

Third District Court of Appeal

State of Florida, July Term, A.D. 2009

Opinion filed September 2, 2009.
Not final until disposition of timely filed motion for rehearing.

No. 3D08-590
Lower Tribunal No. 94-36429

Andre Burke,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Diane Ward,
Judge.

Arnstein & Lehr, Richard L. Rosenbaum, and Cheryl Zickler, for appellant.

Bill McCollum, Attorney General, and Michael C. Greenberg, Assistant
Attorney General, for appellee.

Before COPE, GERSTEN, and SALTER, JJ.

GERSTEN, J.

Andre Burke (“the defendant”) appeals the denial of his petition for writ of
habeas corpus based on manifest injustice. We affirm.

A jury convicted the defendant of first-degree murder. The trial court sentenced the defendant to life in state prison without the possibility of parole. This Court subsequently affirmed. Burke v. State, 718 So. 2d 945 (Fla. 3d DCA 1998).

Thereafter, the defendant moved for post-conviction relief, alleging, inter alia, that his trial counsel was ineffective for misadvising him on his sentence. The trial court held an evidentiary hearing, where both the defendant and his trial counsel testified.

The evidence revealed that, in exchange for a guilty plea, the State had offered to reduce the charge to second degree murder and recommend a sentence of eighteen years in prison. Defense counsel admitted he initially advised the defendant that a first-degree murder conviction carried a sentence of life with a possibility of parole after twenty-five years.

During the trial, however, defense counsel learned that the sentence for first degree murder was life with no possibility of parole. Defense counsel so advised the defendant and the trial court. The trial judge stated “I think as to him it’s the 25 year minimum man.” At that point, however, the defendant indicated he wanted to proceed with the trial.

Thus, the trial court found that the defendant was correctly advised of the possible sentence during the trial and still elected to proceed to trial. Accordingly,

the trial court denied the defendant's motion for post-conviction relief. This Court affirmed the denial of post-conviction relief. Burke v. State, 833 So. 2d 139 (Fla. 3d DCA 2002).

Subsequently, the defendant filed three unsuccessful challenges to the denial of his post-conviction relief motion. This Court affirmed the trial court each time. Burke v. State, 955 So. 2d 579 (Fla. 3d DCA 2007); Burke v. State, 901 So. 129 (Fla. 3d DCA 2005); Burke v. Crosby, 858 So. 2d 1059 (Fla. 3d DCA 2003).

Most recently, the defendant filed this petition for writ of habeas corpus, claiming manifest injustice based on the trial court's misadvice about the sentence. The trial court denied the petition on the ground that the issue had been litigated previously and ruled on.

On appeal, the State asserts the defendant's claim was litigated previously. The defendant contends that his habeas corpus petition is not a relitigation of previously decided issues. Although he admits that he previously litigated the issue of sentencing misadvice, the defendant claims he did so on a claim of ineffective assistance of counsel, not, as here, on a claim of manifest injustice based on trial court error. We find the distinction makes no difference to the res judicata effect of the trial court's ruling on the defendant's first post-conviction relief motion, and affirm.

At the evidentiary hearing, the trial court heard from both the defendant and his defense counsel. Based on this evidence, the trial court found that the defendant chose to proceed to trial even after being advised that he faced life without parole if convicted. Thus, regardless of who initially misadvised him of the sentence, the trial court, as the finder of fact, properly determined that the defendant ultimately understood the sentence he actually faced and, nonetheless, decided to gamble on a jury verdict.

Accordingly, we affirm the denial of habeas corpus relief.

Affirmed.

COPE, J. (specially concurring).

I concur in the result but am unable to join the reasoning of the majority opinion.

Defendant-appellant Burke contends that his trial counsel misadvised him regarding the potential sentence he was facing if convicted of first-degree murder. He acknowledges that he has previously been denied postconviction relief. His successor counsel argues that, notwithstanding the earlier denials of postconviction relief, the defendant should receive relief at this time under the manifest injustice exception to the res judicata doctrine. State v. McBride, 848 So. 2d 287, 290-92 (Fla. 2003).

