

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

MICHAEL D. PHILLIPS,

Appellant,

v.

Case No. 5D21-1362

LT Case No. 2016-300068-CFDB

STATE OF FLORIDA,

Appellee.

_____/

Decision filed October 5, 2021

3.850 Appeal from the Circuit Court
for Volusia County,
Matthew M. Foxman, Judge.

Michael D. Phillips, Punta Gorda, pro se.

Ashley Moody, Attorney General, Tallahassee,
and Deborah A. Chance, Assistant Attorney
General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED.

LAMBERT, C.J., NARDELLA and WOZNIAK, JJ., concur.

Appendix "B"

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Statement Regarding Record Citations

In this brief, the appellant shall be referred to as "M. Phillips" or collectively as the "appellant". The state shall be referred to as "State" or collectively as "appellee". The Seventh Judicial Circuit, Honorable Judge Matthew Foxman, will be referred to as the lower tribunal.

Citations to the original volume record on appeal that the defendant has access to, or any records that the appellant may wish to submit will be referenced as "A", then followed by the page number in the appendix (e.g. A:1).

Citations to the sentencing transcripts will be referenced as "ST", then followed by the page number, then line number (e.g. ST:46:4-9), with the referenced page number in the appendix (e.g. A:5).

Statement of Jurisdiction

This district court of appeal has jurisdiction to review the final orders of trial court. See, Fla.R.App.P. 9.030(b)(1); Article V, Section 3, Florida Constitution (2003).

Statement of the issues

I.

Trial Counsel's performance was ineffective in the trial and sentencing phase of M. Phillips proceedings.

II.

The defendant/Appellant received an illegal sentence.

Statement of the case and facts

On December 27, 2015 the defendant entered a house where Adam, Shelly Phillips and their two children resided, and had battered Adam (30) and Shelly (27) Phillips by the act of stabbing, hitting Shelly 8 times and Adam 7 times. Although the defendant and victims share the same last name they are unrelated and did not know each other. On the night of the incident the defendant entered through the rear door of the victims garage, which was open, and proceeded to go into the residence. Upon inside the defendant had hid himself once he saw someone and was caught in the act of trespassing. After being made the defendant stood from where he was and had acted under impulse and severe mental duress and had stabbed Shelly 8 times sporadically with an unknown intent, then Adam Phillips came to see the commotion and that's when the defendant and Adam spiced off where Adam was ultimately stabbed 7 times sporadically. After the defendant realized the acts he had participated in he fled the house, back out the door, jumped onto the canal and ran to his mother's house where he then vomited, took a shower, then tried to lay down. After Shelly's confrontation and the confrontation with the defendant and Adam, Shelly called 911 while she assisted her husband with the defendant gone. The police arrived and used a battering ram to gain access to the house where both victims went to the hospital, Adam by helicopter and Shelly by ambulance. Adam stayed in the hospital for roughly 72 hours and recovered from his injuries and was expected to improve health as Shelly was held for roughly 24 hours and was dismissed and also expected to heal. Aside from scars and some stitches both victims would recover and not be permanently disfigured for life. The defendant was listed as a potential suspect and by the neighbors a suspicious person

and contact came with himself and the detectives when police brought the defendant in for questioning, he confessed to the crime and admitted his guilt which resulted in an arrest. However, the true intent was never proven and no motive was established by reasonable doubt or as a preponderance of evidence. The defendant was pressured into fabricating a reason as a result of being intentionally, and maliciously called a savage in the interrogation, which fabrication Prima facie does not add up to the facts when the state argues that the defendant obtained the keys to the victims vehicle as his motive in the victims garage but however he contended into the victims house and furthermore does not add up or has been proven to be true and the facts contest that the true motive is unknown. The defendant was arrested and housed in Volusia County Jail. He pleaded "open" nery to the court and received a natural life sentence for burglary w/ battery, 30 years for 1st degree attempted murder (Shelly Phillips), 30 years for 1st degree attempted murder (Adam Phillips) and 60 days county time for petit theft.

The defendant/Appellant filed pro se "Motion to withdraw plea" on 06/20/2017 and was denied on 06/26/2017.

The defendant/Appellant's trial counsel filed a direct appeal on 06/16/2017 and Mandate was issued on 03/23/2018.

