

**IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA**

CASE NO. 3D08-510

SEAN CASEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

**APPEAL FROM CIRCUIT COURT
ELEVENTH JUDICIAL CIRCUIT, MIAMI-DADE COUNTY**

MARCIA J. SILVERS, ESQ.

Florida Bar No. 342459

MARCIA J. SILVERS, P.A.

Attorney for Sean Casey

Suite 606

799 Brickell Plaza

Miami, Florida 33131

305/416-6040

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. MR. CASEY WAS DENIED HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO TESTIFY AT THE SUPPRESSION HEARING	1
II. MR. CASEY WAS DENIED HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL	4
III. THE TRIAL COURT ERRED IN REFUSING TO ADMIT A TAPE RECORDING OF A CONVERSATION SUPPORTING MR. CASEY’S CLAIM THAT DEFENSE COUNSEL ADVISED HIM TO FLEE IN VIOLATION OF MR. CASEY’S STATE AND FEDERAL RIGHTS TO DUE PROCESS	9
IV. DEFENSE COUNSEL HAD A CONFLICT OF INTEREST WHICH DEPRIVED MR. CASEY OF HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL	13
CONCLUSION	14
CERTIFICATE OF SERVICE	14
CERTIFICATE OF COMPLIANCE	15

TABLE OF AUTHORITIES

Page

Cases

<i>Deaton v. Dugger</i> 635 So.2d 4 (Fla. 1993)	1
<i>Jones v. Barnes</i> 463 U.S. 745 (1983)	1
<i>Lott v. State</i> 931 So.2d 80 (Fla. 2006)	1
<i>Morris v. State</i> 931 So.2d 821 (Fla. 2006)	1
<i>State v. Lewis</i> 838 So.2d 1102 (Fla. 2002)	1
<i>State v. Tait</i> 387 So.2d 338 (Fla. 1980)	4
<i>Thompson v. State</i> 194 So.2d 649 (Fla. 2d DCA 1967)	4
<i>Tucker v. State</i> 562 So.2d 415 (Fla. 1 st DCA 1990)	4

ARGUMENT

I.

MR. CASEY WAS DENIED HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO TESTIFY AT HIS SUPPRESSION HEARING.

The Florida Supreme Court has recognized that “[t]he United States Supreme Court has made clear it that a criminal defendant has the *ultimate authority* to make certain fundamental decisions regarding the case, one of which is whether to testify in his or her own behalf.” *Lott v. State*, 931 So.2d 807, 817 (Fla. 2006)(quotations omitted; emphasis added)(quoting from *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). *Accord Morris v. State*, 931 So.2d 821, 833 (Fla. 2006). In order to waive his right to testify, a defendant must make a knowing, voluntary and intelligent waiver. *Id.* at 833. While an on the record waiver of the right to testify is not required, there must be competent, substantial evidence to support a finding that a waiver of the right to testify was knowingly, *voluntarily* and intelligently made. *Lott*, 931 So.2d at 818, citing *State v. Lewis*, 838 So.2d 1102, 1112 (Fla. 2002)(quoting *Deaton v. Dugger*, 635 So.2d 4, 8 (Fla. 1993).

The State does not dispute that the decision to testify by a defendant in a criminal case belongs to the defendant, not his counsel. The record in this case does not support a finding that Mr. Casey made a voluntary decision not to testify at the suppression hearing.

More specifically, in Mr. Casey's sworn addendum to his Rule 3.850 Motion, he swore, *inter alia*, that, if Hirsch had called him as a witness at the suppression hearing, he would have provided testimony "to establish record evidence of the averments in the motion [to suppress]." (R5-909-910). At the evidentiary hearing on Mr. Casey's Rule 3.850 Motion, Mr. Casey testified as follows:

Q On that point, did you say to Mr. Hirsch, Mr. Hirsch, did you tug on his shirt saying, wait a minute, I want to get up and speak to the Court and tell him what happened?

