IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA, CASE NO. 2004-CF-2491-A

Plaintiff,

v.

CLEMENTE JAVIER AGUIRRE-JARQUIN,

Defendant.

_______________________________________/

FILED IN OFFICE
GRANT MALOY
CLERK CIRCUIT COURT
2019 MAY -2 PM 3:20
SEMINOLE CO. FLA
BY D.C.

ORDER DISMISSING DEFENDANT'S PETITION FOR DETERMINATION OF STATUS AS A WRONGFULLY INCARCERATED PERSON

THIS CAUSE comes before the Court on Mr. Aguirre's "Petition for Determination of Status as a Wrongfully Incarcerated Person," e-filed on January 11, 2019, the State's "Motion to Dismiss Petition for Determination of Status as a Wrongfully Incarcerated Person," e-filed on February 8, 2019, Mr. Aguirre's opposition to the motion e-filed on March 28, 2019, the State's reply e-filed on April 1, 2019, and Mr. Aguirre's supplemental brief e-filed on April 12, 2019. Having conducted a hearing on April 4, 2019, and having reviewed the motions, the responses, the case file, applicable law, and upon due consideration, the Court finds as follows:

The Defendant was charged by indictment with two counts of first-degree premeditated murder and by information with one count of burglary with an assault or battery. The trial took place in February 2006, and Defendant was found guilty as charged. The trial court imposed the death penalty for the first-degree murder convictions. The Defendant appealed and the Florida Supreme Court affirmed. Aguirre-Jarquin v. State, 9 So. 3d 593 (Fla. 2009). Following the trial court's denial of the Defendant's Rule 3.851 motion, the Florida Supreme Court reversed the convictions and sentences based upon exonerating evidence and remanded the case to the trial

UNOFFICIAL

court for a new trial. Aguirre-Jarquin v. State, 202 So. 3d 785 (Fla. 2016). The mandate was filed on December 7, 2016. Immediately following the issuance of the Supreme Court's opinion, the State announced its intention to retry the case. On November 5, 2018, the State filed a *nolle prosequi* in the case, and the trial court issued an order directing Mr. Aguirre's release from custody.

The State asserts that the petition is untimely because it was filed more than 90 days after the issuance of the Supreme Court's mandate. The defense asserts that the petition was timely filed because it was filed within 90 days of the order releasing Mr. Aguirre from custody.

In 2008, the Legislature enacted the Victims of Wrongful Incarceration Compensation Act to provide for compensation for those who were wrongfully incarcerated. Pursuant to Fla. Stat. § 961.03(1)(b)1, the person seeking compensation as a wrongfully incarcerated person must file the petition "[w]ithin 90 days after the order vacating a conviction and sentence becomes final." In Bartek v. State, the Fifth District Court of Appeal addressed the meaning of the phrase "becomes final" and concluded that the date the order "becomes final" is the date the mandate is issued. 198 So. 3d 1009, 1010 (Fla. 5th DCA 2016).

The defense seeks to distinguish Bartek based upon facts not contained within the Fifth District Court's opinion itself, asserting that Bartek is distinguishable because the petitioner in that case was released from custody shortly after the mandate was issued, unlike Mr. Aguirre. Also in Bartek, the State filed the *nolle prosequi* within 90 days of the mandate, unlike in Mr. Aguirre's case. Essentially, the defense is advocating for this Court to apply Bartek only when the person is released from custody within 90 days following the mandate, and to apply a different standard for "becomes final" if the person is not released within those 90 days. This Court cannot rely upon facts not contained in the opinion to distinguish Bartek. Moreover, applying Bartek in this manner would lead to the absurd and arbitrary result of someone who is

UNOFFICIAL

released on day 89 having only one day to file his petition while someone released on day 91 would have 90 days to file his petition, and neither individual would know which was their filing deadline until the date of their release. There is nothing in Bartek or the language of the statute that allows for alternative triggering events for filing the petition.

The defense asserts that release from custody is the trigger event for the time limit contained in section 961.03(1)(b)1 because the order of vacatur was not final until Mr. Aguirre was released from custody. The defense argues that this is consistent with the plain meaning of the statute based upon the phrase "was incarcerated" from section 961.03(1)(a). According to the argument, the only way to give meaning to the words "was incarcerated" from section 961.03(1)(a) is to interpret that section as requiring release from custody as a prerequisite for filing a petition, and interpreting "becomes final" in section 961.03(2)(a) as meaning released from custody. However, that is not the only way to give the words "was incarcerated" meaning. The defense's argument seeks to divorce the words from their context. However, that is neither appropriate nor the only way for those words to have meaning. Fla. Stat. § 961.03(1)(a) provides:

> In order to meet the definition of a "wrongfully incarcerated person" and "eligible for compensation," upon entry of an order, based upon exonerating evidence vacating a conviction and sentence, a person must set forth the claim of wrongful incarceration under oath and with particularity by filing a petition with the original sentencing court, with a copy of the petition and proper notice to the prosecuting authority in the underlying felony for which the person was incarcerated:
>
> 1. State that the verifiable and substantial evidence of actual innocence exists and state with particularity the nature and significance of the verifiable and substantial evidence of actual innocence; and
> 2. State that the person is not disqualified, under the provisions of s. 961.04, from seeking compensation under this act.

