

SUPREME COURT OF FLORIDA

Troy Merck, Jr. v. State of Florida

Merck · No. SC19-1864 · Decided July 9, 2020

SUMMARY

The Supreme Court of Florida affirmed the summary dismissal of Troy Merck, Jr.’s third successive postconviction motion. The court held that the record conclusively refuted Merck’s claim under McCoy v. Louisiana because trial counsel had not conceded his guilt by advancing a voluntary-intoxication defense.

CASE DETAILS

COURT	Supreme Court of Florida
WRITING FOR THE COURT	Per Curiam; Chief Justice Canady; Justice Polston; Justice Labarga; Justice Lawson; Justice Muñoz; Justice Curiel
JURISDICTION	Florida
DECIDED	July 9, 2020
DOCKET	SC19-1864
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the summary dismissal of Merck's third successive postconviction motion under Florida Rule of Criminal Procedure 3.851.
STANDARD OF REVIEW	Summary dismissal of a postconviction motion is reviewed de novo.
PRECEDENTIAL VALUE	Published Florida Supreme Court per curiam opinion; precedential value subject to the court's rules and any later treatment.
PARTIES	Troy Merck, Jr. v. State of Florida

TOPICS

- state post-conviction relief
- successive petitions
- sixth amendment
- right to counsel
- appellate procedure

PRACTICE AREAS

- criminal postconviction
- capital punishment
- criminal procedure
- constitutional law
- appellate procedure

QUESTIONS PRESENTED

1. Whether the circuit court properly summarily dismissed Merck's third successive postconviction motion alleging that trial counsel violated *McCoy v. Louisiana* by conceding guilt over Merck's asserted objective of maintaining actual innocence.
2. Whether the Supreme Court needed to decide whether Merck's successive motion was timely under Florida Rule of Criminal Procedure 3.851(d)(2)(B).

HOLDINGS

1. Summary dismissal was proper because the record conclusively refuted Merck's allegation that trial counsel conceded his guilt when presenting the voluntary-intoxication theory.

KEY QUOTATIONS

“Trial counsel’s concession of the defendant’s guilt is central to McCoy.” (-3-)

“In Merck’s case, as we have previously held, trial counsel “never admitted Merck’s guilt in advancing the intoxication theory.”” (-3-)

“Because the record conclusively establishes that Merck is not entitled to relief, we affirm the circuit court’s order.” (-3-)

FACTUAL BACKGROUND

Merck was convicted of first-degree murder in 1993 and ultimately received a death sentence after three penalty phases. In his third successive postconviction motion, he alleged that appointed trial counsel violated his Sixth Amendment rights by refusing to pursue Merck's asserted objective of actual innocence and instead arguing voluntary intoxication, which Merck characterized as a concession of guilt. The Supreme Court concluded that the trial record conclusively established that counsel never admitted Merck's guilt in advancing the intoxication theory.

PROCEDURAL HISTORY

Merck was convicted of first-degree murder and sentenced to death after three penalty phases. The Florida Supreme Court affirmed his conviction and sentence-related proceedings, affirmed the denial of his initial postconviction motion and habeas petition, and affirmed the denial of his first successive postconviction motion. Merck then filed a third successive motion asserting that trial counsel violated the Sixth Amendment under *McCoy v. Louisiana* by conceding guilt while Merck maintained an actual-innocence defense. The circuit court summarily dismissed the motion as untimely, and the Supreme Court of Florida affirmed on the alternative ground that the record conclusively refuted the alleged concession of guilt.

DISPOSITION

affirmed

CASES CITED

- *Merck v. State* (Merck I), 664 So. 2d 939, 940 (Fla. 1995)

- Merck v. State (Merck II), 763 So. 2d 295, 296 (Fla. 2000)
- Merck v. State (Merck III), 975 So. 2d 1054, 1058-59 (Fla. 2007)
- Merck v. Florida, 555 U.S. 840 (2008)
- Merck v. State (Merck IV), 124 So. 3d 785, 790, 794 (Fla. 2013)
- Merck v. State (Merck V), 260 So. 3d 184, 188 & n.1 (Fla. 2018)
- Hurst v. Florida, 136 S. Ct. 616 (2016)
- Hurst v. State, 202 So. 3d 40 (Fla. 2016)
- State v. Poole, 45 Fla. L. Weekly S41 (Fla. Jan. 23, 2020), clarified, 45 Fla. L. Weekly S121 (Fla. Apr. 2, 2020)
- McCoy v. Louisiana, 138 S. Ct. 1500, 1507, 1509 (2018)
- Dailey v. State, 279 So. 3d 1208, 1215 (Fla. 2019)
- Gardner v. State, 480 So. 2d 91, 92 (Fla. 1985)

OPINION

Troy Merck, Jr. v. State of Florida

PER CURIAM.

