

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

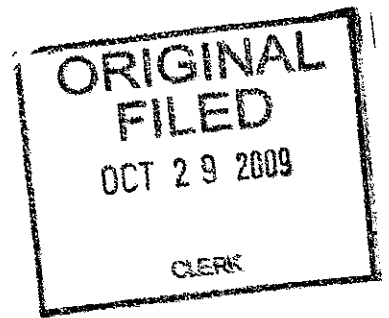
STATE OF FLORIDA,  
Plaintiff,

Case No. F01-07975  
F06-032696

Judge Thornton

vs.

SEAN CASEY,  
Defendant.



RESPONSE TO DEFENDANT'S MOTION FOR LEAVE TO FILE  
BELATED MOTION TO VACATE CONVICTION AND SENTENCE  
FILED ON OR ABOUT OCTOBER 6, 2009

COMES NOW KATHERINE FERNANDEZ RUNDLE, State Attorney of the Eleventh Judicial Circuit of Florida, by and through the undersigned Assistant State Attorney, and files this Response to the Defendant's Motion for Leave to File Belated Motion to Vacate Conviction and Sentence Filed on or About October 6, 2009, and respectfully submits that the defendant, Sean Casey, is entitled to no relief.

Procedural History

The defendant was initially charged with one count DUI manslaughter in violation of §316.193(3)(c)3.b of the Florida Statutes and one count of vehicular manslaughter in violation of §782.071(2) of the Florida Statutes as a result of a traffic fatality that occurred on March 11, 2001. The charging document was

ultimately amended to include a charge of leaving the scene of a crash involving a death in violation of §316.027(1)(b) of the Florida Statutes.

On September 10, 2004, the Defendant failed to appear in court and an *alias* *capias* was issued. Upon his return, the Defendant was charged with failing to appear while on bail in violation of §843.15(1)(a), Florida Statutes, in Case F06-32696. On September 1, 2006, the Defendant filed a demand for speedy trial in the traffic fatality case. When the traffic fatality case was called for trial on October 17, 2006, the State offered the defendant a plea to the bottom of the guidelines.<sup>1</sup> After litigating certain pretrial motions, the Defendant entered a negotiated plea of guilty to DUI manslaughter, vehicular manslaughter and leaving the scene of a crash resulting in death. In exchange for his plea, the Defendant was sentenced to 11.5 years in state prison with the sentence as to count two suspended. The Defendant also entered a plea of guilty to the charge of failing to appear while on bail and was sentenced to 366 days consecutive to the sentence imposed in the other case. Before accepting the plea, the trial court expressly questioned whether the DUI manslaughter and vehicular manslaughter charges were duplicative to each other. (Ex. 1, p. 4). During the plea colloquy, the defendant was explicitly told that the charges were duplicative and for that reason he would not be sentenced for both charges. Ex. 1. P. 11-12).

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<sup>1</sup> The sentencing score sheet prepared at the time reflects that the vehicular homicide charge was not included in the calculations. The score sheet lists DUI manslaughter (§316.193, Florida Statutes) as the primary charge with leaving the scene of a crash involving a death (§316.027, Florida Statutes) and “bond jumping” (§843.15, Florida Statutes), included as additional offenses. (Ex. 2). The “bottom of the guidelines” as reflected on this score sheet is 154.2 months or 12.85 years. (Ex. 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.

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 claims. 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 Appellant's motion for post conviction relief was filed on March 5, 2007.

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. On March 25, 2009, the denial of the defendant's motion for post conviction relief was affirmed in a *per curiam* opinion. On April 13, 2009, the defendant filed a motion for rehearing and a motion for rehearing *en banc*. These motions were denied on May 8, 2009, and a mandate was issued on May 29, 2009. *Casey v. State*, 8 So. 3d 1144 (Fla. 3d DCA 2009).

