

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

JULIAN CHRISTIAN MCINTOSH,

Appellant,

v.

Case No. 5D17-3844

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed April 27, 2018

3.850 Appeal from the Circuit
Court for Orange County,
Alan S. Apte, Judge.

Julian Christian McIntosh,
DeFuniak Springs, pro se.

No Appearance for Appellee.

PER CURIAM.

Appellant, Julian Christian McIntosh, appeals the summary denial of his Florida Rule of Criminal Procedure 3.850 post-conviction motion alleging six claims of ineffective assistance of counsel. We reverse the portion of the order summarily denying ground one and otherwise affirm without discussion.

Appellant was charged with three counts: aggravated assault of Jose Barcia, aggravated assault of Brittany DeLemos,¹ and possession of a firearm by a convicted felon. Prior to trial, the State nolle prossed the charge of aggravated assault against Brittany DeLemos, and Appellant was acquitted in a bifurcated jury trial of aggravated assault against Jose Barcia. He was convicted as charged, however, following a separate trial on the count for possession of a firearm by a convicted felon.

In ground one, Appellant alleges that his counsel was ineffective for failing to call Brittany DeLemos at the second trial, claiming that she would have testified that he did not possess a firearm. Although Ms. DeLemos's proffered testimony could have been impeached with a prior inconsistent statement, Appellant alleges that she would have explained at trial that she lied in her 911 call because, at the time, she was "filled with emotions" and "was desperate" to have Appellant out of her house.² Given our record, we conclude that Appellant is entitled to an evidentiary hearing on ground one unless the trial court on remand is able to attach records conclusively refuting Appellant's claim.

AFFIRMED in part; REVERSED in part; and REMANDED.

ORFINGER, TORPY and EISNAUGLE, JJ., concur.

¹ The record indicates that Brittany DeLemos is also known as Brittany McIntosh.

² Appellant attached an affidavit signed by Brittany DeLemos that is consistent with his allegations.