The defendant/Appellant filed a "Motion for extension of time" on 03/27/2020.

The defendant/Appellant filed a "Emergency Motion for extension of time" on 07/1/2020 Granted on 8/5/2020.

The defendant/Appellant filed a "Motion for Extension of time" on 08/10/2020.

The defendant/Appellant filed "Motion for post conviction relief" 03/27/2020.

The defendant/Appellant filed "Amended Motion Post conviction relief" on 02/22/2021 denied on 05/14/2021.

Defendant/Appellant filed a Notice of appeal on 5/14/21 in the 13th DCA

Summary of the argument

The appellant presents facts in his motions that cannot be refuted by the record of both trial court and trial court's errors and is due an arrest of judgment of an evidentiary hearing on those matters to see whether or not a vacation of the judgment and sentence or a new trial is required.

Argument I.

Counsel was ineffective. Counsel failed to investigate appellants mental competency and mental history before allowing him to plead guilty and his attorney failed to prepare a defense and instead coerced him into entering a guilty plea to negotiate a sentence. Counsel furthermore fails to challenge the insufficiency of the evidence and failed to ensure that courtroom procedures were fair and just to the offender and the offense. The appellant presented clear and convincing evidence that creates a real, substantial, and legitimate doubt as to his competency and counsel fails to raise a defendants alleged incompetency claim. Fla. R. Crim. P. 3.210(b) requires a court to schedule a competency hearing if at any material stage of the criminal proceeding, the court has reasonable ground to believe that the defendant is not mentally competent to proceed. Rule 3.210 was enacted to satisfy the mandate of *Drope v. Missouri*, 420 U.S. 162 (1975), and *Pate v. Robinson*, 383 U.S. 375 (1966), by setting forth procedures sufficient to ensure that a defendant is not tried while incompetent. Pursuant to *Pate*, a rebuttable presumption of incompetency attaches if the defendant shows that the court failed to hold a competency hearing (See A12-5) despite information creating a bona fide doubt as to competency. Because of the difficulty or impossibility of a retroactively determining competency, on direct appeal a trial courts error in failing to order a competency hearing under rule 3.210(b) generally results in reversal for a new trial. Because of the reasonable probability that the outcome of the proceedings would be different and in the appellants best interest counsel presents deficient performance and

actual prejudice. The appellant sets forth a clear and convincing circumstances that create a real, substantial and legitimate doubt as to the movant's competency and it is held that the appellants substantive due process right not to be tried while incompetent was violated, and that the competency to proceed was legitimately in question at the relevant stage. There is a reasonable probability that but for counsel's unprofessional errors, the results of the proceeding would have been different.

Argument II.

Appellant received an illegal sentence of a fundamental error. A verdict of guilty that could not have been obtained without the assistance of the alleged error. The appellant was sentenced to a term of natural life for a first time non-homicide conviction, which sentence has been deemed impermissible by the Supreme Courts.

Conclusion

The appellant alleges multiple errors that require a evidentiary hearing to determine if a new trial, vacation, reversal is required.

Unnotarized Oath § 92.525

Under penalties of perjury, I swear and affirm that
all statements in this Initial Brief are true and complete
under § 92.525 Florida Statutes (2006). Dated this
day of , 2021 at Charlotte Correctional
Institution, Punta Gorda, Florida 33955-9747

Sl Phillips Michael
Appellant/Pro'se

Certificate of Service

I hereby certify that a copy of the foregoing Initial Brief has been furnished to the Attorney General's Office, Criminal Appeals Division State of Florida 11-01 the capitol tallahassee FL 32399-1050

State of Florida at the office of the Attorney General
444 Seabreeze Blvd, 5th Floor Daytona Beach FL 32118
Fifth DCA: 300 South Beach Street Daytona Beach FL 32114,

via U.S. Mail (by placing the foregoing into the hands of certified mailroom personnel at Charlotte Correctional Institution) on this day of 2021.