On or about November 14, 2008, the Defendant filed a motion for post conviction relief. In this motion, the Defendant suggested 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 had new evidence to support the claim previously raised. This motion was denied in a written order filed on August 18, 2009. The defendant filed a notice of appeal on September 18, 2009, and the matter is currently pending before the Third District Court of Appeal. (Case No. 3D09-2555).

On or about April 22, 2009, the defendant filed a Motion for Relief of Judgment Because of Fraud, once again complaining that trial counsel was operating under a conflict when he advised the defendant to accept the plea offered by the State on the morning of trial. The defendant also complained that the trial court erred at the evidentiary hearing in refusing to consider tape-recorded conversation between trial counsel and the defendant where the recordings had been made without trial counsel’s knowledge and consent. In support of this motion, the defendant claimed that the trial court’s ruling was induced by the fraudulent representations of the prosecutors. This motion was denied in a written order filed on August 18, 2009. The defendant filed a notice of appeal on September 18, 2009, and the matter is currently pending before the Third District Court of Appeal. (Case No. 3D09-2555).

## Claims of the Defendant

The defendant claims that his conviction and sentence for vehicular homicide as charged in Count 2 of the Information violates the prohibitions against double jeopardy. Recognizing that the instant motion is both untimely and successive, the defendant relies on Rule 3.050 which gives the trial court authority to excuse missed deadlines for good cause, including, *inter alia*, excusable neglect and asks that he be allowed to file a belated motion to challenge the conviction and sentence imposed for vehicular homicide.

## Argument

### 1. Applicability of Rule 3.050

In support of his belated attempt to set aside his conviction and sentence for vehicular manslaughter, the defendant relies on Rule 3.050 which gives the trial court authority to excuse missed deadlines for good cause, including, *inter alia*, excusable neglect. The defendant's reliance on Rule 3.050 ignores the fact that he retained two different lawyers and filed two separate 3.850 motions within the two years allowed by Rule 3.850. The defendant's attempt to suggest "excusable neglect" also ignores the fact that counsel did raise a double jeopardy violation claim in the Rule 3.850 motion for postconviction relief filed on or about November 14, 2009, albeit as an element of a claim of ineffective assistance of counsel. Finally, the suggestion that the failure to raise the double jeopardy claim now raised within the two year time limits of Rule 3.850 is a result of excusable neglect seems to be little more than an attempt to claim ineffective assistance of

post conviction counsel. Claims of ineffective assistance of postconviction 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 postconviction 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 postconviction 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).

## 2. Procedural Bar

Even assuming, for the sake of argument only, that Rule 3.050 can be used to allow the defendant an opportunity to file a motion for postconviction relief outside the two year time limit set forth in Rule 3.850, the motion would be barred as successive. As the defendant readily acknowledges in his motion, the instant motion is the defendant’s **fourth** postconviction attack on his conviction. The first of these motions was resolved in the State’s favor after an evidentiary hearing. The denial of the first motion for postconviction relief was affirmed on appeal. *Casey v. State*, 8 So. 3d 1144 (Fla. 3d DCA 2009). The denial of the defendant’s second motion, which included a claim that trial counsel was ineffective for allowing the defendant to enter into a plea which violated double jeopardy, is currently pending appellate review in Third District Court Case No. 3D09-2555.

The denial of the defendant's third motion for postconviction relief is also pending appellate review in Case No. 3D09-2555.

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)(holding that a successive 3.850 motion can be denied on the ground that it is an abuse of process, if there is no reason why the issue could not have been raised in a previous motion); *Franklin v. State*, 923 So. 2d 1199, 1199 (Fla. 3d DCA 2006); *Scrambling v. State*, 919 So. 2d 671 (Fla. 5th DCA 2006)(holding that defendant's 3.850 motion for postconviction relief was procedurally barred as successive where the "defendant's current rule 3.850 motion is one that could have or should have been raised in his first rule 3.850 motion"); *Eloisaint v. State*, 868 So. 2d 680 (Fla. 3d DCA 2004). More specifically, a defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by filing successive motions. *Jones v. State*, 591 So. 2d 911 (Fla. 1991). Where a previous motion for postconviction relief raised a claim of ineffective assistance of counsel, a trial court may summarily deny a successive motion that raises an additional ground for ineffective assistance of counsel. *Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997); *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).

