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IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR.,

Appellant,

v. CASE NO. 80,176

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee rejects Zeigler's statement regarding the evidentiary hearing found at pages 8-9 of the Initial Brief and Zeigler's Statement of Facts found at pages 10-14 of the Initial Brief as they contain no record citations and contain argument. For purposes of its Answer Brief, appellee will rely on the following facts:

This is Zeigler's third post conviction proceeding pursuant to Florida Rule of Criminal Procedure 3.850; this court affirmed the denial of his first motion in 1984 and 1985 and affirmed the denial of his second motion in 1986. *Zeigler v. State,* 452 So.2d 5237 (Fla. 1984); *Zeigler v. State,* 473 So.2d 203 (Fla. 1985); *State v. Zeigler,* 494 So.2d 957 (Fla. 1986).

Zeigler filed the first of the three motions in this third proceeding on September 14, 1988 (R 331-451). In this motion Zeigler presented three claims; he alleged that the state (1) failed to disclose the identity of witnesses, (2) failed to disclose an investigator's report and tape recording of a witness interview, and (3) repeatedly suppressed material and exculpatory evidence.

Zeigler filed an amended motion to vacate on October 20, 1989 (R 452-602). Zeigler added an additional allegation to claim one that the state had suppressed additional witnesses (R 462). Zeigler added an additional allegation to claim two that the state withheld a thirteen page report written by Chief Thompson (R 470). The former claim three became claim four, and claim three now alleged that the state fabricated evidence (R 473).

The state filed a motion for final disposition of the motion on November 8, 1991 (R 604-12). The state contended that all claims in the first motion were untimely and successive and that claims one, two and four of the amended petition were untimely and successive (R 602-12). The state requested the court set claim three for an evidentiary hearing to determine whether the facts could have been timely discovered through the exercise of due diligence and if so whether the facts were true and would have materially affected the outcome (R 610).

Zeigler filed a second amended motion to vacate on March 5, 1992 (R 624-78). Zeigler added a claim five, alleging that the trial judge tainted the jury deliberations (R 669-74). Zeigler also alleged, for the first time, that the facts underlying his claims could not have been discovered through the exercise of due diligence (R 634-35). Zeigler stated that claims three and five were based on evidence uncovered only because third parties possessing the knowledge stepped forward after a 1989 television program (R 635). Zeigler stated that claims one and two were based on evidence found in the State Attorney file and he was excused from any default because the state actively concealed this information (R 635). Zeigler stated that claim four was based on both groups of evidence (R 635).

On April 4, 1992, the trial court entered an order partially denying Zeigler's motions (R 736-37). The trial court found that all but the fabricated evidence claims were untimely and filed in a successive petition (R 737).[1] An evidentiary hearing was scheduled for May 27, 1992 (R 737).

At the hearing, Zeigler presented the testimony of two of the inmate/trustees who were present when the orange grove was searched. Bulled could not remember how many days he was out in the orange grove; he thinks it was two but was told it was three so thinks it was three but in any event he was pretty sure it was more than one (R 26). Bulled testified that no bullets were found while he was out there, but one could have been found and he did not see it (R 44, 57-58).

Bulled was resentful of having to come back to testify due to his prior treatment in the State of Florida (R 44). When this case first originated, the State authorized some underhanded tactics when Bulled was incarcerated (R 51-52). Bulled keeps a record of all state officials who have ever threatened him (R 52-53). The Attorney General's Office had something to do with his deportation in 1991, although it was INS who actually made the move (R 54). Bulled was acting as a clerk for death row inmates and the Attorney General's Office and the State Attorney did not appreciate him "stirring it up" (R 55-56).

Bulled was framed in 1975-76; in the State of Florida if they get you once they keep coming at you (R 61, 70). Bulled sued the Orange County Sheriff's Office in 1980 or 1981; he accused that office of fabricating evidence against him (R 70-71). Bulled was deported in 1976, but returned to this country in 1979 and was here through 1991 (R 59). Bulled's family, which

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[1] The trial court had previously entered an order partially denying relief but had not addressed claim five (R 703-04).

has the same last name as him, lived in the area and knew where he could be found from 1977-79 (R 59).

