

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

JOSE SANTOS ,

Appellant,

v.

Case No. 5D14-2728

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed December 12, 2014

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

Jose Santos, Cross City, pro se.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Robin A. Compton,
Assistant Attorney General, Daytona
Beach, for Appellee.

EVANDER, J.

Jose Santos appeals from the summary denial of his Florida Rule of Criminal Procedure 3.850 Motion for Postconviction Relief. We conclude that Santos' first two claims¹ are not conclusively refuted by the record and, accordingly, reverse.

Santos was convicted, after a jury trial, of robbery with a deadly weapon and aggravated battery with a deadly weapon. His convictions were per curiam affirmed by this court. *Santos v. State*, 66 So. 3d 949 (Fla. 5th DCA 2011).

¹ Santos did not appeal from the denial of his other claims raised in the motion.

In his postconviction motion, Santos alleged that his trial counsel was ineffective for failing to investigate, interview, and present the testimony of Ms. Donella and Ms. Garcia. These potential witnesses would allegedly have testified that the victim had told them that Santos was not the individual who had attacked and robbed him. Santos further claimed that he had made his attorney aware of these potential witnesses and their anticipated testimony prior to trial.

The record reflects that the victim had identified Santos in a pretrial photo array, but equivocated in his identification of Santos at trial. The State suggests that the testimony of these two aforementioned witnesses would have been cumulative to the victim's testimony. We disagree. Equivocal identification testimony at trial is materially different from an outright recantation of a prior identification.

We also reject the State's argument that the record established that defense counsel's failure to call these witnesses was a reasonable trial strategy. The failure to call a witness can constitute ineffective assistance of counsel if the witness might be able to cast doubt on the defendant's guilt. *Gutierrez v. State*, 27 So. 3d 192, 194 (Fla. 5th DCA 2010). Although defense counsel is entitled to broad deference regarding trial strategy, a finding that some action or inaction by defense counsel was tactical is generally inappropriate without an evidentiary hearing. *Hamilton v. State*, 860 So. 2d 1028, 1029 (Fla. 5th DCA 2003).

REVERSED and REMANDED for an evidentiary hearing.

COHEN and WALLIS, JJ., concur.