

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 MOTION FOR RELIEF OF JUDGMENT
BECAUSE OF FRAUD FILED ON OR ABOUT APRIL 22, 2009

THIS CAUSE came before the court upon the defendant's Motion for Relief of Judgment Because of Fraud filed on or about April 22, 2009.

Upon review of the defendant's Motion and Motion for Reconsideration, the court file, and the State's response, 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 nothing more than 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. In support of his appeal, the defendant argued, *inter alia*, that the trial court erred in refusing to consider a surreptitiously tape-recorded conversation between the defendant and his attorney and further erred in finding that counsel did not represent conflicting interests when advising the defendant at the plea colloquy. The denial of the defendant's motion for post conviction 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, through counsel, filed a second motion for post conviction relief. In this motion, the defendant argued 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 revisited his claim of conflict by suggesting that he has new evidence to support the claim previously raised. This motion is denied by separate Order of today's date.

6. On or about April 22, 2009, the defendant filed a *pro se* "Motion for Relief of Judgment Because of Fraud Upon the Court," relying on Florida Rule of Civil Procedure 1.540(b) and/or Florida Rule of Criminal Procedure 3.850. In support of this motion for relief, the defendant argues that the ruling on his first motion for post conviction relief was obtained by fraud inasmuch as the transcripts of tape-recorded conversations between the defendant and his attorney and his therapist contradict their testimony at the post conviction evidentiary hearing. The defendant further claims that the exclusion of the tape-recorded conversations was induced by fraudulent representations by the prosecutor, the defendant's attorney and the defendant's therapist denying the commission of a crime during the recorded conversations. The defendant concludes his argument by claiming that but for the "fraud" committed on the court at the evidentiary hearing on his first motion for post conviction relief, the motion would have been granted, and requests that his judgment and sentence be vacated as a result of the conflict of counsel raised previously.

7. On or about May 7, 2009 this Court orally struck, or alternatively dismissed, the defendant's motion, as Defendant's counsel on appeal from the denial of the first 3.850 motion and also for the second 3.850 motion, refused to adopt the defendant's instant *pro se* motion.

8. On or about June 23, 2009, the defendant filed his *pro se* Motion for Consideration.

Findings of Fact and Law

1. At the time the defendant filed his motion to set aside the order denying his first motion for post conviction relief requesting that the conflict issue be revisited, the defendant was represented by counsel, Marcia Silvers. Ms. Silvers filed a motion for post conviction relief also asking this Court to revisit the conflict issue, arguing that the defendant was in possession of additional evidence supporting the claim of conflict. Although both Ms. Silvers and the defendant claim that Ms. Silvers represents the defendant only as to the motion for post conviction relief filed on or about November 14,

2008, this Court finds that inasmuch as both motions challenge the judgment and sentence resulting from the defendant's plea on October 17, 2006, and both motions raise the alleged conflict of counsel in support of relief, the defendant is represented by counsel in this matter. As Ms. Silvers has expressly declined the opportunity to adopt the *pro se* motion, this Court finds that instant motion is a nullity and should be stricken. See *Murray v. State*, 1 So. 3d 407, 408 (Fla. 2d DCA 2009); *Muccio v. State*, 949 So. 2d 376 (Fla. 4th DCA 2007); *Purnell v. State*, 931 So. 2d 134, 135 (Fla. 2d DCA 2006) ("A defendant does not have the right to file *pro se* motions while also represented by counsel, and such motions should be treated as nullities unless they unequivocally seek to discharge counsel."); *Logan v. State*, 846 So. 2d 472, 476 (Fla. 2003) (explaining that *pro se* filings while a defendant is represented by counsel are a nullity with a narrow exception authorizing motions to discharge counsel).

2. "[B]y its own terms, Rule 1.540 applies only to civil causes, not to collateral claims associated with a criminal conviction." *Steinhorst v. State*, 636 So. 2d 498, 500 (Fla. 1994); see also *Williams v. State*, 925 So. 2d 427 (Fla. 3d DCA 2006). When such a motion is filed, it is to be treated as if it had been filed under the correct postconviction rule. See *Steinhorst*, 636 So. 2d at 500; *Bryant v. State*, 971 So. 2d 818, 819 (Fla. 3d DCA 2007); *Williams*, 925 So. 2d at 428. In the alternative, this Court finds that this motion, if not treated as a legal nullity as an unauthorized *pro se* pleading by a represented defendant, must be treated as a motion filed pursuant to Rule 3.850.

The defendant has filed two prior motions for post conviction relief pursuant to Rule 3.850. The defendant's first motion, filed on November 2, 2006, alleged that trial counsel represented conflicting interests when advising the defendant to accept the State's plea offer. The defendant was afforded an evidentiary hearing on this claim and the claim was denied on the merits. The appellate court also addressed the merits of this claim. 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.” The instant motion, properly treated as a 3.850 motion pursuant to *Steinhorst*, is successive.

3. To the extent that the defendant is claiming that Judge Glick erred in refusing to admit the recorded conversations into evidence or find that trial counsel was operating under a conflict of interest, these are claims that have been fully litigated on appeal from the denial of the defendant’s first motion for post conviction relief. The defendant cannot relitigate the issues that were previously raised on appeal based upon the use of different arguments. *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1323 (Fla. 1994) (“proceedings under rule 3.850 are not to be used as a second appeal; nor is it appropriate to use a different argument to relitigate the same issue”).

Conclusion

ORDERED AND ADJUDGED that the defendant’s the defendant’s Motion for Relief of Judgment Because of Fraud filed on or about April 22, 2009, is hereby STRICKEN as a legal nullity. In the alternative, the motion is DISMISSED as an unauthorized successive motion. The Motion, even as considered on the merits, would be denied on the grounds set forth in the other Orders entered this date. The Motion for Reconsideration is also 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. 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 dated January 8, 2007;
5. Initial Brief of Appellant, *Casey v. State*, 3D08-510;
6. Reply Brief of Appellant, *Casey v. State*, 3D08-510;
7. Answer Brief of Appellee, *Casey v. State*, 3D08-510;
8. Order Denying Motion to Vacate Conviction and Sentence, filed March 2, 2007;
9. 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;
Marcia J. Silvers, Esq., Counsel for the Defendant, 2937 SW 27th Avenue, Suite 101,
Miami, Florida 33133-3772;
Sean Casey, Defendant.