On direct examination, Beverly testified that the officers were "tired of looking for a lost string" (R 86). An officer walked up and as the dirt went into the shaker he said "there it is", and "it come from the palm of his hand into the shaker" (R 87). The officer reached right back down and picked it right back up (R 88). On cross examination, Beverly stated that "the guy picked up the shovel, and put it in there. And he like picked his hand up and was like going down. The bullet came from his hand to the dirt and he reached from his hand straight to pick the bullet up" (R 99). Beverly stated that he did not know where the person got the bullet from, and then agreed that he took it out of his pocket (R 100). Beverly could not remember what this person looked like (R 100). Beverly has lived in Orange County and been available since 1976 (R 98).

The trial court orally denied the motion at the conclusion of the hearing, and signed a written order denying the motion on June 8, 1992 (R 265-67, 766-69). The trial court stated that neither witness was worthy of belief; Bulled showed a clear bias against the Orange County Sheriff's Office and Beverly had poor recollection (R 264-65). The trial court further stated that both witnesses had been available and that due diligence had not been exercised (R 266-67). The trial court incorporated its former order summarily denying the other claims, and found that claim 3 was procedurally barred as untimely, procedurally barred as unlawfully successive, and alternatively, that the claim was not established as a matter of fact (R 768).

SUMMARY OF ARGUMENT

POINT 1: The trial court correctly found that claim five was procedurally barred. Zeigler raised similar claims on direct appeal and in prior motions for post conviction relief. Raising a different argument to relitigate a claim previously rejected on direct appeal is improper. Zeigler's assertion that he could not have discovered these facts since he was precluded from interviewing jurors is not sufficient to overcome the procedural bar. Even if the claim was cognizable, relief would not be warranted.

POINT 2: The trial court correctly found Zeigler's remaining claims procedurally barred. The record supports the trial court's finding that Zeigler failed to demonstrate that the factual basis for these claims could not have been discovered by the exercise of due diligence.

POINT 3: The trial court's alternative ruling that claim three was not established as a matter of fact is fully supported by the record. It is not the duty of an appellate court to reweigh the evidence, and an appellate court should not substitute its judgment for that of the trial judge who heard the pertinent testimony.

POINT 1

THE TRIAL COURT CORRECTLY FOUND THAT ZEIGLER'S CLAIM FIVE WAS PROCEDURALLY BARRED AND THAT NEITHER A HEARING NOR RELIEF WAS WARRANTED.

In Zeigler's second amended motion for post conviction relief, which was filed in 1992 in this *third* proceeding, he alleged, on the basis of a 1989 television show, that:

> 86. At a time not known to Mr. Zeigler or his counsel, the trial judge telephoned Juror Brickel's physician and persuaded him to prescribe valium for her over the telephone.

(R 670). Zeigler noted that approximately two hours after the hearing on this juror's "difficulties", the jury returned its verdict (R 670). Zeigler claimed that he was entitled to a hearing to ascertain the truth of these allegations, and if the facts bore out the truth, his convictions should be set aside (R 674). The trial court found:

> Ground V of the Second Amended Motion relating to the alleged intoxication of a juror has previously been litigated and rejected on direct appeal and in the Defendant's first Motion for Post Conviction Relief. The allegation of "newly discovered evidence" is not sufficient to warrant the relief requested.

(R 737). Zeigler now contends that the trial court erred as a matter of law in determining that this claim had previously been adjudicated, and that he could not learn of the facts previously because he has been enjoined from interviewing jurors since the trial in 1976.

