FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1769

DELONTE MARTISTEE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Bay County.
Christopher N. Patterson, Judge.

August 17, 2020

PER CURIAM.

Appellant argues that the trial court erred in denying his amended postconviction motion without a hearing. While we do not pass upon the merits of Appellant's arguments, we agree that he is entitled to an evidentiary hearing as to one ground he raised. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (outlining standards for establishing ineffective assistance of counsel).

In the only point of the postconviction motion as to which we grant relief, Appellant argued that his trial counsel was ineffective for not moving to suppress Appellant's recorded post-Miranda statements to law enforcement officers. We must accept Appellant's factual allegations as true if the record does not refute them. *Brown v. State*, 270 So. 3d 530, 532 (Fla. 1st DCA 2019). We

find that the record does not refute the following factual allegations.

Appellant alleged that he was questioned first at a local college campus security office, and that he was never read his rights before or during this questioning—which the State does not appear to dispute. Appellant alleged that he was "lured" to this meeting under false pretenses when told it related to traffic tickets. He alleged that he was placed in a small room with one door, and questioned aggressively first by one officer and then by three officers in the small room at once, one of whom was leaning against the only door. Appellant alleged the officers told him they had video of the crime scene; and that although his face was not visible, his tattoos would identify him as one of the people in the video. He denied that he had been there. The officers pressured him to take off his shirt and reveal his tattoos. He alleged that he felt intimidated, and that the officers questioned him for 30 to 45 minutes with the intent of making him incriminate himself. These facts sufficiently allege a claim that Appellant was in custody during this questioning. *Ross v. State*, 45 So. 3d 403, 415 (Fla. 2010) (listing factors to be considered in determining whether defendant is in custody).

Appellant ultimately did remove his shirt as a result of this first questioning session, revealing his tattoos, whereupon the officers allegedly declared that his tattoos proved he was shown in the video. Appellant further alleged in his postconviction motion that after answering questions and removing his shirt for the officers at the campus security office, he was handcuffed and transported to the police station. He asked to make a phone call, but then was left alone for several hours without being allowed a call. He was then read his Miranda rights, and admitted to officers that he had lied during initial questioning at the campus security office, and actually was at the scene of the alleged crime.

At trial, Appellant's defense was that the victim consented. The State cross-examined him first about his inconsistent statements, eliciting his admission that he had lied in initial questioning when he said he was not at the scene. He alleged in his postconviction motion that his trial counsel should have moved to suppress evidence of his inconsistent statements, but did not.

This sufficiently alleged the deficient performance prong of a claim of ineffective assistance of counsel. *See Strickland*, 466 U.S. at 687–88 (describing deficient performance of counsel).

Appellant's amended postconviction motion alleged that he was prejudiced by the admission of this evidence, that it hurt his credibility, and that a motion to suppress on these facts would have changed the outcome of his trial. This sufficiently alleged prejudice resulting from ineffective assistance of counsel. *See Lebron v. State*, 135 So. 3d 1040, 1052–53 (Fla. 2014) (describing sufficient allegations of prejudice).

We find that the record excerpts attached to the trial court's order denying relief do not conclusively refute Appellant's claims. In material part, the facts recited in the trial court's order denying Appellant's motion do not match up to Appellant's allegations. Whereas Appellant alleged that it was the removal of his shirt that revealed tattoos that caused the initial group of questioning officers to declare that he was depicted in the video, the trial court's order mentions only tattoos on Appellant's hands, which is not supported by the attached record excerpts.

Further, the trial court concluded that Appellant failed to allege facts that would support a conclusion that he was in custody or reasonably believed he was in custody during the initial questioning. We find that Appellant's motion was facially sufficient to allege that Appellant reasonably believed he was in custody during the initial, unwarned interrogation. He alleged that he was lured to the first meeting under false pretenses, with three law enforcement officers in a small room. One officer was leaning on the closed door. The officers questioned him aggressively and repeatedly demanded that he remove his shirt. *See Ross v. State*, 45 So. 3d 403, 415 (Fla. 2010) (listing similar facts as indicating a defendant is in custody). The record excerpts attached to the order denying Appellant's motion again do not refute Appellant's allegations.

We find that Appellant's allegations were sufficient to warrant an evidentiary hearing, and we therefore reverse and remand for an evidentiary hearing on this claim alone. *See Hamilton v. State*, 915 So. 2d 1228 (Fla. 2d DCA 2005) (reversing for evidentiary hearing where postconviction motion made a

facially sufficient claim of ineffective assistance in failing to move to suppress statements). We also encourage the trial court to consider appointing counsel for Appellant, as he requested upon filing his postconviction motion. *See* Fla. R. Crim. P. 3.850(f)(7) (listing factors for determining appropriateness of appointing counsel). Finding no merit in Appellant's other claims, we affirm the denial of those without comment.

AFFIRMED in part, REVERSED in part, and REMANDED for an evidentiary hearing.

OSTERHAUS, KELSEY, and NORDBY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Delonte Martistee, pro se, Appellant.

Ashley Moody, Attorney General; and Barbara Debelius, Benjamin L. Hoffman, and Adam Wilson, Assistant Attorneys General, Tallahassee, for Appellee.