2017 WL 4820273 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Eleventh Judicial Circuit
Miami-Dade County

STATE of Florida, Plaintiff,
v.
William Arthur ARTIGAS, Defendant.

No. F05-31681C.
July 14, 2017.

**Order Denying Amended Motion to Vacate Plea, Judgment and Sentence**

Miguel de la O, Judge.

***1 THIS MATTER** came before the Court on Defendant, William Artigas' ("Artigas") Amended Motion to Vacate Plea, Judgment and Sentence ("Motion") filed on January 23, 2017. The State of Florida ("State") filed its Response to the Motion on March 8, 2017. The Court held an evidentiary hearing ("Hearing") on May 8, 2017 and June 26, 2017, during which Thomas Mote (Artigas' Trial Counsel), Mario Perez de Corcho ("Perez de Corcho") (the victim in this case), and Artigas testified.

## I. BACKGROUND.

On August 13, 2007, the Defendant entered a plea of guilty to one count of attempted felony murder with a deadly weapon, in violation of Florida Statutes section 782.051 (1), two counts of false imprisonment with a deadly weapon, in violation of Florida Statutes section 787.02(2), one count of aggravated child abuse with great bodily harm, in violation of Florida Statutes section 827.03(2), one count of aggravated battery, in violation of Florida Statutes section 784.045(1)(a), one count of kidnapping with a deadly weapon, in violation of Florida Statutes section 787.01(2), one count of aggravated assault with firearm, in violation of Florida Statutes section 784.021 (1)(A), one count of battery, in violation of Florida Statutes section 784.03, and one count of attempted premeditated murder with a deadly weapon, in violation of Florida Statutes section 782.04(1)(A) 1.

Artigas was sentenced to 5 years in prison, followed by 10 years of probation. While on probation, Artigas was arrested for burglary of an occupied dwelling, burglary of an unoccupied dwelling, and grand theft in the third degree. [1] As a result of this arrest, the State filed a probation violation affidavit. Facing a probation violation hearing on these serious charges, Artigas moves to vacate his 2007 conviction in order to moot his probation violation. As grounds to vacate his conviction, Artigas claims he has uncovered new evidence of his innocence in the form of a "recantation" by the victim, Perez de Corcho.

## II. STANDARD FOR POSTCONVICTION RELIEF BASED ON NEWLY DISCOVERED EVIDENCE.

In the Motion and Response, and memoranda of law submitted after the Hearing, both the State and Artigas urged this Court to apply *McLin v. State*, 827 So. 2d 948 (Fla. 2002). The Court informed both parties that they had argued the wrong standard, and scheduled a second evidentiary hearing to avoid an ineffective assistance of counsel claim stemming from this Motion for failure of counsel to put on testimony addressing the correct standard as set forth by the Florida

  

Supreme Court in *Long v. State*, 183 So. 3d 342 (Fla. 2016), and the Third DCA in *Perez v. State*, 212 So. 3d 469 (Fla. 3d DCA 2017).

We likewise establish a similar two-prong test for determining postconviction claims for newly discovered evidence relating to guilty pleas which adopts the first prong of the *Jones* test and the second prong from *Grosvenor.* First, the evidence must not have been known by the trial court, the party, or counsel at the time of the plea, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the defendant must demonstrate a reasonable probability that, but for the newly discovered evidence, the defendant would not have pleaded guilty and would have insisted on going to trial. "[I]n determining whether a reasonable probability exists that the defendant would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial."

***2** *Long v. State*, 183 So. 3d 342, 346 (Fla. 2016) (quoting *Grosvenor v. State*, 874 So. 2d 1176, 1181-82 (Fla. 2004)).

At the second evidentiary hearing on June 26, 2017, Artigas testified he would not have pled guilty if he had known about Perez de Corcho's new testimony. However, he undermined his own duress defense by claiming he did not torture or beat Perez de Corcho.

## III. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Florida Supreme Court has noted that recantation testimony is exceedingly unreliable.

Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial. "Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true."

*Armstrong v. State*, 642 So. 2d 730, 735 (Fla. 1994) (quoting *Bell v. State*, 90 So. 2d 704, 705 (Fla. 1956)).

This Court concludes that Perez de Corcho's testimony at the Hearing is not newly discovered evidence, is unreliable, and Artigas would have still have pled guilty even if Perez de Corcho had said back in August 2007 that co-defendant, Manuel Balbin ("Balbin"),[2] had threatened Artigas.

### A. PEREZ DE CORCHO'S TESTIMONY IS NOT NEWLY DISCOVERED EVIDENCE.

Obviously, when a witness recants his or her testimony, it may constitute newly discovered evidence. However, "not all recantations will be considered newly discovered evidence." *Archer v. State*, 934 So. 2d 1187, 1194 (Fla. 2006). Here, Perez de Corcho testified at the Hearing that he thinks Artigas was acting under duress from Balbin. Perez de Corcho did not, however, recant his deposition or trial testimony.[3] *See Koo v. State*, 184 So. 3d 1101, 1105 (Fla. 2016) ("[t]here was no recantation to consider and both courts correctly determined that the unsworn letter did not qualify as newly discovered evidence because nothing in the letter recanted Dr. Saleh's trial testimony."); *Jones v. State*, 678 So. 2d 309, 313 (Fla. 1996) ("Jones argues that this Court has traditionally treated recantations as newly discovered evidence. Jones fails to recognize, however, that this is not a case in which a witness suddenly recants his or her trial testimony years after the fact."); *Hope v. State*, 68 So. 3d 307, 308 (Fla. 4th DCA 2011) ("Here, Coleman did not recant his statements about

  

seeing appellant with a gun and driving away with the co-defendant, nor did he recant his conversation with appellant after the incident, which showed guilty knowledge on the part of appellant.").

***3** At best, Perez de Corcho now tries – for reasons that will be discussed later – to "spin" his prior testimony in a new light to excuse and exonerate Artigas. Setting aside (for now) the fact that this Court does not find Perez de Corcho's testimony at the Hearing credible, it is not a recantation in any sense of the word. *Cf. Archer v. State*, 934 So. 2d 1187, 1195 (Fla. 2006) ("Indeed, the recantation offers a completely different version of the facts that, if true, could undermine Archer's conviction and sentence. We therefore find that the recantation evidence in this case was newly discovered evidence.").

Some of Perez de Corcho's testimony at the Hearing is consistent with his deposition and trial testimony [4] – which by definition is not a recantation. Other portions of his testimony would be a recantation because it minimizes Artigas's actions on October 4th and 5th, 2005; but this testimony was largely impeached by the State in cross-examination and this Court rejects it. The remainder of Perez de Corcho's testimony amounts to no more than conjecture of why Artigas participated in the brutal torture [5] of Perez de Corcho and whether Balbin was forcing Artigas to participate. This conclusory testimony is not a recantation nor admissible at a trial.

**B. PEREZ DE CORCHO'S TESTIMONY IS NOT CREDIBLE.**

The Florida Supreme Court has repeatedly "noted that recanted testimony is 'exceedingly unreliable,' and if a trial court is not satisfied that the recanted testimony is true, *it has a duty to deny the defendant a new trial*." *Heath v. State*, 3 So. 3d 1017, 1024 (Fla. 2009) (citations omitted) (emphasis in original). This Court has no difficulty finding that Perez de Corcho's testimony is not reliable and exercising its duty to deny the Motion.

First, in determining whether newly discovered evidence warrants vacating a guilty plea, this Court "should further consider … any inconsistencies in the newly discovered evidence." *Heath v. State*, 3 So. 3d 1017, 1024 (Fla. 2009). Perez de Corcho was impeached a number of times during the Hearing with his deposition and trial testimony when he tried to minimize Artigas' role in torturing him.