On direct appeal, Zeigler "question[ed] the propriety of numerous consultations prior to the rendition of the verdict among the court, attorneys, bailiffs, clerk, nurse and a juror". *Zeigler v. State,* 402 So.2d 365, 374 (Fla. 1981). This court determined that the trial judge's actions demonstrated the exercise of sound discretion. *Id.* In his first motion for post conviction relief, Zeigler alleged that the jury deliberations were tainted by undue pressure from the trial judge and by the

use of intoxicants. This court found the claim either was or should have been raised on direct appeal and was not cognizable under Rule 3.850. *Zeigler v. State,* 452 So.2d 537 (Fla. 1984). In his second motion for post conviction relief, Zeigler alleged that as a result of serious prejudicial jury misconduct involving racial bias and coercion he was denied the right to a fair trial by an impartial jury. This court found that this was a successive petition and the record supported the denial of all relief. *State v. Zeigler,* 494 So.2d 957 (Fla. 1986).

Appellee contends that the trial court correctly denied relief. Post conviction proceedings are not to be used as a second appeal, and matters which were raised or could have been raised in the original appeal cannot again be raised in a 3.850 motion. *King v. State,* 597 So.2d 780 (Fla. 1992). Raising a different argument in a motion to vacate sentence in order to relitigate an issue raised and rejected on direct appeal is inappropriate. *Brown v. State,* 596 So.2d 1026 (Fla. 1992). Further, this is a successive petition which was filed well beyond the time limit, so any claims raised in it are further barred. *Spaziano v. State,* 570 So.2d 289 (Fla. 1990). Finally, appellee would note that the instant claim was not raised until more than two years after these alleged "new facts" were discovered.[2] Pursuant to *Adams v. State,* 543 So.2d 1244 (Fla. 1989), all post conviction motions filed after June 30, 1989 which are based on new facts must be filed within two years from

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[2] Zeigler alleged that this claim is based on evidence uncovered only because third parties possessing the knowledge stepped forth in 1989 as a result of a television program (R 635).

the date the facts became known. Since Zeigler "discovered" the facts supporting this claim in 1989 but did not raise it until 1992, it is clearly barred.

Zeigler's assertion that he could not have discovered these facts since he was precluded from interviewing the jurors is not sufficient to overcome the procedural bar.[3] Appellee would first point out that Zeigler's allegations concern actions of the trial judge and the juror's doctor, which the jurors would have no knowledge of, and even if they did any testimony regarding those actions would be inadmissible hearsay. Zeigler has never been precluded from speaking to the trial judge or the doctor, who are the only people who would have first hand knowledge if this occurred, and has never alleged that he attempted to speak to these people on this issue and was precluded from doing so.

Finally, appellee contends that even if the claim was cognizable, neither a hearing nor relief would be required since the allegations are simply too incredible to have ever occurred. The record demonstrates the trial court took extreme care to avoid any solo contact with the juror and to put every action on the record (R 2705-2759). It is simply not possible that in a span of two hours time, while the juror at issue was deliberating, the trial court was somehow able to obtain the name of her private physician, contact the physician, somehow obtain a

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[3] It is not clear exactly how these "facts" came to Zeigler's attention, other than something about a television show. Appellee contends that Zeigler's allegations about a "television show" and maybe some phantom winess are insufficient and far to speculative to warrant further consideration, and for this reason as well the trial court was correct in finding the claim barred.

prescription for Valium, get the prescription filled, get the pills to the juror in deliberations, and the juror become "intoxicated".

POINT 2

THE TRIAL COURT CORRECTLY FOUND ZEIGLER'S REMAINING CLAIMS PROCEDURALLY BARRED.

Zeigler contends that the trial court erred as a matter of law and fact in finding that claims one through four were procedurally barred. In claim one, Zeigler alleged that the state failed to disclose the identity of known witnesses, (specifically the Jellison family which had been staying at a motel behind the crime scene, and the Roaches who had driven by the crime scene), whose testimony did not fit the state's theory of the case. In claim two, Zeigler alleged that the state withheld Chief Thompson's thirteen page report, summaries of witness statements by Detective Frye, and an interview with Frank Smith, which was mentioned in the Frye report. In claim three, Zeigler alleged that the state had fabricated evidence, specifically, the bullet that had been found in the orange grove. In claim four, Zeigler set forth a variety of allegations, all of which allegedly demonstrated a pattern of misconduct by the state. The trial court found that all of the claims were procedurally barred as untimely and successive (R 736-37, 766-69). The trial court further found that Zeigler had failed to demonstrate that the factual basis for these claims could not have been discovered by the exercise of due diligence prior to the expiration of the time limits. *Id.* The trial court's ruling is supported by the record.