### 3. Jurisdiction

Assuming, again for the sake of argument only, that the instant motion is not procedurally barred, this court lacks the jurisdiction to address the merits of the defendant's claim inasmuch as the defendant raised the same double jeopardy claim (albeit as an element of a claim of ineffective assistance of counsel) in his second motion for postconviction relief filed on or about November 14, 2008. This motion was denied on August 18, 2009, and is currently pending appellate review in Case 3D09-2555.

As a general rule, the trial court does not have jurisdiction to address the merits of a successive motion for post conviction relief while the denial of the first motion is pending appellate review. *Tompkins v. State*, 894 So. 2d 857, 859 (Fla. 2005) ("the circuit court did not have jurisdiction to consider Tompkins' motions while the appeal of the denial of his previous motions, which raised similar claims, was pending in [Florida Supreme] Court"); *Washington v. State*, 823 So. 2d 248, 249 -250 (Fla. 4th DCA 2002); *Gobie v. State*, 188 So. 2d 34 (Fla. 3d DCA 1966).

#### 4. Double Jeopardy<sup>2</sup>

Although the defendant is generally correct in asserting that he cannot be convicted of both vehicular homicide and DUI manslaughter where there is but a single death,<sup>3</sup> the defendant is nonetheless entitled to no relief.

In the instant case, the defendant was advised several times during the plea colloquy that the charges of vehicular homicide and DUI manslaughter were duplicative. (Ex. 1, p. 4, 10-13, 22). Nonetheless, the defendant accepted a negotiated plea bargain whereby he would be convicted of both charges and sentenced only to the DUI manslaughter charge. (Ex. 1). This waived any double jeopardy objection. *See Novaton v. State*, 634 So. 2d 607 (Fla. 1994). Not only did the defendant waive any objection to the vehicular homicide conviction, the suggestion that the defendant was prejudiced by the duplicative charge is also refuted by the record. The record demonstrates that neither the negotiated term of years, i.e. "the bottom of the guidelines," nor the ultimate sentence imposed was premised on the improper consideration of both charges inasmuch as the vehicular homicide was not included in the sentencing score sheet which formed the basis of the State's offer. (Ex. 2).

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<sup>2</sup> In the interest of judicial economy, the State of Florida addresses the merits of the defendant's claims without waiving the procedural and jurisdictional bars raised in response to the defendant's motion for permission to file a belated postconviction motion.

<sup>3</sup> *See State v. Chapman*, 625 So. 2d 838, 839-40 (Fla. 1993) (a single death cannot support convictions for both DUI manslaughter and vehicular homicide); *Galiana v. State*, 868 So. 2d 1218, 1219 (Fla. 3d DCA 2004); *Edwards v. State*, 639 So. 2d 203, 203 (Fla. 2d DCA 1994).

Conclusion

WHEREFORE, based upon the foregoing reasons and authorities cited herein, the State of Florida requests that this Honorable Court deny the Defendant's Motion for Leave to File Belated Motion to Vacate Conviction and Sentence Filed on or About October 6, 2009. In the event that this request is denied, the State of Florida respectfully requests that the motion be dismissed for lack of jurisdiction and/or as successive pursuant to Rule 3.850(f).

Respectfully submitted,  
KATHERINE FERNANDEZ RUNDLE  
STATE ATTORNEY

BY: 

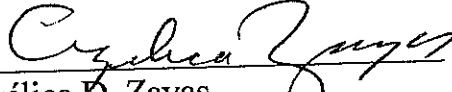
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above was mailed to Sean Casey, DC#B03942, New River Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026, on this 28<sup>th</sup> day of October, 2009.

  
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Angélica D. Zayas  
Assistant State Attorney