For example, Perez de Corcho first testified during the Hearing that Artigas only hit him a few times. Yet, on cross-examination by the State he admitted it was Artigas who suggested carving initials into Perez de Corcho with a knife, and that Artigas supplied the knife Balbin used to carve the letters "SD" on Perez de Corcho. Perez de Corcho also admitted it was Artigas who suggested Balbin shoot Perez de Corcho four times before they release him. Balbin then proceeded to shoot Perez de Corcho three times. [6] Indeed, near the end of his direct testimony, under questioning by Artigas's counsel, Perez de Corcho said: "It seems like they were all together." [7]

***4** Second, Perez de Corcho never once claimed he had lied during his deposition or trial testimony. To the contrary, he admitted his prior testimony was true whenever the State confronted him with it, and Perez de Corcho insisted he never made anything up during his deposition and trial testimony.

Third, Perez de Corcho's motivation for now minimizing Artigas's role in his torture became clear as the Hearing wore on. Perez de Corcho was approached by Artigas' lawyer in December 2016 and informed that Artigas had been arrested on new charges and was facing the possibility of "life in prison" because of his prior conviction in the case involving Perez de Corcho. Perez de Corcho repeatedly said he did not want this Court to sentence Artigas to life in prison because of what happened to him (Perez de Corcho). He thinks "everybody should get a second chance" and wants Artigas to get one. [8]

Frankly, this Court is at a loss to understand Perez de Corcho's efforts to aid Artigas. Artigas is undeserving of Perez de Corcho's forgiveness or help. A pop psychologist might surmise Perez de Corcho suffers from some form of post-

traumatic stress or lingering Stockholm Syndrome. Thankfully, this Court need not understand the warped sense of loyalty Perez de Corcho continues to show Artigas. It is enough this Court can see clearly that Perez de Corcho tried his level best to minimize Artigas's role in the face of overwhelming evidence that he was at times contradicting his testimony from a decade ago, testimony which – despite his efforts to help Artigas – Perez de Corcho did not recant.

Finally, this Court notes that the difference in Perez de Corcho's memory when the testimony may benefit Artigas, compared to when the testimony will hurt Artigas's bid to vacate his conviction, is startling. It is clear to this Court that Perez de Corcho will say almost anything in order to exonerate Perez de Corcho. As noted, maybe it is PTSD, maybe it is Stockholm Syndrome, maybe he's been threatened; all this Court can conclude is that Perez de Corcho's testimony minimizing Artigas's role is not credible. The evidence of Artigas's voluntary participation in the torture of Perez de Corcho is plentiful and credible.

**C. ARTIGAS WOULD HAVE STILL PLED GUILTY EVEN IF PEREZ DE CORCHO HAD TESTIFIED THAT BALBIN HAD THREATEN ARTIGAS.**

If convicted at trial, Artigas was facing a sentence of 14 years to life (with a 10 year minimum mandatory). The State's offer of 5 years in prison followed by 10 years of probation was an offer too good to pass up in light of the fact that the State would have relied on Perez de Corcho's uncontested testimony that Artigas (with Balbin not present) blindfolded Perez de Corcho and transported him to the apartment where he was tortured, that Artigas was himself armed with a knife during the torture, that Artigas held Perez de Corcho at knifepoint, that Artigas himself tied Perez de Corcho to a chair with jumper cables. The *coup de grace* would have been the twin facts that Artigas blocked the door before the torture began to prevent Perez de Corcho from leaving and later, when Balbin left the room, Artigas made no attempt to escape, to free Perez de Corcho, or to seek help.

***5** As a result of this testimony, Artigas had – and has – a terrible duress defense.

> 1) the defendant reasonably believed that a danger or emergency existed that he did not intentionally cause; 2) the danger or emergency threatened significant harm to himself or a third person; 3) the threatened harm must have been real, imminent, and impending; 4) the defendant had no reasonable means to avoid the danger or emergency except by committing the crime; 5) the crime must have been committed out of duress to avoid the danger or emergency; and 6) the harm the defendant avoided outweighs the harm caused by committing the crime.