Zeigler first contends that he was unable to discover the facts underlying claim three until they were revealed to him by a third party. While Zeigler states that "it is undisputed that appellant was actually unaware of the facts underlying Claim III until his counsel learned those facts from a third party in 1989," (IB 22), the issue is whether counsel *could have been aware* of those facts through the exercise of due diligence. Fla. R. Crim. P. 3.850. The trial court specifically found that Zeigler had not exercised due diligence (R 767), and that finding is fully supported by the record.

The names of the inmate/trustees that assisted in the search of the orange grove were disclosed to the defense prior to trial (R 171, 223). Defense counsel testified at the hearing that he gave the list of names to one of his investigators, but the investigator told him that the witness at the chicken farm (Bulled) had been deported (R 227-28). Significantly, while defense counsel testified that he assumed that the bullet in the orange grove had been planted (R 243), no further investigation of this matter was ever pursued until Bulled contacted the attorney in 1989 (R 229).

While Bulled was deported in 1976, he returned to this country in 1979 and was here through 1991 (R 59). Bulled's family, which has the same last name as him, lived in the area and knew where he could be found from 1977-79 (R 59). Johnny Beverly, the other former inmate who testified at the hearing, has lived in Orange County and been available since 1976 (R 98). Thus, the record reflects that had counsel exercised due

diligence, the facts underlying this claim may well have been discovered prior to trial, and certainly could have been discovered at the time Zeigler filed his first and second motions for post conviction relief.[4] The trial court correctly found this claim procedurally barred as untimely and successive.

Zeigler next alleges that he was unable to discover the facts underlying claims one and two due to the misconduct of the state. Zeigler claims that former counsel examined the state attorney's files in 1982, but did not find any of the materials forming the basis of claims one and two. Zeigler therefore asserts that the state is estopped from asserting the time bar due to its affirmative misconduct, and alternatively, that he may be excused from his default on the basis of futility since several state attorney's offices, including Orange County,[5] had invoked exceptions to the Public Records Law.

Pursuant to Florida Rule of Criminal Procedure 3.850, Zeigler had until January 1, 1987 in which to file a motion for post conviction relief. Zeigler filed two motions prior to that time. The instant "facts" were not even investigated until

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[4] Zeigler contends that to the extent that counsel should have discovered this and did not, ineffective assistance was rendered. This was never alleged in the trial court, so it is not cognizable on appeal. *Doyle v. State,* 526 So.2d 909 (Fla. 1988). Further, since there is no right to counsel in post conviction proceedings, this would not be sufficient to excuse the default. *See, e.g., Coleman v. Thompson,* 111 S.Ct. 2546 (1991).

[5] Zeigler cites to *Provenzano v. Dugger,* 561 So.2d 541 (Fla. 1990), which occurred in Orange County, but was prosecuted by the State Attorney's Office in Duval County. There is nothing in this record to support Zeigler's allegation that the Orange County State Attorney's Office ever utilized any public record exceptions, and certainly nothing to demonstrate that any exceptions were ever cl;aimed in this case.

April, 1987, which is beyond the time limitations. Zeigler has made no attempt to demonstrate why this investigation was not done before the outer time limit expired, so the trial court correctly found that the claims were procedurally barred and successive. *Demps v. State,* 515 So.2d 196 (Fla. 1987); *Agan v. State,* 560 So.2d 222 (Fla. 1990). Appellee would also point out that defense counsel knew of the existence of Detective Frye's report prior to trial (R 347), which Zeigler claims was recently discovered, so any claims relating to it could have been litigated at trial, on direct appeal, or in the first post conviction motion. Appellee contends that this includes any derivative information contained in the Frye report, such as the existence of the Smith interview. In addition, counsel was aware that Frank Smith had been contacted by the Orange County Sheriff's Department on January 21, 1976 (TR 1380), had also deposed Smith, so certainly should have been aware of any "statement" that he gave to the police. Finally, while Zeigler alleges that he found the Thompson report in April, 1987, he did not raise this claim until October, 1989, so it is clearly time barred. *Adams, supra.*