A I sent him a letter. I had told him I wanted to get on top of the highest mountain point to tell my story, tell what's going on. *I wanted to testify and he said, no, out of the question.*

Q *He said no, out of the question?*

A *Yes.*

(R10-1533)(emphasis added).

Subsequently, at this same evidentiary hearing, Hirsch testified as follows:

Q Now at the time of the motion to suppress, did you feel that the cross examination had gone your way?

A Yes. It was difficult cross examination. They were exceedingly experienced and skilled officers, but I thought that we had gotten everything we needed.

Q And did *you* make then a strategic decision to not put Mr. Casey on the stand?

A Yes.

Q Why did *you* do that?

A He had nothing to add. The facts were scarcely in dispute. The police reports, the officers' testimony, his recorded statement and our private conversations all pointed in the identical direction.

There was almost no factual dispute. It was really a question of what legal significance attached to the uncontroverted conduct in which the officers had engaged.

Q After making that analysis at the end of the motion, did *you* make a decision to rest your case on the evidence that had been presented and the cross examination?

A *That's correct.*

Q And did you discuss that with Mr. Casey?

A Briefly.

Q And did he object to that?

A Not at all, no.

(R10-1597-98)(emphasis added).

Thus, the record is plain that, after Mr. Casey testified that Hirsch refused to let him testify, Hirsch testified that *he himself* made the decision that Mr. Casey would not testify - *not* Mr. Casey. Hirsch did not deny that Mr. Casey told him that he wanted to testify. Although Hirsch claimed that Mr. Casey did not object when Hirsch told Mr. Casey that he could not testify, Hirsch conceded that it was Hirsch who made the "decision to not put Mr. Casey on the stand." (R10-1597). Furthermore, Hirsch never testified that he allowed Mr. Casey to make the final decision on whether or not he should testify which is what the State and federal constitutions require.

Parenthetically, the State implies that Mr. Casey has waived his right to claim that he was denied his constitutional right to testify at his suppression hearing because he "did not object when counsel announced at the suppression hearing that

the defense would not be presenting any evidence in support of the motions.” State’s Br. at 31. This claim is meritless.

Mr. Casey did not have an absolute right to speak for himself to the trial court since he was represented by an attorney. *See e.g., State v. Tait*, 387 So.2d 338, 340 (Fla. 1980) (“When the accused is represented by counsel, affording him the privilege of addressing the court or the jury in person is [not an absolute right but, rather,] a matter for the sound discretion of the court”); *Tucker v. State*, 562 So.2d 415 (Fla. 1st DCA 1990)(trial judge did not err in refusing to allow defendant to speak in court while represented by an attorney); *Thompson v. State*, 194 So.2d 649, 650 (Fla. 2^d DCA 1967)(“the right of the defendant to speak for himself when represented by counsel is subject to restriction by the trial court in the exercise of its power to prescribe the manner in which the trial will proceed”). Accordingly, it would be improper to penalize Mr. Casey for not doing so.

II.
DEFENSE COUNSEL RENDERED INEFFECTIVE
ASSISTANCE OF COUNSEL WHEN HE REFUSED
TO ALLOW MR. CASEY TO TESTIFY AT
THE SUPPRESSION HEARING.

The State contends that Mr. Casey never proffered what he would have said if he testified at the suppression hearing so the fact that he did not testify at that hearing is of no consequence. State’s Br. at 32-35. This argument is erroneous.

Mr. Casey swore in his addendum to his Rule 3.850 Motion that he would have testified at the suppression hearing consistent with the averments in his pre-trial motions to suppress. More specifically, on January 8, 2007, Mr. Casey, through counsel, filed a sworn addendum to his Rule 3.850 Motion in which he claimed that Hirsch rendered ineffective assistance of counsel because he failed to call Mr. Casey as a witness at the previously described hearing on Mr. Casey's motions to suppress.

