that laboratories and legal authorities "consider whether there may be past cases, specifically involving convictions, in which it would be appropriate to evaluate the potential impact of the reported conclusions and/or related testimony on the conviction."

The State argues that Defendant's motion is procedurally barred as untimely as there were learned criticisms of hair comparison testimony prior to 2013, and cites to Com v. Edmiston, 65 A. 3d 339, 352-53 (PA. 2013):

> Therefore, to constitute facts which were unknown to a petitioner and could not have been ascertained by the exercise of due diligence, the information must not be of public record and must not be facts that were previously known but are now presented through a newly discovered source. The "fact" Appellant relies upon as newly discovered is not the publication of the NAS Report, but the analysis of the scientific principles supporting hair comparison analysis. His argument is that the Commonwealth's evidence, specifically the testimony of Mr. Tackett, is unreliable based on the information recited in the NAS Report. It is when the underlying information was available to Appellant in the public domain that we must examine.

Com. v. Edmiston, 619 Pa. 549, 570-71, 65 A.3d 339, 352 (2013) cert. denied, 134 S. Ct. 639 (U.S. 2013)

Additionally, the State argues that even if the motion were timely, Defendant cannot show the requisite prejudice as there were no less than seven witnesses who testified that Defendant confessed to them. Thus, even without the hair analyst's testimony, the outcome of the trial would have been the same.

To prevail on a claim of newly discovered evidence, Defendant must meet two requirements:

> First, the evidence must not have been known to the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See Jones v. State,* 709 So.2d 512, 521 (Fla.1998). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. *See Jones,* 591 So.2d at 916. When determining whether an evidentiary hearing is required on a successive rule 3.851 motion, the court may look at the entire record. "If the motion, files and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing." Fla. R.Crim. P. 3.851(f)(5)(B). Although evidentiary hearings are not automatic, courts are encouraged to liberally allow hearings on timely raised claims that commonly require factual determinations. *See Amend. to Fla. Rule of Crim. Pro. 3.851,* 797 So.2d 1213, 1219 (Fla.2001).

Henyard v. State, 992 So. 2d 120, 125-26 (Fla. 2008)

In the instant case, regardless of the timeliness, vel non, of the motion, the court finds that the claim does not warrant an evidentiary hearing and should be summarily denied.

At trial, seven witnesses testified that Defendant confessed to them, at different times, that he murdered Mr. Poteet. Defendant now claims that the testimony some of those witnesses is unreliable. Certainly, the time to assert that allegation was well before now. Such a claim cannot possibly be considered "newly-discovered evidence" and Defendant cannot boot-strap this allegation onto his current claim regarding the hair analysis in an attempt to make the claim of witness unreliability timely. Thus, the court will not entertain the Defendant's contention that "[t]he new evidence…coupled with all the other evidence demonstrating the bias and unreliability of the lay witness testimony…creates a reasonable probability that Sireci would be acquitted on a retrial." The success or failure of Defendant's claim rests solely on the allegation of newly discovered evidence regarding the microscopic hair analysis.

The State cites to Duckett v. State, 2014 WL 2882627; 39 Fla. L. Weekly S456 (Fla. 2014) to support its position, while Defendant claims that Duckett is distinguishable on the facts. According to Defendant, there was "considerably more evidence linking Duckett to the crime than there is linking Mr. Sireci to the crime." The court does not agree. The court cannot

overlook the *seven* confessions Defendant made. Regardless of the testimony by the hair analysis, the court finds that it was these confessions that most likely led to Defendant's conviction. If the testimony of Bill Munroe were excluded, is not likely that Defendant would be acquitted at trial. Thus, even if the report of the ASCLD could be considered newly discovered evidence, it is not of such nature that it would probably produce an acquittal on retrial.

Based on the foregoing, it is ORDERED AND ADJUDGED:

1. The Successive Rule 3.851 Motion is hereby DENIED.

2. Defendant may file a Notice of Appeal in writing within 30 days from the date of rendition of this Order.

3. The Clerk of Court shall promptly serve a copy of this Order upon Defendant, including an appropriate certificate of service.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida, this 24 day of November, 2014.

Wayne C. Wooten
Circuit Court Judge

Certificate of Service

I certify that a copy of the foregoing Order Denying Successive Rule 3.851 motion has been provided this 24 day of November, 2014 to **Maria E. DeLiberato**, Assistant CCRC; **Julissa Fontan**, Assistant CCRC, Capital Collateral Regional Counsel – Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136; **Pamela Jo Bondi**, Attorney General; **Scott A. Browne**, Office of the Attorney General, 3507 E. Frontage Rd., Suite 200, Concourse Center 4, Tampa, Florida 33607-7013; **Jeffrey L. Ashton**, State Attorney; **Kenneth Nunnelley**, Assistant State Attorney, Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801.
sasa

Judicial Assistant