Even if these claims were cognizable, relief would not be warranted in any event. Claim one involves a statement from Jon Jellison, who with his parents and sister was staying at the motel behind the Zeigler furniture store where the murders occurred. Zeigler also makes reference to statements by the Roaches, who apparently drove by the store the night of the murder. Appellee would first point out that the Roach issue was

presented as claim four in Zeigler's second motion for post conviction relief, and found to be barred. *State v. Zeigler,* 494 So.2d 957 (Fla. 1986) (Appendix 1).

In order to prevail on a claim pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963), a defendant must establish:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So.2d 170, 172 (Fla. 1991). Further, the state is not required to make a complete and detailed accounting to the defense of all police investigatory work on a case. *Spaziano v. State,* 570 So.2d 289 (Fla. 1990).

Zeigler has failed to demonstrate that the Jellison information was material in any way. Zeigler alleged that it would have undermined the state's timing theory, that it would have contradicted Chief Thompson's testimony that he was the first to arrive, and that it was irreconcilable with the state's position that no shots were fired after the police arrived. Zeigler has apparently overlooked his own statements and trial testimony, which are also completely at odds with Mr. Jellison's statement. Zeigler maintained that his wife and in-laws were murdered during the course of a robbery, that Mays was involved in the robbery but was killed by his confederates, and Zeigler was shot by the burglars and left to die. *Zeigler v. State,* 402

So.2d 365 (Fla. 1981). Zeigler then contacted the police by calling a friend's home, and Chief Thompson arrived and took him to the hospital. Appellee contends that Zeigler in no way demonstrated how the Jellison statement would have affected the outcome of the trial, and it could not have since it is not even consistent with Zeigler's version of events. *See, Hegwood, supra.* Appellee would also point out that Zeigler never alleged that he would have called any of the Jellisons had he known about them nor has he demonstrated how their testimony would have fit into his theory of defense.

Likewise, Zeigler failed to demonstrate materiality with regard to any of the allegations set forth in claim two. As to the Thompson report, Zeigler alleged that he could have impeached Thompson's trial testimony that he observed damp blood on Zeigler, since the report states that he observed only dry blood (R 471, 649). Both reports state that Zeigler was in a "bloody" or "bloodied" condition (R 515, 519); there simply are no material inconsistencies between the two statements. Further, it would hardly have been effective impeachment that a man who claimed he was recently shot, as Zeigler had, had only dry blood on him. Consequently, the evidence carries little impeachment value and is not otherwise exculpatory in nature. *Mendyk v. State,* 592 So.2d 1076 (Fla. 1992).

Zeigler has failed to demonstrate that he was even entitled to the witness summaries contained in the Frye report, and the state contends he was not since the statements themselves were disclosed and any derivative work product based on them was not

subject to disclosure. Even if Zeigler was entitled to the investigating officer's work product, he has failed to demonstrate materiality. Appellee contends that there is no way that these witnesses could have been impeached with another person's interpretation of their statements. *See, Spaziano, supra* (investigator's notes are no more than investigator's inferences drawn from his investigation, and not admissible evidence). In any event, the alleged inconsistencies set forth in Zeigler's motion certainly would not have affected the outcome of this case, as they are minimal at best (R 472, n. 10).[6] *See, Thompson v. State,* 553 So.2d 153 (Fla. 1989).

Likewise, Zeigler has failed to allege or demonstrate materiality with regard to the Smith interview. Zeigler simply alleged that it "could well have contained impeachment evidence useful to the defense" (R 348, 472, 653). Such allegation falls far short of a demonstration that there is a reasonable probability that the outcome of the proceedings would have been different. *Swafford v. Dugger,* 569 So.2d 1254 (Fla. 1990). Further, Smith was impeached with his prior deposition testimony (TR 1372-85).