UNOFFICIAL

(emphasis added). The only prerequisite for filing a petition contained in section 961.03 is that a court order vacated the person's conviction and sentence of incarceration based upon exonerating evidence. The pleading requirements are that the petition be under oath, set forth the exonerating evidence, and state the person is not disqualified pursuant to section 961.04. The section requires that a copy of the petition be served on the prosecuting authority. The "was incarcerated" language is part of a string of clauses identifying which prosecuting authority must get notice, i.e. the prosecuting authority that prosecuted the felony for which the person was convicted and received a sentence of incarceration.

Furthermore, the defense's argument conflates custody and incarceration. The "was incarcerated" language is connected to "the underlying felony." Therefore, while Mr. Aguirre remained in custody until November 2018, he was no longer incarcerated on the underlying felonies in this case once the mandate was issued on the order vacating his conviction and sentence. [1] The language is equally susceptible to the interpretation that the petitioner is no longer incarcerated on the underlying felony upon vacatur of the conviction and sentence.

Next, the defense asserts that the 90-day limit must run from the date of the petitioner's release from custody because release from custody is a precondition to an application for payment. He argues that because Fla. Stat. § 961.05(3)(d) requires documentation from the Department of Corrections (DOC) regarding the person's "release from the custody" of DOC for the application for compensation, the person must be released from custody before filing the petition. This argument overlooks the fact that the statute creates a two-phase process for seeking compensation. The first phase involves the determination of eligibility for compensation and is

[1] Fla. Stat. § 944.17(3)(a) provides that only those convicted and sentenced by a circuit court to an incarcerative sentence of 1 year or more may be received by DOC into the state correctional system. Mr. Aguirre presented documentation that he was still in DOC custody until this Court's November 5, 2018, despite no longer having an incarcerative sentence. It is unclear why Mr. Aguirre was still in DOC custody when he should not have been. He presumably could have pursued bond pursuant to Fla. R. Crim. P. 3.131.

UNOFFICIAL

governed by Fla. Stat. § 961.03. Pursuant to Fla. Stat. § 961.02(4), "'eligible for compensation' means that a person meets the definition of the term 'wrongfully incarcerated person' and is not disqualified from seeking compensation under the criteria prescribed in s. 961.04." The second phase involves the determination of entitlement for compensation and is governed by Fla. Stat. § 961.05. Pursuant to Fla. Stat. § 961.02(5), "'entitled to compensation' means that a person meets the definition of the term 'eligible for compensation' and satisfies the application requirements prescribed in s. 961.05, and may receive compensation pursuant to s. 961.06." While a determination of eligibility is a prerequisite for filing the application for compensation and a determination of entitlement, there is no requirement in the statute that the person be able to satisfy the entitlement requirements contained in section 961.05 prior to filing the petition under section 961.03. Therefore, the fact that Mr. Aguirre could not provide documentation as to his release from DOC within 90 days of the mandate is irrelevant to the time limit for filing a petition under section 961.03. Contrary to the defense's assertion, Mr. Aguirre had everything necessary to file the petition at the time the mandate was issued. He was not required to have everything necessary to file an application for compensation under section 961.05 at the time of filing the petition for eligibility. The Legislature chose to make the trigger event for the filing deadline the finality of the vacatur order, not release from custody. The defense argues that this Court should interpret "becomes final" to mean release from custody, in part because section 961.05(d) requires documentation of the person's release from custody. However, this provision undercuts the defense's argument. It shows that the Legislature knew to use the phrase "release from custody" when it wanted to do so.

The defense argues that the State's interpretation would lead to an absurd result because it would require Mr. Aguirre to file a "placeholder" petition when he did not have a viable claim while he was still facing retrial. First, the Court notes that contrary to the defense's asserting, the

UNOFFICIAL

filing of the petition would not clog the trial court's dockets. The petitioner does not file a separate suit, but files the petition within the underlying felony case. There is nothing in section 961.03 that limits the time for the trial court to rule upon the petition. Generally, in criminal cases, pretrial motions are not ruled upon until after they are called up for hearing, and this procedure does not result in a clogging of the trial court's docket.[2] The defense also asserts that the statute creates a Catch-22 because it neither provides for staying the proceedings pending retrial nor provides for both the petition and the retrial to proceed at the same time. First, this argument overlooks the Court's inherent power to control its docket. The lack of a provision for staying the petition does not preclude the court from doing so. Next, the statute does contemplate a petitioner facing retrial. Section 961.03(2)(a) provides that if the prosecuting authority agrees that the petitioner is eligible for compensation, it must include in its response a certification that "no further criminal proceedings in the case at bar can or will be initiated by the prosecuting authority." If all judicial labor must be concluded prior to the filing deadline, this language would be meaningless. The prosecuting authority would never need to certify that no further proceedings would be initiated if the time limit only begins to run after any retrial is terminated.