In the addendum, Mr. Casey swore as follows:

1. The Defendant had no prior criminal history and no prior experience or knowledge about the criminal justice system until arrested in this cause.
2. Prior counsel filed a Motion to Suppress Statement and Physical Evidence in this cause. A hearing was held on the motion and *counsel neglected to call the Defendant as a witness to establish record evidence of the averments in the motion, despite the fact that the Defendant wished to testify.*
3. The Court granted the Motion, apparently because it simply did not believe the testimony of the police officers. The State prevailed on appeal. See *State v. Casey*, 821 So2d. 1187 (3DCA 2002). The Court reversed because "the testimony of the police officers was not impeached, discredited, controverted, contradictory within itself, or physically impossible". The Court cited a series of controlling precedent, which counsel should have been aware of, that held that a Court was "required to accept" such evidence. *There was no record evidence introduced by the Defendant to support the allegations of police misconduct plead in the motion. Had counsel done so, the suppression order would have been affirmed* and the State would have been unable to continue the prosecution.

4. *Counsel provided ineffective assistance of counsel by not calling the Defendant as a witness so that there would be record evidence to support the allegations raised in the motion*, particularly where the Defendant had previously advised counsel he wished to testify.

(R5-909-910) (emphasis added). Mr. Casey further asked the trial court to take judicial notice of the prior Order, motions, memoranda and testimony pertaining to his suppression motions. (R5-911). Furthermore, the State concedes that Mr. Casey testified at the hearing on the Rule 3.850 Motion that the facts set forth in the motions to suppress by his counsel were correct. (R10-1532). *See* State's Br. at 35.

Thus, the record shows that Mr. Casey would have testified consistent with his pre-trial motions to suppress that the police officers "couched" their questions to him "in such a way as to suggest that his car had been stolen." (R1-36). Mr. Casey's testimony would have been that the police officers - not Mr. Casey - suggested that Mr. Casey's car had been stolen and this would have supported his defense theory that the police officers did this in order to manipulate him into cooperating with them in a stolen vehicle investigation and thereby gain his consent to search his apartment and car and be debriefed.

The State relies upon Mr. Hirsch's testimony at the Rule 3.850 hearing that Mr. Casey could not have testified at the suppression hearing in a manner that was contrary to that of the police officers. State's Br. at 38. However, as demonstrated below, this testimony of Hirsch is totally incredible because it is contradicted by

Hirsch's own testimony at the Rule 3.850 hearing and Hirsch's own pre-trial motions to suppress filed on behalf of Mr. Casey. More specifically, at the Rule 3.850 hearing, Mr. Hirsch testified as follows:

Q Now, did there come a time when you and Mr. Haber decided a motion to suppress in this case would be appropriate?

A That was I believe before Mr. Haber became involved as co-counsel in this case, but whether it was or not, the answer to your question is yes.

Q And did you proceed with filing the motion to suppress?

A Actually, there was several motions to suppress and several supplemental memorandums to those.

Q Was the motion to suppress the glass?

A The issue was that *according to Mr. Casey, and he was very consistant[sic] in his narrative of events to me, the police had very guilefully misled him. They misled him to believe from the outset that he was not the suspect in a homicide, but the victim of an auto theft, that they were searching for his car, that they needed information, cooperation from him.*

And on that basis, he came down to Miami Beach Police Department. He made a statement. He signed some waivers in connection with searches and so on.

Q Now based on what he told you about that, did you file a motion pursuant to that legal issue?

A I certainly did.

(R10-1594-95)(emphasis added). This testimony of Mr. Hirsch at the Rule 3.850 hearing plainly shows that Mr. Hirsch knew that Mr. Casey could have testified at the suppression hearing in a manner that was contrary to that of the police officers' testimony at that hearing. Furthermore, in Mr. Casey's pre-trial motions to suppress,

which were written after consulting with Mr. Casey, Hirsch repeatedly wrote that the police officers “couched” their questions to Mr. Casey “in such a way as to suggest that his car had been stolen.” (R1-36).