The allegations set forth in claim four are clearly procedurally barred and will not be addressed any further. Every citation contained in the claim is from the trial record. A review of Zeigler's first motion for post conviction relief demonstrates that the same claims were presented there and were

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[6] Zeigler alleged one minor inconsistency in Thomas' testimony and one in William's testimony, neither of which relate to major issues.

found procedurally barred (Appendix 2); *Zeigler v. State,* 452 So.2d 537 (Fla. 1984). The trial court was correct in summarily denying relief on claims one through four.

POINT 3

THE TRIAL COURT'S ALTERNATIVE RULING THAT CLAIM THREE WAS NOT ESTABLISHED AS A MATTER OF FACT IS FULLY SUPPORTED BY THE RECORD.

Zeigler contends that the trial court's denial of a new trial is clearly erroneous and contrary to the weight of the evidence. Appellee would first point out that it is not the duty of the appellate court to reweigh the evidence, and an appellate court should not substitute its judgment for that of the trial judge who has personally heard the pertinent testimony. *State v. Sireci,* 536 So.2d 231 (Fla. 1988).

Zeigler first claims that he was denied a full and fair opportunity to litigate the state's misconduct;[7] he claims he sought to uncover and present evidence that there was pressure to obtain a conviction and that Felton Thomas was never present in the orange grove. As the state pointed out, Zeigler never included any allegations regarding Thomas in his motion for post conviction relief, so the trial court properly declined to hear evidence on this issues (R 318). Likewise, there was no

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[7] Throughout his motions and brief, Zeigler asserts that the state pressured witnesses to change testimony, concealed exculpatory evidence, and engaged in other misconduct to secure his conviction. As demonstrated, there is no support for any of these allegations. It must be remembered that Zeigler refused to waive speedy trial in this case, so the state was just as pressed as Zeigler to get its case together. Considering the number of witnesses involved and the amount of evidence, the state would hardly have time to "wilfully suppress" any of it.

demonstration that the facts surrounding the this claim could not have been discovered previously through the exercise of due diligence. Further, Zeigler never sought to proffer any of this alleged evidence either at the hearing or in writing, so the state contends that any such claim is waived as it is far too speculative to review on appeal. *See, Lucas v. State,* 568 So.2d 1822 (Fla. 1990).

Zeigler next contends that the trial court's credibility determination is contrary to the weight of the evidence. Zeigler states that contrary to the trial court's finding, Bulled did not state a bias against Orange County, but named a specific law enforcement officer. The record demonstrates that Bulled has a bias against virtually every law enforcement institution and agency in the State of Florida.

Bulled was resentful of coming back to testify

> because I suffered double jeopardy in this state and that was a moot point which I don't want to go into, but I felt I shouldn't have been deported from this state after I paid my penalty to society. And I felt I shouldn't have been deported. And they sought enhanced punishment on me and deported me.

(R 44). In addition,

> ...when this case first originated, I did suffer some repercussions from the State, to be quite frank. Not you personally, but the State authorized some underhanded tactics when I was incarcerated.
>
> * * *
>
> A. The fact of the matter was they told me, you know, certain officials right in the state had received word from State Attorney and that it's best to my interest not to pursue this case.

(R 51-52). Bulled keeps a record of all state officials who have ever threatened him, which he provided to Zeigler's attorney (R 52-53). Apparently some of those state officials who "have it in" for Bulled are with the Attorney Generals' Office, as that office had something to do with his deportation in 1991, although it was INS that actually made the move (R 54). Bulled was acting as a clerk for death row inmates and the Attorney General's Office and the State Attorney did not appreciate Bulled "stirring it up" (R 55-56).

Bulled was framed in 1975-76; in the State of Florida if they get you once, they're going to keep coming at you (R 61, 70). Bulled sued the Orange County Sheriff's Office in 1980 or 1981; he accused that office of fabricating evidence against him (R 70-71). The record clearly supports the trial court's finding that Bulled was not a credible witness.

