

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2007

DAVID JENSEN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D07-40

[September 19, 2007]

TAYLOR, J.

David Jensen appeals the summary denial of his motion for postconviction relief, filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm the trial court's denial of all claims, except claims five and seven.

In claim five of the postconviction motion, appellant alleged that counsel was ineffective in allowing him to appear at his jury trial in prison attire and in failing to object to his appearing before the jury in leg shackles. He alleged that the jury actually saw and heard the iron shackles. Because appellant's claim of ineffective assistance is facially sufficient and not conclusively refuted by the record, the trial court erred in summarily denying this claim. *See Miller v. State*, 852 So. 2d 904 (Fla. 4th DCA 2003) (holding that the defendant's claim that counsel was ineffective for failing to object to his appearing before the jury in leg restraints was facially sufficient).

In claim seven, appellant alleged that counsel provided ineffective assistance by failing to call certain alibi witnesses at trial. Because appellant's motion alleged availability of the witnesses and otherwise met the requirements of *Nelson v. State*, 875 So. 2d 579 (Fla. 2004), we hold that it was facially sufficient.

Accordingly, we reverse and remand for an evidentiary hearing or attachment of portions of the record that conclusively refute appellant's claims five and seven.

Affirmed in part; Reversed in part and Remanded.

SHAHOOD, C.J., and WARNER, J., concur.

* * *

Appeal of order denying rule 3.850 motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Ana I. Gardiner, Judge; L.T. Case No. 03-12030 CF10A.

David Jensen, Moore Haven, pro se.

Bill McCollum, Attorney General, Tallahassee, and Melynda L. Melear, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.