Thus, based upon Mr. Casey’s statements to Hirsch, Hirsch himself filed pre-trial motions arguing that the police officers - not Mr. Casey - suggested that Mr. Casey’s car had been stolen in order to manipulate him into cooperating with them in a stolen vehicle investigation and thereby gain his consent to search his apartment and car and be debriefed. However, the police officers directly contradicted Hirsch’s argument by testifying at the suppression hearing that it was *Mr. Casey* who told them that he believed his car was stolen. (R6-1009-10, 1025). Mr. Casey wanted to testify at the suppression hearing that the police officers falsely told him when they arrived at his apartment that they were investigating the theft of his car. Such testimony would have directly contradicted the testimony of the police. (R10-1527-29, 1532). Accordingly, for all of the foregoing reasons, the State’s claim that there was competent substantial evidence that Mr. Casey’s testimony at the suppression hearing would not have contradicted the testimony of the police fails.

III.
**THE TRIAL COURT ERRED IN REFUSING TO
ADMIT A TAPE RECORDING OF A CONVERSATION
SUPPORTING MR. CASEY'S CLAIM THAT
DEFENSE COUNSEL ADVISED HIM TO FLEE.**

The State claims that Mr. Casey's own testimony and that of his mother establish that Hirsch never told [Mr. Casey] to flee. State's Br. at 27. This claim is contradicted by the record.

At the Rule 3.850 hearing, Mr. Casey testified in pertinent part as follows:

Q Let's fast forward to the issue in the motion. Tell the judge the first time that Mr. Hirsch suggested to you that you should leave the country and the circumstances?

* * *

A. It was November 2003, I went into his office and he said this is where we stand You know that if you are convicted of circumstantial evidence, and I have gotten to know you over these years and you know if I were you or if I could do anything, I would make you disappear.

You speak Spanish, you travel a lot, you know prison is not going to be good for you. I certainly don't want to see you there and that could be where you could go, and basically that's the message that I got quite clear from him.

* * *

In that particular meeting, it was, if I were you, I would just disappear.

(R10-1510-11).

Q Okay. Now did you have subsequent meetings with Mr. Hirsch where the topic of you leaving the country was discussed?

A Well, right after that November, that was November 2003, I remember it clearly, in fact it was the last week in November, he had told me before I left, he said go meet one more time with Dr. Rappaport.

* * *

Dr. Rappaport said you know, I know you met with Milton. You know, he gave you a message. Do you have any doubt? I just want to say that you know you can be a fugitive and he told me that it's not difficult.

He was telling me that there is fake I.D.'s. He even told me his two sons left the country one time and they look alike and they used different types of identification. He talked about plastic surgery.

He talked about, you know being low profile. He mentioned all these things that were collaborating[sic] the information, the advice that Mr. Hirsch gave me in his meeting.

* * *

In that session, he said well I know you met with Milton. I'm here to, you know, convey the message.

(R10-1511-1513).

Q Did you discuss it further with Mr. Hirsch?

A Every time I traveled we always had to come into court for all of those 30 trips and get approval, so there were some trips and he'd like, oh, you're still here.

(R10-1514).

Q Mr. Hirsch did nothing to assist you to leaving, isn't that correct?

A Besides giving me the advice.

(R10-1541).

Q Never told you when to go?

A Well, he said, trial could be around the corner. You know, you got to start thinking of what you're going to do.

(R10-1541).

Q Mr. Hirsch didn't tell you to go to Chile?

A No. He always referred to Argentina.

(R10-1543).

Q And the truth is that at no time did Mr. Hirsch assist you in leaving the country?

A *He advised me to leave.*

(R10-1554)(emphasis added).

In addition, Mr. Casey's mother testified at the Rule 3.850 hearing that Hirsch told her, "I wish I could put Sean in another planet somewhere and make him disappear...." (R10-1576). She further testified that Hirsch "made the reference to Argentina." (R10-1579).