What is even more significant than the fact that Bulled is totally incredible is the fact that he gave no testimony whatsoever in support of Zeigler's claim. Bulled could not remember how many days he was out in the orange grove (he thinks it was two but was told it was three so he thinks it was three but in any event he was pretty sure that it was more than one) (R 26). Bulled testified that no bullets were found while he was out there, but one could have been found and he did not see it (R 44, 57-58). Thus, Bullet had no knowledge of the state "planting" evidence. *See,* §90.604, Fla. Stat. (1991).

The record also demonstrates that, contrary to Zeigler's assertions, Beverly's memory was far from "sharp and precise with

regard to the details that form appellant's claim" (IB 35). On direct examination, Beverly testified that the officers were "tired of looking for a lost string" (R 86). An officer walked up and as the dirt went into the shaker he said "there it is", and "it come from the palm of his hand into the shaker" (R 87). The officer reached right back down and picked it right back up (R 88). On cross examination, Beverly stated that "the guy picked up the shovel, and put it in there. And he like picked his hand up and was like going down. The bullet came from his hand to the dirt and he reached from his hand straight to pick the bullet up" (R 99). Beverly stated that he did not know where the person got the bullet from, and then agreed that he took it out of his pocket (R 100). Beverly could not remember what this person looked like (R 100).

The record supports the trial court's credibility (or lack thereof) determination in this case. A comparison of the two former inmates' testimony shows that, contrary to Zeigler's assertions, there is virtually no consistency between Bulled's and Beverly's account. Most significantly, as stated, Bulled testified that no bullet was ever found while he was there.

Zeigler next claims that the trial court's "ultimate conclusion" conflicts with the great weight of the evidence. Appellee would first point out that contrary to Zeigler's allegation, the state never "actively concealed the identity of the inmate/trustys" until the last possible moment; the witnesses were disclosed prior to trial and if the defense had a serious problem with the timing it should have alleged and litigated a

discovery violation. Likewise, contrary to Zeigler's allegation, there are no documents which "cast a suspicious pale over the 'discovery' of the bullet" (IB 38), and the state provided a perfectly reasonable explanation for the dates involved. Alton Evans testified that it would not have been unusual for him to hold the evidence for three days, as long as it was secured, and he had a place to secure evidence at that time (R 140). There was nothing in the documents submitted to demonstrate that Bryan held the evidence for three days (R 144).

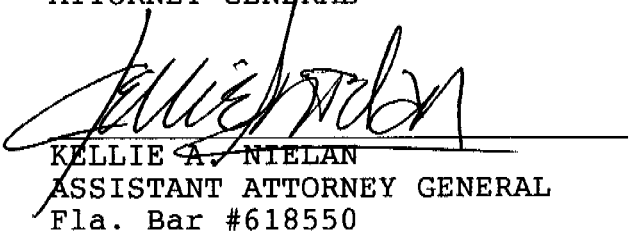
Zeigler also faults the trial court for relying on sixteen year old testimony as opposed to sixteen year old memories. The sixteen year old testimony occurred approximately five months after the events occurred; the instant testimony is based on sixteen year old recollections arrived at after discussions with Zeigler's attorneys. It is within the trial court's discretion to find the state's witnesses more credible than the defenses'. *Kight v. Dugger,* 574 So.2d 1066 (Fla. 1990). The trial court did not abuse its discretion in rejecting the testimony of Bulled, who had no knowledge of the facts supporting the claim and who clearly was biased against law enforcement, or in rejecting the testimony of Beverly, whose recollection was far from clear.

CONCLUSION

Based on the foregoing arguments and authorities, appellee requests this court affirm the trial court's denial of Zeigler's third motion for post conviction relief in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Dennis H. Tracey, III, and John Houston Pope, 100 Park Avenue, New York, NY 10017, this 21st day of December, 1992.

KELLIE A. NIELAN
Of Counsel