Next, the defense asserts that filing of a "placeholder" petition would trigger the timing provisions of the Act, which could be problematic for a petitioner still in custody because section 961.05 requires documentation of a release date. This argument overlooks one crucial point. While there are time limits for filing the petition, for the State to respond, and for the proceedings before the administrative law judge, there are no time limits for when the trial court

[2] This would not be the only instance when a motion for compensation must be filed prior to the entitlement being established. Fla. R. App. P. 9.400 requires that motions for appellate attorney's fees be filed at the time that the reply brief is due. Thus, there are often opposing motions for appellate attorney's fees filed when ultimately only one party will be entitled to their fees.

UNOFFICIAL

must make its initial ruling on eligibility. Sections 961.03(3) and (4), which govern what the trial court must do based upon the State's response, do not contain any time limits. There is no requirement that the trial court forward the petition to the administrative law judge within a certain amount of time after the State responds. Therefore, there is nothing in the act prohibiting the trial court from holding the matter in abeyance pending disposition of a retrial. The two-year time limit in section 961.05 does not begin to run until the trial court issues its final order following the administrative law judge's ruling. Furthermore, the fact that section 961.05 has a two-year time limit for filing the application undercuts the defense argument that a Petitioner has to be released prior to filing the petition because he must meet all of the requirements of section 961.05 at the time of filing. If that were the case, the petitioner would not need such a lengthy period of time to file an application because he would already have everything he needs prior to the issuance of the final order that triggers the time limit for filing the application.

The defense asserts that proceeding on the petition for compensation at the same time that the petitioner is seeking retrial would infringe on the Petitioner's constitutional rights. The defense asserts that it would either infringe on his right to a fair trial by giving the State an unfair preview of his criminal defense or infringe on his right not to present any evidence at his trial because he has to prove his innocence as part of the compensation proceedings. Requiring the petitioner to prove his innocence in the compensation proceedings in no way forces him to present any evidence at his criminal retrial. As noted, it is unlikely that the trial and the petition will be proceeding simultaneously because the trial court would not rule on the petition for eligibility until the trial is terminated. Even so, at the time that the petition is filed, both sides would already be fully aware of the evidence of the Petitioner's innocence. Fla. Stat. § 961.03(1)(a) requires as a prerequisite to filing of the petition, an order vacating the conviction and sentence based upon exonerating evidence. In order for there to be an order based upon

UNOFFICIAL

exonerating evidence, there had to be a proceeding before a court at which the defense presented evidence of the Petitioner's innocence. In this case, that evidence was presented at the Rule 3.851 hearing. Therefore, by the time the petition is filed, both sides would be fully aware of the evidence of innocence.

Based upon the clear language of section 961.03(1)(b)1 and the holding of Bartek, the trigger for the filing deadline was the issuance of the Florida Supreme Court mandate. Moreover, given that the statute is in the nature of a waiver of sovereign immunity, the statute must be strictly construed in favor of the State, not Mr. Aguirre. Fessenden v. State, 52 So. 3d 1, 6-7 (Fla. 2d DCA 2010). Mr. Aguirre's petition was filed well beyond the 90 days provided by statute.

Finally, the defense asserts that this Court should equitably toll the time limit for filing the petition in this case. Essentially, he argues that he could not file the petition so long as he remained wrongfully incarcerated and he was not released until his Court's November 5, 2018 order. Equitable tolling applies "when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his right mistakenly in the wrong forum." Machules v. Department of Admin., 523 So. 2d 1132, 1134 (Fla. 1988). However, Mr. Aguirre has not demonstrated that he was misled or lulled into inaction given that the Fifth District issued its opinion in Bartek prior to the issuance of the mandate in this case, and he has not demonstrated that he was prevented from filing the petition in some extraordinary way.

The Court notes that the statute makes the process to obtain compensation cumbersome and counterintuitive. It is also ill suited to situations like this case when the petitioner remains in custody facing retrial. However, it was incumbent upon counsel to be aware of the deadlines contained in the statute and the case law interpreting that deadline. This Court cannot rewrite a

UNOFFICIAL

clear and unambiguous statute or ignore binding Fifth District case law because it believes the statute was drafted poorly or that Mr. Aguirre should be entitled to compensation.

Based upon the clear language of section 961.03 and Bartek, Mr. Aguirre's petition is untimely. Therefore, the State's motion to dismiss is well taken and this Court is precluded from referring the case to an administrative law judge for further proceedings.

Accordingly, it is

ORDERED and ADJUDGED that the petition is DISMISSED as untimely.

DONE and ORDERED in Chambers, Sanford, Seminole County, Florida, this 2nd day of May, 2019.

JOHN D. GALLUZZO, Circuit Judge

Copies furnished this 2nd day of May 2019 to:

Office of the State Attorney
Attn: ASA Stewart Stone
sstone@sa18.org

Frank Bankowitz, Esquire
Lead Counsel for Defendant
FJB@BankowitzLaw.com

Mary-Louise Samuels Parmer, Esquire
Co-Counsel for Defendant
marie@samuelsparmerlaw.com

JUDICIAL ASSISTANT

UNOFFICIAL