

Third District Court of Appeal

State of Florida, January Term, A.D. 2008

Opinion filed February 20, 2008.
Not final until disposition of timely filed motion for rehearing.

No. 3D07-2150
Lower Tribunal No. 97-10236

Electo Echevarria,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, Diane Ward, Judge.

Electo Echevarria, in proper person.

Bill McCollum, Attorney General, and Heidi Milan Caballero, Assistant Attorney General, for appellee.

Before COPE, GREEN, and RAMIREZ, JJ.

PER CURIAM.

This is an appeal of an order denying a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. We affirm in part and reverse in part.

Defendant-appellant Electo Echevarria was convicted of first-degree murder and other offenses and was sentenced to life in prison. This conviction was affirmed on direct appeal. Echevarria v. State, 929 So. 2d 620 (Fla. 3d DCA 2006).

The defendant filed a motion for postconviction relief. In claim five, the defendant alleged that his counsel was ineffective for failing to call codefendant Pedro Rodriguez, also known as “Pichi,” as a defense witness at his trial. The defendant maintains that Rodriguez would have materially contradicted the testimony of the prosecution’s key witness.

The State responded that Rodriguez had a Fifth Amendment privilege not to testify. The codefendant had been tried separately, and the State asked the trial court to take notice of the fact that the codefendant’s appeal to this Court remained pending until a date after the defendant’s trial. See Rodriguez v. State, 905 So. 2d 959 (Fla. 3d DCA 2005) (decided June 22, 2005). However, the State’s trial court response did not bring forth any facts demonstrating that the codefendant had asserted his Fifth Amendment privilege at trial. We have taken judicial notice of this court’s file in the codefendant’s appeal, and it appears the defendant testified

on his own behalf at trial. We therefore conclude that this particular claim by the defendant is not conclusively refuted. We reverse the order now before us in part and remand for further proceedings on point five only. We affirm the trial court's order on the remaining issues.

Affirmed in part, reversed in part, and remanded for further proceedings consistent herewith.