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ALA COURT CRIMINAL APPEALS

C.R.-03-1163

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

RONALD SWINEY)
)
Appellant)
)
vs,)
)
STATE OF ALABAMA)
)
Appellee)

On Appeal From The
CIRCUIT COURT OF SHELBY COUNTY, ALABAMA
Case No. CC88-77.61

APPELLANT'S REPLY BRIEF AND ARGUMENT

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SUMMARY OF THE ARGUMENT

Patrick Swiney concedes that there are circumstances, without listing every circumstance, where dismissal of a Rule 32 petition without a hearing is warranted, and is a matter of judicial discretion. These include, but are not limited to, cases where the Rule 32 petition is before the court, but without the filing fee being paid, or there has been a ruling finding the petitioner to be indigent. Other Rule 32 petitions that are procedurally proper are due to be summarily dismissed because the Rule 32 petition has no merit. This conclusion of the petition being without merit can be based upon the complete lack of evidence to support the pleadings contained in the Rule 32 petition, or where the trial judge has personal knowledge of the contents of the petition, and this knowledge leads to a well founded conclusion that the petition has no merit.

The Rule 32 petition in this case was summarily denied, without there being an evidentiary basis for the denial, or the basis of denial being the personal knowledge of the trial judge.

There is evidence in the form of the affidavit of a properly qualified expert that the evidence in this case can

be tested, and that the result of the testing can prove the actual innocence of Patrick Swiney. The State argues that the test that can prove the actual innocence of Patrick Swiney is not new, but is an old test. The expert for Patrick Swiney gives testimony by affidavit that the materials, procedures, and equipment used in the "new" test are in fact, new. The expert for the State on the one hand states in his affidavit that the "new" test is not new at all, but is old science, even though the State Department of Forensic Sciences does not have the capability of performing this test at this time. Additionally, the expert employed by the State Department of Forensic Sciences declares that the test is so new as to lack acceptance by the general scientific community.

There is testimony by affidavit as to whether the "new" test is in fact, capable of producing newly discovered evidence. There is a considerable and facially irreconcilable difference of opinion in the affidavits of the experts for Patrick Swiney, and for the State.

Evidence from the trial, in the form of the rifle, bullets, and other materials still exists in an evidence locker, and can be subjected to the "new" test. The "new"

test, whatever the outcome, would be conclusive. The results of the "new" test would, in the first alternative, prove that it was physically, scientifically, and actually impossible for Patrick Swiney to have fired the weapon that killed the victims in this case. The second alternative would be that the "new" test would prove that Patrick Swiney did in fact fire the rifle that killed the victims in this case.

The "new" test using similar materials proves that Patrick Swiney could not have fired the weapon that killed the victims in this case. Patrick Swiney has been denied permission to perform the "new" test using the rifle, bullets, and materials which are stored in an evidence locker and can be tested.

The State performed scientific tests on the bullet, rifle, and materials before the trial of the case. The State testified that testing had been performed and the results were inconclusive. However the State experts did not reveal that the test that was performed tested for trace elements that had not been used in the bullets fired by the rifle, and that there was nothing for the "old" test to discover. The State knew in advance that their test was a

sham, but that information was suppressed, the information was material, and if defense counsel and the jury had known that the test performed by the State Forensics Laboratory was a sham, it is reasonable to expect that the outcome of the case would have been different.

The State did not brief on the issues of that it was error for the trial Court to dismiss Patrick Swiney's Rule 32 petition based upon their being no evidentiary basis for dismissal, or on the issue of the dismissal without affording a hearing under the circumstances of the case, being a denial of due process.

Patrick Swiney contends that he is actually innocent, and that the "new" testing would totally exonerate to him of this crime, as DNA testing has exonerated many other wrongfully convicted defendants. The conviction in this case was obtained by tainted evidence, and justice requires that the dismissal be reversed, that Patrick Swiney be given an opportunity to be heard and to present evidence and testimony to support his petition, and that he be allowed to test the rifle, bullets, and other materials associated with this case.

Finally, there were two (2) motions pending in the

trial Court when the Rule 32 petition was denied. These motions were for summary judgment, and for a declaratory judgment. Patrick Swiney contends that the trial Court erred to reversal when it did not rule upon motions pending in the trial Court before dismissing the Rule 32 petition.

Patrick Swiney contends that the judgment of the trial Court is due to be reversed.

ARGUMENT

1. Evidence of Actual Innocence Exists And The Petition Is Timely Filed under Rule 32.1(e) A.R. Crim.P.

The State has waived appellate review of their argument because of their failure to comply with Rule 28 (a) (5), Ala. R.App.P., which requires parties to include in the argument section of their appellate brief citations to relevant legal authorities, as well as portions of the record. Attention is invited to the argument contained in Appellee's Brief from pages 20 to 59. The State favors this Court with 39 pages of the feelings and beliefs of the Attorney General and his deputies. One citation of authority, *Farris v. State*, 2003 WL 222-2035 7, *4 (Ala. Crim. App. 2003), is at page 32. (There are 9 cases referenced in footnotes in these pages).

Notwithstanding a failure to provide legal argument by the State, Patrick Swiney contends that this appeal of the denial of his Rule 32 petition should be eventually decided on the merits of the petition, rather than by the dismissal, which Patrick Swiney contends was an abuse of discretion by the trial Court.

At trial, a sham scientific test was testified to buy the

expert from the State Department of Forensic Sciences. Patruck Swiney was then convicted, based in large part on this "old" test, that was in fact, a sham.

There is a "new" test that produces results that are "newly discovered evidence." This newly discovered evidence will conclusively prove that Patrick Swiney is actually innocent. The Rule 32 petition in this case is timely filed after Patrick Swiney discovered this recently discovered "new" test that will conclusively prove his innocence. The State

While the State's argument on this issue is found from pages 20 to 49, and is divided into seven headings, a fair summary of the argument of the State may be accurately stated as being in two distinct parts. The State argues that (1) the test used by Dr. Nordby, the expert for Patrick Swiney, is not "newly discovered evidence" (Appellee's Brief at 22) with (2) the follow on sub argument being that the preliminary testing conducted by Dr. Nordby in this case does not use the same rifle, ammunition, and clothing samples that are the evidence in this case. (Appellee's Brief at 25-28) (The reason being that these items are stored in an evidence locker and testing of these items was