

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

Case Nos. F01-7975
F06-32696

Judge Thornton

vs.

SEAN CASEY,
Defendant.

ORDER DENYING THE DEFENDANT'S SECOND MOTION FOR POST
CONVICTION RELIEF FILED ON OR ABOUT NOVEMBER 14, 2008

THIS CAUSE came before the court upon the defendant's second Motion for Post Conviction Relief filed on or about November 14, 2008.

Upon review of the defendant's second motion and reply, the entire two box court file, the State's response, all attachments to the aforementioned filed documents, and after having listened to legal arguments at a two hour non-evidentiary hearing, this Court finds that the defendant is entitled to no relief.

Procedural History

1. On October 17, 2006, the defendant accepted the State's offer to plead guilty in Case F01-7975 to one count DUI manslaughter in violation of §316.193(3)(c)3.b, Florida Statutes, one count of vehicular manslaughter in violation of §782.071(2), Florida Statutes, and one count of leaving the scene of a crash involving a death in violation of §316.027(1)(b), Florida Statutes, in exchange for a sentence of 11.5 years, with the sentence as to count two suspended. The defendant also agreed to plead guilty in Case F06-32696 to one count of failing to appear while on bail in violation of §843.15(1)(a), Florida Statutes, in exchange for a sentence of 366 days consecutive to the sentence imposed in Case F01-7975.

2. On or about November 2, 2006, the defendant filed a motion to vacate his plea alleging that trial counsel advised him to flee before trial, assisted him in his efforts to remain in Chile, and encouraged him to take the plea to prevent him from explaining that counsel advised him to flee. As a result, the defendant claimed that he was deprived of conflict-free counsel. On or about January 5, 2007, the defendant filed an addendum to his claim, arguing that trial counsel was ineffective for failing to call the defendant as a witness at the hearings on the motions to suppress.

3. On January 8, 2007, an evidentiary hearing on this motion was held. The defendant and his mother, Genevieve Casey, testified in support of the post conviction relief. The State presented the testimony of trial counsel, Milt Hirsch and Michael Haber, and the defendant's therapist, Michael Rappaport. Following the evidentiary hearing, the trial court denied the motion for post conviction relief, finding that the defendant's motion was an expression of "buyer's remorse." A written order denying the defendant's motion for post conviction relief was filed on March 5, 2007.

4. On February 8, 2008, the defendant was granted permission to file a belated appeal challenging the denial of his first motion for post conviction relief. The denial of the defendant's motion for postconviction relief was affirmed by the Third District Court of Appeal on March 25, 2009. *Casey v. State*, 8 So. 3d 1144 (Fla. 3d DCA 2009).

5. On or about November 14, 2008, the defendant filed the instant motion for post conviction relief. In this motion, the defendant suggests that trial counsel was ineffective for: 1) failing to object to a plea "induced" by the trial court judge; 2) misadvising the defendant of the consequences of his guilty plea; 3) failing to object to an inadequate amount of time to consider the plea offer from the State; 4) failing to properly investigate all available witnesses and defenses; and 5) failing to object to an illegal conviction and sentence. The defendant also revisits his claim of conflict by suggesting that he has new evidence to support the claim previously raised.

Findings of Fact and Law

1. Rule 3.850(f) expressly provides that “A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.” Where the grounds raised in the second or successive motion could have been raised in the first motion, the trial court may properly dismiss the second motion. *See, e.g., Moore v. State*, 820 So. 2d 199 (Fla. 2002); *Franklin v. State*, 923 So. 2d 1199, 1199 (Fla. 3d DCA 2006); *Scrambling v. State*, 919 So. 2d 671 (Fla. 5th DCA 2006); *Eloisaint v. State*, 868 So. 2d 680 (Fla. 3d DCA 2004). A defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by filing successive motions and where a previous motion for post conviction relief raised a claim of ineffective assistance of counsel, a successive motion that raises an additional ground for ineffective assistance of counsel may be summarily denied. *Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997); *Jones v. State*, 591 So. 2d 911 (Fla. 1991); *Tafero v. State*, 524 So. 2d 987 (Fla. 1987); *Card v. Dugger*, 512 So. 2d 829 (Fla. 1987); *Christopher v. State*, 489 So. 2d 22 (Fla. 1986). *See also Ragan v. State*, 643 So. 2d 1175, 1176 (Fla. 3d DCA 1994).

2. In his first motion for post conviction relief, the defendant claimed that counsel was ineffective for failing to call him as a witness at the suppression hearing and for urging him to take the plea offered by the State to hide his own alleged wrongdoing. In addition to revisiting his claim of conflict, the defendant now claims that counsel was ineffective for the grounds set forth on page two of this Order. Having raised claims of ineffective assistance of counsel in his first motion, the defendant is precluded from raising new allegations of ineffective assistance of counsel in this successive motion. Having specifically raised the alleged conflict of counsel in his first motion, the defendant is precluded from raising it once again in this successive motion.