1st Philip Michael
Appellant/Pro'se

DC# V52627

Charlotte Correctional Institution

33123 001 Well Road

Dunthorpe Florida 33955-9747

Appendix 'C'

**In the Circuit Court of the Seventh Judicial
Circuit in and for Volusia County, Florida**

Case Number: 2016 300068 CFDB
Judge: MATTHEW M FOXMAN

State of Florida

vs

MICHAEL D PHILLIPS

Defendant

CLERK'S CERTIFICATE OF MAILING

I, **LAURA E ROTH**, Clerk of the Circuit Court in and for Volusia County, hereby certify that I mailed a copy of

Order Denying Defendant's "Belated Motion for Extension of Time;" and Final Order

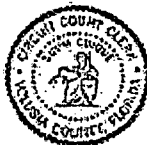
Denying Defendant's "Motion for Post-Conviction Relief Amended Grounds D, E, G," and Motion for Post Conviction Relief

to: Michael D. Phillips DC # V52627
Charlotte Correctional Institution
33123 Oil Well Rd
Punta Gorda, FL 33955

FILED
21 MAY 14 PM 12:33
CLERK OF THE CIRCUIT
& CTY COURT VOLUSIA CTY
CC18

on the 14th day of May, 2021, by United States mail, postage prepaid. The date of mailing has been noted on the docket sheet.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office this 14th day of May, 2021.



LAURA E. ROTH
CLERK OF THE CIRCUIT COURT

By: _____

Cristina Santucci
Deputy Clerk

and Count IX, sixty (60) days imprisonment. Defendant pursued a direct appeal of his judgment and sentence, which was *per curiam* affirmed; mandate issued March 23, 2018. *See Phillips v. State*, 241 So. 3d 175 (Fla. 5th DCA 2018).

Defendant filed his motion for post-conviction relief on March 24, 2020, pursuant to the mailbox rule, albeit a day late. Irrespective of a possible timeliness issue, this Court entered an interim order on Defendant's post-conviction motion on March 30, 2020. On July 1, 2020, Defendant filed an emergency motion for the extension of time, which was tardily submitted. This Court granted the extension of time on August 5, 2020. Defendant filed another motion for the extension on August 3, 2020, which was rendered moot by the August 5, 2020, order. Defendant filed his "belated motion for extension of time" on February 16, 2021; and then filed the pleading entitled "motion for post-conviction relief amended grounds D, E, G" filed February 18, 2021.

DEFENDANT'S "BELATED MOTION FOR EXTENSION OF TIME"

The Court shall address Defendant's motions separately. Defendant moves this Court to grant his belated motion for the extension of time and accept his "motion for post-conviction relief amended grounds D, E, G" as timely filed. For the following reasons, Defendant's motion is **DENIED**.

As stated above, Defendant filed his initial motion for post-conviction relief on March 24, 2020. This Court entered an interim order striking Grounds D, E, and G of Defendant's post-conviction motion on March 30, 2020. This Court *then* granted a belated motion for the extension of time on August 5, 2020, allowing Defendant an additional sixty (60) days leave to amend¹.

¹ Taking into account the time allotted in the August 5, 2020 order, Defendant had approximately one hundred eighty-nine (189) days or over six (6) months leave to amend his post-conviction motion from March 30, 2020 to October 5, 2020.

State, 88 So. 3d 312, 316 (Fla. 4th DCA 2012) (citing *Nelson v. State*, 43 So. 3d 20, 33 (Fla. 2010)); see also *Dougherty v. State*, 149 So. 3d 672, 676 (Fla. 2014). Moreover, in general a trial court error cannot be raised in a Rule 3.850 motion, because these errors could have been raised on direct appeal. *Ramon v. State*, 219 So. 3d 204, 205 (Fla. 5th DCA 2017) (citing generally *Swanson v. State*, 984 So.2d 629, 629 (Fla. 1st DCA 2008); See also Fla. R. Crim. Pro. 3.850(c). Therefore, Ground B is **DENIED**.

GROUND C

In Ground C, Defendant argues that the sentence imposed violates the eighth amendment. Defendant further argues that the life sentence imposed is cruel and unusual as he qualified for a youthful offender designation. Defendant also appears to allege that 2014-220, Laws of Florida³ applies in this matter. This claim fails as a matter of law and is refuted by the record.

