

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

ANDRAE THOMAS,

Appellant,

v.

Case No. 5D20-209

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed November 13, 2020

3.850 Appeal from the Circuit
Court for Orange County,
Jenifer M. Harris, Judge.

Andrae Thomas, Milton, pro se.

No Appearance for Appellee.

HARRIS, J.

Andrae Thomas appeals the summary denial of his Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. In his motion, Thomas raised five claims of ineffective assistance of counsel: failing to preserve Thomas's right to appeal (claim one); failing to advise Thomas of consequences of committing a new law violation while on release awaiting sentencing (claim two); failing to depose a potential impeachment

witness (claim three); and failing to raise a Brady¹ violation based on newly discovered evidence (claims four and five). In its answer to Thomas's motion, the State argued that claim three should be dismissed as entirely speculative but acknowledged that Thomas should be given an opportunity to amend the claim. The State further argued that Thomas's remaining claims should be summarily denied as each was conclusively refuted by the record. In support of its position, the State cited to the court's plea colloquy as well as numerous documents contained in the court's online docket. However, the State failed to attach any of those documents to its response.

The trial court agreed with the State's position and dismissed Thomas's third claim with leave to amend. When Thomas failed to amend, the court entered its order summarily denying each of Thomas's claims, incorporating therein the State's response. Despite attaching numerous documents to its order, the court failed to attach the main documents relied upon by the State, to wit: a transcript of Thomas's plea hearing (to refute claims one and two) and docket entries 121 and 151 (to refute claims four and five). Because the documents attached to the court order do not by themselves conclusively refute Thomas's claims, we reverse.

A rule 3.850 motion can be denied without an evidentiary hearing when the motion and record conclusively demonstrate that the movant is entitled to no relief. See Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). "To uphold a lower court's summary denial of claims raised in a rule 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record." See Kimbrough v. State, 886 So. 2d 965 (Fla. 2004) (quoting Peede v. State, 748 So. 2d 253, 257 (Fla. 1999)). When reviewing a

¹ Brady v. Maryland, 373 U.S. 83 (1963).

postconviction court's summary denial of a rule 3.850 motion, this Court must accept the movant's factual allegations as true to the extent they are not refuted by the record. See Franqui v. State, 59 So. 3d 82 (Fla. 2011).

In its response to the first two claims, the State referenced specific instances from the plea colloquy where Thomas is repeatedly advised that by entering a plea, he would waive his right to appeal. In response to the court's questioning, Thomas acknowledged that he fully discussed the waiver of appellate rights with his attorney and that he understood the waiver and accepted it. Similarly, the State discussed a portion of the plea hearing where Thomas acknowledged discussing with his attorney what could happen to his plea offer if he committed any new law violation prior to his sentencing date. Thomas acknowledged that he was fully aware that in such an event, the court could exceed the terms of the negotiated plea. Assuming the State's representations are accurate, claims one and two would be conclusively refuted by the transcript of the plea colloquy. However, the transcript was not attached. See Wolfgang v. State, 212 So. 3d 501, 504 (Fla. 5th DCA 2017) (on remand, trial court must either attach other records that conclusively refute the allegation or must hold evidentiary hearing).

Similarly with respect to claims four and five, Thomas argues that a certain witness was never disclosed by the State. The two documents the State relied upon in its answer (online entries 121 and 151) are purportedly supplemental discovery notices which include the witness in question. As such, these documents would appear to conclusively refute claims four and five. However, once again, these two documents were attached to neither the State's response nor the court's order, and the documents that were attached to the order are insufficient alone to refute these claims.

In his third claim, Thomas argues that his counsel was ineffective by failing to depose a witness. According to Thomas, this witness could provide impeachment evidence against one of the State's main witnesses and that this deposition testimony would have resulted in a suppression of critical evidence. The court dismissed this claim without providing any specific basis for doing so, but gave Thomas 60 days to amend. No amended claim was filed and claim three was summarily dismissed.

In order to allege a facially sufficient claim of ineffective assistance of counsel for failing to depose witnesses, a defendant must state with particularity the identity of the witnesses, the substance of the expected testimony, and explain how the omission of this evidence prejudiced the outcome of the case. See Highsmith v. State, 617 So. 2d 825, 826 (Fla. 1st DCA 1993); see also Magill v. State, 457 So. 2d 1367, 1370 (Fla. 1984) ("In order to characterize the lack of depositions as a specific omission, [the defendant] would have to identify a specific evidentiary matter to which the failure to depose witnesses would relate."). Although Thomas's claim does contain some speculative assertions, he does ultimately make all of the necessary allegations to support facially sufficient claim for ineffective assistance based on counsel's failure to depose a witness. Therefore, we find that the trial court improperly dismissed claim three with leave to amend and erred when it summarily denied the claim following Thomas's failure to amend.

For these reasons, we reverse the order summarily denying Thomas's claims and remand this matter to the trial court to attach records that conclusively refute each of Thomas's claims or to hold an evidentiary hearing.

REVERSED and REMANDED with instructions.

EVANDER, C.J., and ORFINGER, J., concur.