

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D22-25

SIMON SINCLAIR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Jackson County.
James J. Goodman, Judge.

December 20, 2022

PER CURIAM.

In this appeal, the appellant claims that the trial court erred by denying his claim for postconviction relief after an evidentiary hearing. The appellant argues that the trial court erred by finding his newly discovered evidence unreliable. Because the trial court's findings are supported by competent, substantial evidence, we affirm.

When determining whether to grant a motion for postconviction relief based on a claim that the defendant has obtained newly discovered evidence, the defendant first must show that the evidence was not known to him, his attorney, or the trial court and could not have been discovered through the use of due diligence. *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997). If

the defendant successfully demonstrates the requirements of that first prong, then he must also show that the newly discovered evidence would probably produce an acquittal on retrial. *Id.* The trial court is required to weigh the newly discovered evidence against the evidence that was admitted at trial. *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991). The appellate court will uphold a trial court's ruling on a motion for postconviction relief after an evidentiary hearing if the trial court's findings are supported by competent, substantial evidence. *Blanco*, 702 So. 2d at 1252. The appellate court will not substitute its judgment for the trial court's judgment on questions of fact, witness credibility, and weight of the evidence. *Id.*

In the appellant's motion for postconviction relief, he claimed he newly discovered an eyewitness to the robbery that he was convicted of committing. The appellant's newly found eyewitness, Patrick Lively, was an inmate housed at the same correctional facility as the appellant. Mr. Lively provided an affidavit that was attached to the appellant's motion. In Mr. Lively's affidavit, he stated that he saw Robert Davis II commit the robbery outside of the bank. Mr. Lively saw Mr. Davis pull out a gun, take the old lady's money, and run away. The affidavit was written nearly eighteen years after the robbery.

After several revisions of his motion, the trial court granted the appellant an evidentiary hearing and appointed counsel for him. During the evidentiary hearing, Mr. Lively admitted that he was ten years of age when he witnessed the robbery. He also admitted that he was serving a life sentence and had been convicted of five felonies. Mr. Lively claimed to have been with his cousin Murray when the robbery happened, but he did not know how old his cousin was or his cousin's last name. He claimed Mr. Davis was wearing black clothing, but he did not know if Mr. Davis was wearing all black or just a portion of his clothing was black. He did not know if Mr. Davis was wearing anything on his head. Mr. Lively never saw Mr. Davis get closer than five to six feet from the victim. On redirect, Mr. Lively was asked about his statement that he saw Mr. Davis take the money from the victim, but Mr. Lively stated that he no longer recalled those facts.

In its order denying the appellant's motion for postconviction relief, the trial court found the appellant failed to show that the newly discovered evidence would probably lead to an acquittal. It found Mr. Lively not credible. The trial court pointed out the contradictions between Mr. Lively's affidavit and his testimony during the evidentiary hearing. It also compared Mr. Lively's recall of the events to the evidence admitted at trial, noting the inconsistencies between Mr. Lively's testimony and the testimony provided by the trial witnesses.

During the trial, Captain Roland Lipford testified that the victim identified the appellant from a photographic lineup as the person who robbed her. He also testified that the bank teller identified the appellant from a photographic lineup as the person who requested permission to stand under the bank's awning to get out of the rain. He did not tell the bank teller that the victim identified the appellant as the person who robbed her.

The bank teller testified that she picked the appellant out of a photographic lineup as the person who requested permission to stand under the bank's awning until the rain subsided. She was positive about her identification. She got a good look at his face, but could not see his hair. The appellant wore a hooded jacket tied around his head hiding his hair. She saw the appellant move to the other side of the door when the victim exited the bank. A minute after the victim exited the door, she heard the victim scream and could see the victim laying on her back. When the bank teller exited the bank, the victim screamed, "He hit me, he hit me, he hit me," and "He took my money." The victim's mouth was bleeding, and she was holding out her hand.

The victim testified that while she was in the bank, a man stuck his head in the door requesting permission to stand under the awning. She identified him as a well-built, lighter-in-color black man wearing a desert storm camouflaged jacket with a hood over his head. The hood was tied with a string, so she could not see his ears or hair. The victim described his eyes, cheek bones, and roundness of his face. She looked at his face several times when they came face to face while waiting on opposite sides of the glass window for the rain to stop. When the victim came out of the door, she was clutching her cashed paycheck in her fist. When she

reached her car door, she heard someone come up behind her and say, “Stormy weather,” or “Rainy weather.” The victim turned around and responded, “It sure is.” Then, the man said, “Give me your damn money.” The man pointed a gun with a long, shiny barrel at her. This was the same man she saw ask permission to stand under the awning and the same man she identified in the photographic lineup. The next thing the victim remembered was waking up in the hospital with a cut above her right eye, bruises on both sides of her face, a broken hand, a nosebleed, and a busted mouth. The victim’s broken hand was the same hand the victim had the money in. The victim could not forget the appellant’s face, she recalled his face every day, and she was positive that he was the person who robbed her.

The facts that came out during the trial show support for the trial court’s findings that Mr. Lively was not credible. Mr. Lively testified that he never saw Mr. Davis take the victim’s money, did not see Mr. Davis get close to the victim, and saw Mr. Davis run away after pulling a gun on the victim. The evidence presented during the trial showed that the appellant got close to the victim, took the victim’s money, and injured the victim before leaving the crime scene. It also showed that the victim was wearing a hooded jacket, which was not black. Accordingly, the trial court’s findings of fact that led it determine the appellant failed to show that his newly discovered evidence would probably produce an acquittal is supported by competent, substantial evidence.

AFFIRMED.

B.L. THOMAS, ROBERTS, and JAY, JJ., concur.

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

Simon Sinclair, pro se, Appellant.

Ashley Moody, Attorney General, and Steven Edward Woods,
Assistant Attorney General, Tallahassee, for Appellee.