

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT  
*January Term 2009*

**THOMAS M. MCNULTY,**  
Appellant,

v.

**STATE OF FLORIDA,**  
Appellee.

No. 4D08-4695

[July 1, 2009]

PER CURIAM.

Thomas McNulty appeals the summary denial of his Florida Rule of Criminal Procedure 3.850 motion which alleged ineffective assistance of counsel. McNulty raised several arguments below, only one of which we find necessitates remand.

In April 2006, McNulty was charged with felony DUI and refusing to consent to a breathalyzer/blood test. A jury found him guilty of Count I, the felony DUI, and the state presented a certified copy of McNulty's driving record showing three prior convictions for DUI. Thereupon the court found McNulty guilty of felony DUI. McNulty pled nolo contendere to count II (refusal to consent to testing). He received a five-year sentence in the Department of Corrections for the felony DUI. On direct appeal his convictions were affirmed. *McNulty v. State*, 972 So. 2d 197 (Fla. 4th DCA 2008).

Subsequently, McNulty filed a rule 3.850 motion for post conviction relief alleging that he received ineffective assistance of counsel (IAC) because his trial attorney failed to investigate whether the 1982 DUI, which was part of the basis for the felony DUI charge, was uncounseled and should not have been used to enhance his fourth DUI to a felony.

In response to an order to show cause issued by this court, the state argued, citing *State v. Beach*, 592 So. 2d 237 (Fla. 1992), that McNulty was required to allege under oath four factors to support his claim: 1) that the offense involved was punishable by more than six months of imprisonment or that the defendant was actually subjected to a term of

imprisonment; 2) that the defendant was indigent and thus entitled to court appointed counsel; 3) that counsel was not appointed; and 4) that the right to counsel was not waived. We believe that the recent decision of *State v. Kelly*, 999 So. 2d 1029 (Fla. 2008), modified *Beach* so that a defendant now has to allege (in addition to factors 2, 3, and 4) only that the offense was punishable by imprisonment, not that the offense was punishable by more than six months imprisonment or that he was actually imprisoned. In other words, in *Kelly* the Florida Supreme Court ruled that indigent defendants have a right to counsel in all criminal prosecutions punishable by imprisonment, even misdemeanor prosecutions, unless the trial judge “opts out” by providing a written pretrial certification that the defendant will not be imprisoned for the charged offense.

Applying *Kelly* to this case,<sup>1</sup>

it is evident that McNulty alleged in his 3.850 motion only one of the four factors necessary to support a claim of IAC, that is, he alleged only that his trial attorney failed to investigate whether the 1982 DUI (which was part of the foundation for the felony DUI) was uncounseled. McNulty made no allegations that the offense was punishable by imprisonment; that he was indigent and entitled to court appointed counsel; and that he did not waive the right to counsel. Thus, he failed to allege the threshold requirements of *Kelly*. Nevertheless, in light of the Florida Supreme Court’s decision in *Spera v. State*, 971 So. 2d 754 (Fla. 2007) (trial court must allow a defendant at least one opportunity to correct a pleading deficiency in a first 3.850 motion), we direct the trial court to afford McNulty the opportunity to amend his motion to allege the necessary *Kelly* factors, if he can do so in good faith.<sup>2</sup>

*Reversed and remanded for further proceedings.*

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<sup>1</sup>Trial courts apply the decisional law that is in effect at the time of a hearing under certain circumstances. See *Witt v. State*, 387 So.2d 922 (Fla. 1980); *Smiley v. State*, 966 So. 2d 330 (Fla. 2007), which holds that for decisional law to be applied retroactively it must: 1) originate in the Supreme Court of Florida or the U.S. Supreme Court; 2) be constitutional in nature; and 3) represent a development of fundamental significance. *Kelly* was a Florida Supreme Court decision, dealing with right to counsel and was thus constitutional in nature, and it represents a development of fundamental significance. Thus, on remand *Kelly* applies.

<sup>2</sup>We note that *Spera* was decided on November 1, 2007 and McNulty’s 3.850 motion was filed on July 1, 2008, thus, the *Spera* decision, which requires trial courts to give a defendant an opportunity to amend, was applicable.

GROSS, C.J., MAY and CIKLIN, J.J., concur.

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Appeal of order denying rule 3.850 motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John J. Murphy, III, Judge; L.T. Case No. 06-5015 CF10A.

Thomas M. McNulty, Okeechobee, pro se.

Bill McCollum, Attorney General, Tallahassee, and Daniel P. Hyndman, Assistant Attorney General, West Palm Beach, for appellee.

***Not final until disposition of timely filed motion for rehearing.***