As I read it, the majority opinion takes the position that a claim of manifest injustice makes no difference. Majority opinion at 3. That is not so. The Florida Supreme Court has said that “*res judicata* will not be invoked where it would defeat the ends of justice.” Id. at 291. The Supreme Court has also recognized a “manifest injustice” exception to the law of the case doctrine and to the collateral estoppel doctrine. Id. at 291-92. The question to be decided is whether there is a manifest injustice within the meaning of McBride.

Turning to the merits, prior to trial, counsel advised the defendant that the penalty for first-degree murder was life imprisonment without the possibility of parole for twenty-five years. Counsel was aware that the legislature had changed the first-degree murder statute, but believed that it did not apply to this defendant. Prior to trial the State had offered a plea of eighteen years incarceration. Trial counsel recommended that the defendant accept it, but he refused. The plea offer was withdrawn at the time that the trial began.

During the trial, counsel became aware that his advice may have been incorrect. The following transpired:

[DEFENSE COUNSEL]: I have been informed by some informal conversation I had with a colleague that I may have misinterpreted the consequences of my client. I was under the impression life would be with a 25 year minimum man[datory] and I have been informed that is no longer the case, that may have affected his ability to make a rational and informed decision as to the consequences.

I have just had this discussion with him sidebar before the court came back and told him and also met with the state attorney in the hallway that he was, he had withdrawn the offer.

THE COURT: This is a '94 case, 25 year minimum man on the '94 case. I think '94 is still 25 year minimum mand.

[DEFENSE COUNSEL]: That was my impression. I do know the change came in '95.

THE COURT: I think as to him it's the 25 year minimum man.

[DEFENSE COUNSEL]: Let me put this on the record because I am here thinking that I might have done that. The bottom line, he indicated after I told him there may have been a change in the law. He indicated that he wanted to proceed with the trial to its (*sic*) conclusion but I needed to have that on the record.

(Emphasis added).

Thus, during the trial, defense counsel raised the possibility that he had misadvised the defendant regarding the sentence for first-degree murder. The trial court offered the opinion that the old law applied to this defendant so that he would be eligible for parole after twenty-five years. The trial continued and the defendant was convicted of first degree murder.

At sentencing the court revisited the question of what version of the first-degree murder statute was applicable to this case. It turned out that the elimination of parole for first-degree murder took effect May 25, 1994. Ch. 94-228, § 1, Laws of Fla., codified as § 775.082(1)(a), Fla. Stat. (Supp. 1994). The defendant committed his crime on October 25, 1994, so the mandatory sentence was life without eligibility for parole.

The defendant filed a timely motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 and the trial court conducted an evidentiary hearing in 2001. The order denying postconviction relief is in the record now before us, but not the transcript.

In 2007, the defendant filed the current petition for writ of habeas corpus in the trial court. The defendant contends that the discussion with the trial court quoted above necessarily misled him about the potential sentence for first degree murder, and that relief should be granted. The trial court denied relief on the basis of the 2001 rule 3.850 proceeding, and subsequent pro se habeas petitions, which were denied.

I agree that we must affirm the denial order. As stated in the 2001 order, defense counsel had recommended that the defendant accept the eighteen-year offer. Trial counsel had explained to the defendant that the lesser included offense of second-degree murder also carried a life sentence.* Defense counsel advised the defendant that he would likely receive the maximum sentence if convicted of second-degree murder, and that the only way he could do better than the eighteen-year offer was if the jury found him guilty of manslaughter. According to the order, the defendant told trial counsel that “he believed the jury would find him guilty of Manslaughter and ‘wanted to take it all the way.’”

Based on the portions of the order denying rule 3.850 relief, the manifest injustice standard is not met in this case and the trial court correctly denied relief.

* The order suggests, but does not specifically state, that trial counsel had explained that there was no possibility for parole under a guidelines life sentence for second-degree murder. That was true even prior to the enactment of chapter 94-228, Laws of Florida.