Supreme Court of Florida _____ No. SC19-1864 _____

TROY MERCK, JR.,

Appellant, vs.

STATE OF FLORIDA,

Appellee. July 9, 2020 PER CURIAM. Troy Merck, Jr., appeals the circuit court's order summarily dismissing his successive postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons below, we affirm.

BACKGROUND

In 1993, Merck was convicted of the first-degree murder of James Newton and sentenced to death. Merck v. State (Merck I), 664 So. 2d 939, 940 (Fla. 1995). We affirmed Merck's conviction on direct appeal but remanded for resentencing at a new penalty phase. Merck, 664 So. 2d at 944. Upon resentencing in 1997, Merck was again sentenced to death. Merck v. State (Merck II), 763 So. 2d 295, 296 (Fla. 2000). However, we again remanded for a new penalty phase and resentencing on direct appeal from the resentencing. *Id.* At Merck's third penalty phase in 2004, he was sentenced to death, and this Court affirmed. Merck v. State (Merck III), 975 So. 2d 1054, 1058-59 (Fla. 2007), cert. denied, Merck v. Florida, 555 U.S. 840 (2008). We have since affirmed the denial of Merck's initial motion for postconviction relief and denied his accompanying petition for writ of habeas corpus. Merck v. State (Merck IV), 124 So. 3d 785, 790 (Fla. 2013). Most recently, we have affirmed the denial of Merck's first successive motion for postconviction relief. Merck v. State (Merck V), 260 So. 3d 184, 188 (Fla. 2018). While Merck V was pending, Merck filed his second successive postconviction motion seeking relief from his sentence of death

pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), receded from in part by *State v. Poole*, 45 Fla. L. Weekly S41 (Fla. Jan. 23, 2020), clarified, 45 Fla. L. Weekly S121 (Fla. Apr. 2, 2020), which the circuit court granted in 2017. Although the State initially appealed the circuit court’s order, it voluntarily dismissed the appeal. Accordingly, this Court never reviewed the propriety of that order, which is now final. However, in *Merck V*, we held that the fact that Merck is awaiting resentencing does not deprive this Court of jurisdiction -2- over postconviction challenges to Merck’s “capital conviction for which a sentence of death was imposed.” *Merck V*, 260 So. 3d at 188 & n.1. At issue in this appeal is Merck’s third successive motion for postconviction relief, which he filed on May 10, 2019. In that motion, Merck argued that his conviction violates the Sixth Amendment pursuant to the United States Supreme Court’s decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), because his appointed trial counsel refused to abide by Merck’s asserted objective of defense— actual innocence—and instead conceded Merck’s guilt at trial by arguing the defense of voluntary intoxication.¹ The circuit court dismissed Merck’s claim as untimely under rule 3.851(d)(2)(B) and in so doing stated that “even if Merck’s motion was timely filed, it likely would have been denied as without merit.”

ANALYSIS

We review the summary dismissal de novo, see *Dailey v. State*, 279 So. 3d 1208, 1215 (Fla. 2019), and affirm because the record conclusively refutes Merck’s allegation that trial counsel conceded Merck’s guilt at trial. Trial counsel’s concession of the defendant’s guilt is central to *McCoy*. See *McCoy*, 138 S. Ct. at 1507, 1509 (addressing the issue of “whether it is unconstitutional to

1. At the time of Merck’s trial, voluntary intoxication was a defense to specific-intent crimes. See *Gardner v. State*, 480 So. 2d 91, 92 (Fla. 1985). The Legislature has since abrogated this defense. § 775.051, Fla. Stat. (2019); ch. 99- 174, § 1, Laws of Fla. (creating section 775.051, effective October 1, 1999). -3- allow defense counsel to concede guilt over the defendant’s intransigent and unambiguous objection” and holding that if a defendant “expressly asserts that the objective of ‘his defence’ is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt” (quoting U.S. Const. amend. VI)). In Merck’s case, as we have previously held, trial counsel “never admitted Merck’s guilt in advancing the intoxication theory.” *Merck IV*, 124 So. 3d at 794. Because the record conclusively establishes that Merck is not entitled to relief, we affirm the circuit court’s order. It is therefore unnecessary to address the circuit court’s ruling that Merck’s motion was untimely under rule 3.851(d)(2)(B).

CONCLUSION

For the foregoing reasons, we affirm the circuit court’s order dismissing Merck’s successive postconviction motion. It is so ordered. CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, and COURIEL, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND,

IF FILED, DETERMINED. An Appeal from the Circuit Court in and for Pinellas County, Nancy

Moate Ley, Judge - Case No. 521991CF016659XXXXNO Linda McDermott of McClain & McDermott, P.A., Estero, Florida, for Appellant -4- Ashley Moody, Attorney General, Tallahassee, Florida, and Stephen D. Ake, Senior Assistant Attorney General, Tampa, Florida, for Appellee -5-

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