

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

DONTE GRANT,

Appellant,

v.

Case No. 5D20-1700
LT Case No. 2010-CF-746-A-O

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed October 1, 2021

3.850 Appeal from the Circuit Court
for Orange County,
Lisa T. Munyon and Leticia J. Marques,
Judges.

Matthew R. McLain, of McLain Law,
P.A., Longwood, for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Whitney Brown
Hartless, Assistant Attorney General,
Daytona Beach, for Appellee.

SASSO, J.

Appellant, Donte Grant, appeals the denial of his Florida Rule of
Criminal Procedure 3.850 motion for postconviction relief. We reverse the

summary denial of ground two. In all other respects, we affirm without further discussion.

In ground two, Grant alleged his trial counsel was ineffective for failing to call his brother as an alibi witness, and the postconviction court summarily denied the claim based on a statement trial counsel made to the trial court. We determine the record does not conclusively refute Grant's claim. Even if trial counsel's statement was accepted as evidence, the limited statement does not, without more, conclusively refute Grant's allegations, which we must accept as true. *See generally Washington v. State*, 46 Fla. L. Weekly D664 (Fla. 5th DCA Mar. 26, 2021). Accordingly, we reverse as to ground two for the postconviction court to either attach documents that conclusively refute Grant's claim or to conduct an evidentiary hearing.

AFFIRMED, in part; REVERSED, in part; REMANDED for further proceedings.

EISNAUGLE, J., concurs.

TRAVER, J., concurs and concurs specially, with opinion.

TRAVER, J., concurring specially.

Based on our available record, I agree that Appellant has presented a facially sufficient postconviction claim for ineffective assistance of counsel for allegedly failing to call an alibi witness. *See Spera v. State*, 971 So. 2d 754, 756 (Fla. 2007) (citing *Nelson v. State*, 875 So. 2d 579, 584 (Fla. 2004)).

The postconviction court's summary denial was based on a three-page excerpt from the trial transcript, which suggests that after the jury retired to deliberate, the trial court asked Appellant whether he had any issues with his trial counsel's performance. Appellant complained that his trial counsel failed to call his brother as a witness. He, however, declined to discuss what his brother would have said after the trial court correctly informed him that his response could potentially incriminate him in the event of a retrial. On the other hand, trial counsel stated that Appellant never requested him to interview or list the brother as a trial witness. But trial counsel declined to say anything further on the grounds that it would violate attorney-client privilege.

Mid-trial colloquies can be useful in confirming defendants' understanding of their rights. This, in turn, may preempt subsequent postconviction challenges. For instance, it would be difficult for a

postconviction movant to claim he did not know he had a right to testify in his own defense if a trial judge conducted a colloquy with him before his case-in-chief began, outlining his right to either testify or remain silent. *E.g.*, *Santiago v. State*, 294 So. 3d 969, 972 (Fla. 1st DCA 2020). Similarly, if a trial court conducted a thorough colloquy with a defendant about whether he wished to call any witnesses, and he said he did not, a later postconviction challenge may be more difficult to advance than this one. *See, e.g.*, *McIndoo v. State*, 98 So. 3d 640, 641 (Fla. 4th DCA 2012).

But these mid-trial colloquies are ill-suited to resolve credibility determinations between defendants and their lawyers. Trial counsel identified a major factor in this context, which is that attorney-client privilege is not waived, and therefore, trial counsel may not testify with the candor he could employ in a postconviction evidentiary hearing. *See Reed v. State*, 640 So. 2d 1094, 1097 (Fla. 1994). The trial court's colloquy here did not allow the postconviction court to assess the parties' credibility or to make the credibility determination it implicitly did.¹ Appellant said he told trial counsel to call his brother as a witness; trial counsel said Appellant did no such thing.

¹ The trial judge, the postconviction judge who summarily denied two of Appellant's claims, and the postconviction judge who denied Appellant's newly discovered evidence claim after an evidentiary hearing were all different judges.

In this context, the limited record does not refute Appellant's allegations, which we are required to accept as true at this stage. While it is theoretically possible that additional record citations could refute Appellant's remaining claim, an evidentiary hearing will most likely be necessary to resolve this ground.