*Stannard v. State*, 113 So. 3d 929, 932 (Fla. 5th DCA 2013) (citation omitted). Artigas's duress defense easily fails prongs 1 and 4.

In *Wright v. State*, 402 So. 2d 493 (Fla. 3d DCA 1981), the court affirmed the trial court's refusal to even give the jury an instruction on duress where the defendant failed to warn the victim, failed to aid the victim, failed to seek help the victim, and did not escape when given the opportunity.

> [The defendant] worked alongside the victim, Hall, on the afternoon of the murder and could have warned her, but did not; she was outside of La Rocca's presence for several hours that afternoon; she neither called the police nor told her mother nor attempted to flee. In short, the defendant by her own admission, made no attempt to warn the victim, contact the authorities, or escape from La Rocca's control, despite ample opportunity to do so.

*Id.* at 497 n.6. *See also Mickel v. State*, 929 So. 2d 1192, 1196 (Fla. 4th DCA 2006) ("Even under Mickel's version of events, the evidence demonstrates that he had many opportunities to escape Hojan's supposed compulsion, such as when he walked outside after eating, when he went to the truck to retrieve the bolt cutters, or during the times when Hojan

went into the freezer. In his statement to the police, Mickel conceded that he was not in the restaurant when Hojan first pulled the gun; instead of leaving the area for help, he went back inside.").

## IV. CONCLUSION.

Perez de Corcho's testimony is not a recantation, and does not qualify as newly discovered evidence. At most, Perez de Corcho says he does not recall Artigas's participation as clearly now as he did 10 years ago. Yet, Perez de Corcho never testified that he was lying 10 years ago. The Court does not find it credible that the only intact memories Perez de Corcho has from 10 years ago are about Balbin threatening Artigas. Consequently, for all the reasons set forth in this Order, the Court gives no credit to Perez de Corcho's testimony that Artigas was acting under duress. It further finds that Artigas has failed to meet his burden to convince this Court that, even if Perez de Corcho's testimony was credible newly discovered evidence, he would have risked going to trial and possibly receiving a life sentence rather than accept the plea in 2007 of 5 years in prison followed by 10 years of probation. The Motion is denied.

**DONE and ORDERED** in Miami-Dade County, Florida this 14th day of July, 2017.

<<signature>>

***6** Miguel M. de la O

Circuit Judge

Footnotes

1 Artigas was subsequently convicted when he pled guilty to these charges.

2 Balbin was the leader of the local chapter of a gang called "Satan's Disciples" at the time of this crime. Artigas was second in command. Perez de Corcho was a relatively new member.

3 Artigas did not go to trial, he pled guilty on August 13, 2007. References to Perez de Corcho's trial testimony refers instead to the trial of Artigas' co-Defendant, Michael Bevans Silva, on August 15, 2007.

4 For example, Perez de Corcho's testimony that Balbin had a gun, directed many of the acts that night, and inflicted many of the injuries on Perez de Corcho, is all contained in his deposition of December 21, 2006.

5 Brutal may be an understatement. For hours on October 4th and 5th, 2005, Perez de Corcho was kidnapped, threatened with execution, beaten, electrocuted, lit on fire, branded with a knife, and shot multiple times by Balbin, Artigas, and Michael Bevans Silva, acting in concert with each other.

6 Perez de Corcho gives as one of his reasons for coming forward to testify on Artigas's behalf that Artigas later suggested Balbin forgo the fourth shot. For this belated act of kindness, Perez de Corcho is grateful and prone to forgive Artigas. This Court chooses to focus instead on Artigas's role in encouraging the first three shots and how this fact undermines Perez de Corcho's alleged recantation.

7 Quotes from the Hearing are based on this Court's notes. This Order has been drafted without aid of a transcript.

8 For reasons known only to him, Perez de Corcho did not consider that Artigas got his "second chance" when he served only five years in prison for his participation in the crimes against Perez de Corcho.