The Youthful Offender Statute states that:

(1) The court *may* sentence as a youthful offender any person:

(a) Who is at least 18 years of age or who has been transferred for prosecution to the criminal division of the circuit court pursuant to chapter 985;

(b) Who is found guilty of or who has tendered, and the court has accepted, a plea of nolo contendere or guilty to a crime that is, under the laws of this state, a felony if such crime was committed before the defendant turned 21 years of age; and

(c) Who has not previously been classified as a youthful offender under this act; however, a person who has been found guilty of a capital or life felony may not be sentenced as a youthful offender under this act.

§ 958.04, Fla. Stat. (2016) (emphasis added). “The discretionary nature of youthful offender sentencing provides further support that it is not a fundamental right for defendants.” *Jackson v. State*, 191 So. 3d 423, 427 (Fla. 2016). “A ‘lower court is under no obligation to sentence [a

³ §§ 775.082, 921.1401, .1402, Fla. Stat. (2016).

(2015); § 777.04, Fla. Stat. (2015); § 810.02(2)(a), Fla. Stat. (2015); and § 812.014(3)(a), Fla. Stat. (2015). Therefore, Ground C is **DENIED**.

GROUND D

In Ground D, Defendant contends that a due process violation occurred due to prosecutorial misconduct. Defendant specifically contends that the trial prosecutor made several improper statements at sentencing. This claim was stricken in the March 30, 2020, interim order. The Court shall address the amended ground in the section entitled “Motion for Post-Conviction Relief Amended Grounds D, E, and F.”

GROUND E

In Ground E, Defendant asserts that trial counsel rendered ineffective assistance of counsel when they failed to properly advise him concerning his right to plea not guilty by reason of insanity. Defendant further asserts that trial counsel failed to: (1) conduct adequate legal research, (2) discuss potential strategies, (3) conduct an adequate investigation into the underlying offenses; (4) interview key witnesses; (5) pursue the defense of insanity; (6) present mitigating factors concerning mental health at sentencing; and (7) present mitigation witnesses at sentencing. This claim was stricken in the March 30, 2020, interim order. The Court shall address the amended ground in the section entitled “Motion for Post-Conviction Relief Amended Grounds D, E, and F.”

GROUND B

In Ground B, Defendant states that a due process violation occurred when the trial court failed to adhere to Florida Rule of Criminal Procedure 3.210. This ground was addressed above and denied above. Accordingly, the ground remains **DENIED**.

GROUND C

In Ground C, Defendant argues that the sentence imposed violates the Eighth Amendment. Defendant further argues that the life sentence imposed is cruel and unusual as he qualified for a youthful offender designation. This ground was addressed above and denied above. Accordingly, the ground remains **DENIED**.

GROUND D

In Ground D, Defendant contends that a due process violation occurred due to prosecutorial misconduct. Defendant specifically contends that the trial prosecutor made several improper statements at sentencing. As stated above, Defendant filed his initial motion for post-conviction relief on March 24, 2020. This Court entered an interim order striking Grounds D, E, and G on March 30, 2020. This Court granted a belated motion for the extension of time on August 5, 2020, allowing Defendant an additional sixty (60) days leave to amend. The Court file reflects no intervening motions during the nearly four and a half month period between the filing of the last motion for extension of time and the instant “motion for post-conviction relief amended grounds D, E, G” - *See* Appendix A. Thus, the amendment is untimely. “Any claim for which the insufficiency has not been cured within the time allowed for such amendment shall be summarily denied” Fla. R. Crim. P. 3.850(f)(3). Therefore, Ground D is **DENIED**.

argument made on page one hundred sixty-five (165) lines 24-25 mislead the Court at sentencing. *See id.* at pp 165. The Court does not find the statement to be misleading, based upon Dr. Krop's testimony that Defendant appreciated the wrongfulness of his actions; nor did this singular argument influence the sentence imposed. *See id.* at pp. 115-118, 178-180. The Court would note that as a practical matter, trial judges have the unique ability to evaluate comments and questions lodged by attorneys and weigh them against the evidence presented before them, when making final determinations on the merits.