3. The suggestion that the defendant’s successive motion is justified because postconviction counsel was negligent or ineffective in the preparation of the first motion is without merit as claims of ineffective assistance of post conviction counsel do not present

a valid basis for relief. *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996), *cert. denied*, 522 U.S. 1122, 118 S.Ct. 1064, 140 L.Ed.2d 125 (1998). *See also Gonzalez v. State*, 990 So. 2d 1017, 1034 (Fla. 2008) (“To the extent that Gonzalez is making an ineffective assistance of post conviction counsel claim, this Court has repeatedly rejected such a claim.”); *Kokal v. State*, 901 So.2d 766, 777 (Fla. 2005) (“We have repeatedly held that claims of ineffective assistance of post conviction counsel are not cognizable.”); *Waterhouse v. State*, 792 So. 2d 1176 (Fla. 2001); *Downs v. State*, 740 So. 2d 506, 514 (Fla. 1999). Accordingly, the defendant cannot justify a successive post conviction motion by claiming ineffective assistance of post conviction counsel. *Tompkins v. State*, 994 So.2d 1072 (Fla. 2008); *Jimenez v. State*, 997 So. 2d 1056, (Fla. 2008).

4. The defendant’s attempt to justify his renewed claim of conflict by alleging the existence of newly discovered, i.e. a letter allegedly faxed to trial counsel approximately three years before the defendant filed his first motion for post conviction relief, is also without merit. By definition, newly discovered evidence concerns facts that were ‘unknown by the trial court, by the party, or by counsel at the time of trial’ and which could not have been discovered by the defendant or counsel through the use of due diligence.” *Downs v. State*, 740 So. 2d 506, 514 (Fla. 1999). *See also Robinson v. State*, 707 So. 2d 688, 691 (Fla. 1998); *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997); *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991). The fact that the defendant “did not remember” authoring or sending the fax to his trial counsel, before it was “found” by his mother among his personal belongings in Chile, does not create a claim of newly discovered evidence justifying piecemeal litigation. The conversations and communications between the defendant and his attorney relative to the claim that trial counsel urged the defendant to flee prior to trial necessarily took place before the defendant fled and before the defendant filed his first motion. Thus, the defendant was fully aware of the contents of these communications long before he filed his first motion for post conviction relief. Moreover, as the author of the fax allegedly sent to trial counsel approximately three years before he filed his first motion, the defendant was in the best position to tell his attorney about the fax and the possibility that a copy of the fax could be found among his personal belongs in Chile. The record reflects that the defendant filed his first motion three weeks after he entered his guilty plea. There was no need to file a motion for post conviction relief and

proceed to a hearing on that motion before reviewing his own files for possible evidence to support his claims. The defendant's failure to investigate his own files before filing his first motion cannot justify additional review of a matter that has been fully litigated at an evidentiary hearing. *See, e.g., Gentry v. State*, 464 So. 2d 659, 661 (Fla. 4th DCA 1985) (defendant is precluded from filing a subsequent post-conviction motion which alleges the same ground for relief previously disposed of after an evidentiary hearing).

Conclusion

ORDERED AND ADJUDGED that the defendant's the defendant's Motion for Post Conviction Relief filed on or about November 14, 2008 is hereby DENIED.

The defendant, Sean Casey, is hereby notified that he has the right to appeal this order to the District Court of Appeal of Florida, Third District within thirty (30) days of the signing and filing of this order.

In the event that the defendant takes an appeal of this order, the Clerk of this Court is hereby ordered to transport, as part of this order, to the appellate court the following:

1. Motion for Post Conviction Relief, filed on or about November 14, 2008 (with all attachments);
2. State's Preliminary Response to Defendant's Motion for Post Conviction Relief Filed on or About November 14, 2008, filed on or about December 8, 2008 (with all attachments);
3. Defendant's Reply Memorandum in Support of Motion for Post Conviction Relief, filed on or about July 31, 2009;
4. Transcript of the October 17, 2006 plea colloquy;
5. Transcript of the January 8, 2007 evidentiary hearing;
6. Initial Brief of Appellant, *Casey v. State*, 3D08-510;
7. Reply Brief of Appellant, *Casey v. State*, 3D08-510;

8. Answer Brief of Appellee, *Casey v. State*, 3D08-510;
9. Order Denying Motion to Vacate Conviction and Sentence, filed March 2, 2007;
10. Motion for Post Conviction Relief, filed November 2, 2006.

DONE AND ORDERED at Miami, Dade County, Florida, this 18th day of August, 2009.


John Thornton
Circuit Court Judge

Copies Provided To:

Angélica D. Zayas, Assistant State Attorney;

Gail Levine, Assistant State Attorney;

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Sean Casey, Defendant