

Supreme Court of Florida

WEDNESDAY, JANUARY 16, 2019

CASE NO.: SC19-69
Lower Tribunal No(s).:
3D18-1175; 132009CF0355250001XX

DON T FERGUSON

vs. STATE OF FLORIDA

Petitioner(s)

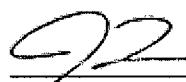
Respondent(s)

This case is hereby dismissed. This Court lacks jurisdiction to review an unelaborated decision from a district court of appeal that is issued without opinion or explanation or that merely cites to an authority that is not a case pending review in, or reversed or quashed by, this Court. *See Wells v. State*, 132 So. 3d 1110 (Fla. 2014); *Jackson v. State*, 926 So. 2d 1262 (Fla. 2006); *Gandy v. State*, 846 So. 2d 1141 (Fla. 2003); *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002); *Harrison v. Hyster Co.*, 515 So. 2d 1279 (Fla. 1987); *Dodi Publ'g Co. v. Editorial Am. S.A.*, 385 So. 2d 1369 (Fla. 1980); *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

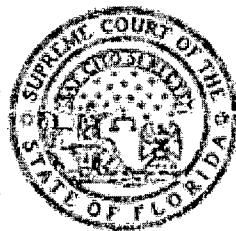
No motion for rehearing or reinstatement will be entertained by the Court.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



td

Served:

MICHAEL WILLIAM MERVINE
DON T FERGUSON
HON. SPENCER JET MULTACK, JUDGE
HON. MARY CAY BLANKS, CLERK
HON. HARVEY RUVIN, CLERK



Third District Court of Appeal

State of Florida

Opinion filed August 1, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1175
Lower Tribunal No. 09-35525

Don Ferguson,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, Spencer J. Multack, Judge.

Don Ferguson, in proper person.

Pamela Jo Bondi, Attorney General, for appellee.

Before SUAREZ, EMAS and FERNANDEZ, JJ.

PER CURIAM.

Affirmed.

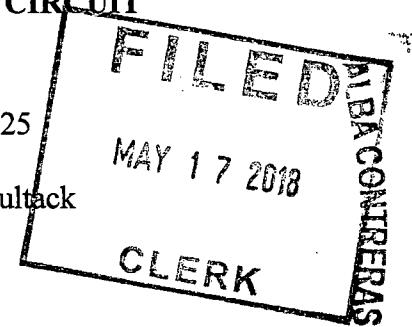
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.

Case No. F09-35525

Judge: Spencer Multack

Don Ferguson,
Defendant.



**ORDER DENYING DEFENDANT'S MOTION
FOR POST-CONVICTION RELIEF**

THIS CAUSE having come before this Court on the Defendant, Don Ferguson's, Motion for Postconviction Relief and this Court having reviewed the motion, the court files and records in this case, and being otherwise fully advised in the premises therein, hereby DENIES the Motion for Postconviction Relief and further states:

The Defendant has filed successive post-convictions motions raising the same or similar issues over the past seven years attacking his conviction for Lewd and Lascivious Molestation. Rule 3.850 (h) states

Successive Motions

- (1) A second or successive motion must be titled: "Second or Successive Motion for Postconviction Relief."
- (2) A second or successive motion is an extraordinary pleading. Accordingly, a court may dismiss a second or successive motion if the court 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 defendant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure or there was no good cause for the failure of the defendant or defendant's counsel to have asserted those grounds in a prior motion. When a motion is dismissed under this subdivision, a copy of that portion of the files and records necessary to support the court's ruling shall accompany the order denying the motion.

RECORDED

SP 5/3/10

First, the Defendant's motion does not include the required "second" or "successive" language as required by the rule. Looking beyond that technical deficiency, the Defendant alleges three grounds on which he seeks relief.

"Ground 1" alleges that the Court failed to give a requested lesser-included offense. This claim was made in the Defendant's *Writ of Prohibition* (3D-2336), which was denied by the Third District Court of Appeal on September 21, 2011. The lesser-included claim was then raised in the Defendant's *Motion for Post-Conviction Relief* filed on March 27, 2012. The trial court denied the motion on August 30, 2012. The Third District Court of Appeal affirmed the trial court's ruling on October 9, 2013 (3D13-339). The Defendant is raising the same issue again, this time with the supporting authority of *Wong v. State*, 212 So.3d 351 (Fla. 2017), which he avers is new law and should apply retroactively.

Wong, is factually similar to the Defendant's case, however, it is not new law. *Wong* readdresses the preservation for appeal of the denial of a lesser-included offense, which was announced in *State v. Heathcoat*, 442 So.2d 955 (Fla. 1983). *Wong* also discusses the well settled law on when a permissive lesser included offense should be afforded to a requesting party¹. See *Sanders v. State*, 944. So.2d 203 (Fla. 2006). Both of these laws were controlling at the time of the Defendant's direct appeal and subsequent post-conviction motions, which addressed this very issue. The Court must deny the Defendant's successive prayer for relief pursuant to Rule 3.850(h)(2) as being both successive and procedurally bared.

¹ A defendant is entitled to an instruction on a permissive lesser included offense upon request where two conditions are met: "(1)-the indictment or information must allege all the statutory elements of the permissive lesser included offense; and (2) there must be some evidence adduced at trial establishing all of these elements." *Khianthalat*, 974 So.2d at 361 (quoting *Jones v. State*, 666 So.2d 960, 964 (Fla. 3d DCA 1996)); see also Fla. R. Crim. P. 3.510(b). *Wong v. State*, 212 So.3d 351 (Fla. 2017). See also, *Stoffel v. State*, 2018 WL 2225023 (Fla. 1st DCA 2018) (Defendant charged with lewd and lascivious molestation is not entitled to a lesser-included offense of battery when the charging document does not indicate the touching was against the will of the victim.)

"Ground 2" of the Defendant's motion alleges the remarks made by the prosecutor during closing arguments were "egregious," and "Ground 3" alleges that the jury instructions failed to include all the essential elements of the crime charged. A second motion is unauthorized if it "fails to allege new or different grounds" or if the court finds "an abuse of procedure" from the failure to raise the new grounds in the original motion. *Zeigler v. State*, 632 So.2d 48 (Fla.), *cert. denied*, 115 S.Ct. 104, 130 L.Ed.2d 52 (1993). This Court finds that there is no good cause for the failure of the Defendant to have asserted those grounds "2" and "3" in his prior motions. The Defendant's claims, as in "Ground 1" are successive and procedurally barred pursuant to Rule 3.850(h)(2).

Thus, based upon the above cited authority, the Defendant's Motion for Post-Conviction Relief is **DENIED**.

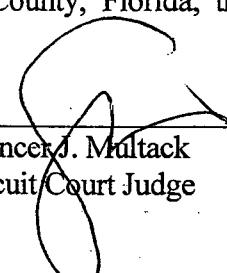
The Defendant, Don Ferguson, is hereby notified that he has the right to appeal this order to the District Court of Appeal of Florida, Third District within thirty (30) days of the signing and filing of this order.

The Clerk of this Court is hereby ordered to send a copy of this Order to the Defendant.

If the Defendant takes an appeal of this order, the Clerk of this Court is hereby ordered to transmit, as part of this order, to the appellate court the following:

1. Defendant's Motion.
2. This order.

DONE AND ORDERED at Miami, Miami-Dade County, Florida, this the 17 day of May, 2018.


Spencer J. Multack
Circuit Court Judge

I CERTIFY that a copy of this order has been furnished to
DEFENDANT, Don Ferguson by mail this 24th day
of May, 2018.

