

Third District Court of Appeal

State of Florida, July Term, A.D. 2008

Opinion filed July 9, 2008.
Not final until disposition of timely filed motion for rehearing.

No. 3D07-3141
Lower Tribunal No. 97-33314

Ernest McKay,
Petitioner,

vs.

The State of Florida,
Respondent.

A Case of Original Jurisdiction – Ineffective Assistance of Counsel.

Ernest McKay, in proper person.

Bill McCollum, Attorney General, for respondent.

Before COPE, CORTIÑAS, and SALTER, JJ.

PER CURIAM.

Ernest McKay filed a pro se petition alleging ineffective assistance of appellate counsel. Although his petition was untimely under Florida Rule of Appellate Procedure 9.141(c)(4)(B), he asserts that consideration of his claim is

necessary to avoid a manifest injustice. See Baker v. State, 878 So. 2d 1236 (Fla. 2004).

McKay and several co-defendants were convicted of substantive criminal offenses and conspiracy to commit criminal offenses. The charges included offenses under the Florida Racketeer Influenced and Corrupt Organization (RICO) Act, section 895.01, Florida Statutes (1995), and conspiracy to violate RICO. McKay was ultimately convicted and sentenced on four of the conspiracy counts and two substantive criminal offenses.

In a post-conviction case brought by a co-defendant, Kanisky Evans, we held that a “principal” jury instruction should not have been given with respect to the conspiracy counts, citing Ramirez v. State, 371 So. 2d 1063 (Fla. 3d DCA 1979). We therefore vacated the conviction and sentence on those counts and remanded for a new trial on the conspiracy counts only, leaving undisturbed the conviction and sentence on the remaining counts. Evans v. State, 32 Fla. L. Weekly D2476 (Fla. 3d DCA Oct. 17, 2007).

For the reasons set forth in our decision in Evans, we now vacate and remand for new trial McKay’s conviction and sentence as to the conspiracy counts—counts 2, 3, 4, and 12—while leaving undisturbed McKay’s conviction and sentence on counts 5 and 6.

Petition granted in part and denied in part.