At the Rule 3.850 hearing, Mr. Casey's counsel proffered that, on the tape, Hirsch advised Mr. Casey to leave the country and, accordingly, the tape should be admitted. (R10-1648, 1652-54). The State contends that Mr. Casey's counsel "never precisely proffered what words were uttered that constituted these 'crimes' committed on the tape." (State's Br. at 44-45). However, Mr. Casey's counsel specifically proffered that, on the tape, "Mr. Hirsch was advising him to leave the country as my

client has testified to....” (R10-1648) and Mr. Casey’s counsel stated, “I think if a lawyer tells a client to flee the jurisdiction... it’s a criminal act.” (R10-1654). Furthermore, Mr. Casey’s counsel offered to cue the tape up to the point that he was talking about and said that it would only take a minute to listen to it. (R10-1653). Why would Mr. Casey’s counsel have wanted to play that portion of the tape for the judge if the tape did not show what he had proffered it would show?

The State misleadingly asserts that, “when discussing the tape recordings with post-conviction counsel in a letter dated December 23, 2006, Appellant [Mr. Casey] expressly acknowledged that the record ‘reveals very little.’ (*Casey v. State*, 3D08-95, Petition for Writ of Habeas Corpus Granting a Belated Appeal, App. 4).” State’s Br. at 43 n. 3. However, the State deletes the rest of the sentence which provides, “since my mom was in the room,” as well as the sentence just before where Mr. Casey wrote, “Regarding the tape recordings, I wish we saved a copy. If I need to take my case to the media, the tapes make for a good sound byte *and give my story credibility.*” (*Casey v. State*, 3D08-95, Petition for Writ of Habeas Corpus Granting a Belated Appeal, App. 4)(emphasis added).

IV.
**DEFENSE COUNSEL HAD A CONFLICT OF
INTEREST WHICH DEPRIVED MR. CASEY
OF EFFECTIVE ASSISTANCE OF COUNSEL.**

The State argues that, “[t]o the extent that there was any conflict in the testimony, the trial court’s credibility determinations [regarding the conflict of interest claim] are supported by competent, substantial evidence and should not be disturbed on appeal.” State’s Br. at 27. This claim would not pass the “straight face test” if, as previously explained, the trial judge had not erroneously refused to admit the tape recording of the conversation supporting Mr. Casey’s claim that Hirsch advised him to flee. Notably, Mr. Casey is filing a motion to supplement the record on appeal in this case with a copy of this tape recording and its transcription.

For all of the reasons explained in Mr. Casey’s initial brief at 37-38, the trial court erred in finding Hirsch’s testimony that he did not advise Mr. Casey to flee to be credible. Furthermore, as Mr. Casey’s attorney asked Hirsch at the Rule 3.850 hearing, “What possible motivation could Mr. Casey have to either himself or his mother tape record you if on a prior occasion you hadn’t said something along the lines of leave the country?” (R10-1629).

Accordingly, the trial court should have found that Hirsch’s testimony was not credible and that he, in fact, had a conflict of interest in this case that violated Mr. Casey’s Sixth and Fourteenth Amendment rights.

CONCLUSION

For all of the foregoing reasons, this Court must reverse the trial court's denial of Mr. Casey's Rule 3.850 motion.

Respectfully submitted,

MARCIA J. SILVERS, ESQUIRE
Marcia J. Silvers, P.A.
Counsel for Sean Casey
799 Brickell Plaza, Suite 606
Miami, Florida 33131
Telephone: 305/416-6040
Facsimile: 305/372-1644
E-mail: marciasilverspa@aol.com

BY: _____

MARCIA J. SILVERS, ESQUIRE
Florida Bar No. 342459

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17th day of February 2008 to Linda S. Katz, Assistant Attorney General, Suite 650, 444 Brickell Avenue, Miami, Florida 33131 and Angelica D. Zayas, Assistant State Attorney, Graham Building, 1350 Northwest 12th Avenue, Miami, Florida 33136.

BY: _____

MARCIA J. SILVERS, ESQUIRE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief complies with the font requirements of Fla.R.App.P. 9.210(a)(2) for computer-generated briefs.

MARCIA J. SILVERS