The following references were made in Defendant's amended motion for post-conviction relief. Defendant references a question on page eighty-two (82) line 22. However, upon review the question actually occurred on page sixty-two (62) line 22. Defendant claims that the question had a negative impact on sentencing, upon review of the record; the Court does not find that the question had the impact claimed by Defendant, as the Court did not reference this *passing* question when pronouncing the sentence. *See id.* at pp. 62, 178-180. The Court clearly was referencing the nature of the underlying incidents. *See id.* Defendant next re-alleges the question presented on page one hundred sixteen (116), line 5. The Court does not find that the question had the impact claimed by Defendant. Supplementary, the Court did not make any reference to Defendant waiting inside the home when imposing the sentence. Rather the Court stated "[y]ou chose to arm yourself; you went into a stranger's home, you attacked them violently with the intent to kill." *See id.* at pp. 116, 178-180.

Lastly, Defendant references a question lodged by the prosecutor concerning his jail phone call on page eighty-nine (89) line 21. Defendant states the question was prejudicial. The Court does not find that the question had the impact claimed by Defendant, as the Court did not reference this *passing* question when pronouncing the sentence. *See id.* at pp. 89, 178-180. Again, the Court

Furthermore, the claim is facially insufficient, as Defendant's allegations remain conclusory and speculative after amendment. *See Gillis*, 807 So. 2d at 206. Therefore, Ground E is **DENIED**.

Alternatively, the Court finds that this ground is refuted by the record as at sentencing Dr. Krop stated that Defendant was competent to proceed and would not qualify, as someone who is not guilty by reason of insanity. *See Appendix B* at pp. 100-127. Therefore, Ground E is **DENIED**.

GROUND F

In Ground F, Defendant alleges that a due process violation occurred because he was incompetent to proceed at sentencing. This ground was addressed above and denied above. Accordingly, the ground remains **DENIED**.

GROUND G

In Ground G, Defendant argues that the trial prosecutor committed prosecutorial misconduct by presenting arguments that render their actions malicious. The arguments appear in the State's sentencing memorandum. As stated above, Defendant filed his initial motion for post-conviction relief on March 24, 2020. This Court entered an interim order striking Grounds D, E, and G on March 30, 2020. This Court granted a belated motion for the extension of time on August 5, 2020, allowing Defendant an additional sixty (60) days leave to amend. The Court file reflects no intervening motions during the nearly four and a half month period between the filing of the last motion for extension of time and the instant "motion for post-conviction relief amended grounds D, E, G" *See Appendix A*. Thus, the amendment is untimely. "Any claim for which the

RULING

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Defendant's "belated motion for extension of time" is **DENIED**; and
2. Defendant's "motion for post-conviction relief amended grounds D, E, G" and Defendant's motion for post-conviction relief are **DENIED**.

Defendant has **30 days** from the rendition of this order to file a notice of appeal.

12 **DONE AND ORDERED** in Chambers, in Volusia County, Daytona Beach, Florida, this day of _____, 2021.


MATTHEW M. FOXMAN
CIRCUIT COURT JUDGE

cc: Michael Dakota Phillips, Defendant, D.C. # V52627, Reception and Medical Center (Main Unit-Male), P.O. Box 628, Lake Butler, Florida 32054-0628
The Office of the State Attorney, Post-Conviction Division, eservicevolusia@sao7.org

Appendix 'D'

Supreme Court of Florida

FRIDAY, APRIL 22, 2022

CASE NO.: SC22-531

Lower Tribunal No(s):

5D21-1362; 642016CF300068XXXADB

MICHAEL D. PHILLIPS

vs. STATE OF FLORIDA

Petitioner(s)

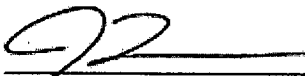
Respondent(s)

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 *Wheeler v. State*, 296 So. 3d 895 (Fla. 2020); *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.

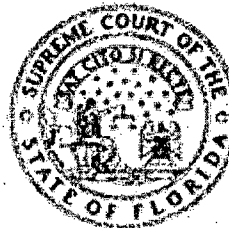
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Test:



John A. Tomasino

Clerk, Supreme Court



CASE NO.: SC22-531

Page Two

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Served:

REBECCA ROCK MCGUIGAN

MICHAEL D. PHILLIPS

HON. LAURA E. ROTH, CLERK

HON. SANDRA B. WILLIAMS, CLERK

HON. MATTHEW M. FOXMAN, JUDGE