

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

KEONTAY L. BAKER, DOC #H04184,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

Case No. 2D19-2944

Opinion filed July 31, 2020.

Appeal pursuant to Fla. R. App. P.
9.141(b)(2) from the Circuit Court
for Polk County; Neil A. Roddenberry,
Judge.

Keontay L. Baker, pro se; and Wade M.
Whidden and Karen A. Johnson of Whidden
Johnson, P.L., Tampa, for Appellant.

PER CURIAM.

Keontay Baker appeals from the postconviction court's final order summarily denying his amended motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. Because ground five of his motion is facially sufficient and the attached portions of the record do not refute his claim, we reverse the postconviction court's order insofar as it denied ground five. We affirm the order in all other respects.

Baker was convicted following a jury trial of burglary of a dwelling and grand theft from a dwelling (\$100 or more). The limited record before us establishes

that Baker became a suspect after law enforcement matched a car rented in his name to the car that was observed outside of the house where the crimes took place. Baker maintained his innocence, proclaiming that his friend was driving the car on the day of the crimes. A surveillance video captured the silhouette of the perpetrator, and a law enforcement officer identified Baker from the video. At trial, Baker relied on a misidentification defense and testified that it was his brother who was responsible for the offenses. This court affirmed his judgment and sentences. See Baker v. State, 191 So. 3d 467 (Fla. 2d DCA 2016) (table decision).

Thereafter, Baker filed the instant rule 3.850 motion for postconviction relief, alleging, in pertinent part, a claim of newly discovered evidence in the form of an affidavit from his brother confessing to the crimes for which Baker was convicted. Baker alleged that his brother was willing to testify and admit to committing the crimes. He argued that the evidence would probably produce an acquittal on retrial. Finally, Baker alleged that the evidence was newly discovered because his brother did not prepare the affidavit until his release from prison in May 2018. In the affidavit, Baker's brother explained that he had a drug problem at the time of the crimes but now that he is sober he feels immensely guilty that his brother is in prison for something he did. Baker's two sisters also filed affidavits explaining that after Baker's brother was released from prison he confessed to them that he had committed the crimes.

After ordering the State to respond to ground five of Baker's motion, the postconviction court rendered a final order denying the motion in its entirety and adopting the State's arguments as to why ground five should be summarily denied. Its denial was premised on several findings: (1) the evidence does not constitute newly discovered evidence because the record shows that Baker knew that someone else

used his rental car on the day of the crimes, (2) the evidence is inherently incredible "in that the witness has decided to come forward after the statute of limitations has run in the case," and (3) the record conclusively refutes Baker's claim because he was identified as the perpetrator by a law enforcement officer from a surveillance video of the crimes. Baker timely appealed.

"We review the postconviction court's summary denial of a rule 3.850 motion de novo." Duncan v. State, 232 So. 3d 450, 452 (Fla. 2d DCA 2017). A defendant must meet two requirements to prevail on a claim of newly discovered evidence. "First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence." Tompkins v. State, 994 So. 2d 1072, 1086 (Fla. 2008). "Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Id. (citing Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)). "The summary denial of a newly discovered evidence claim will be upheld if the motion is legally insufficient or its allegations are conclusively refuted by the record." Id. at 1087 (citing McLin v. State, 827 So. 2d 948, 954 (Fla. 2002)). "Moreover, '[i]n undertaking this review, the factual allegations of the motion must be accepted as true unless refuted by the record.'" Utile v. State, 235 So. 3d 1045, 1048 (Fla. 5th DCA 2018) (alteration in original) (quoting Simpson v. State, 100 So. 3d 1258, 1259 (Fla. 4th DCA 2012)).

The postconviction court first ruled that Baker's brother's affidavit does not constitute newly discovered evidence because Baker knew at the time of trial that his brother was driving his rental car on the day the crimes were committed. But in his affidavit, Baker's brother claimed that he was unwilling to come forward and confess to

the crimes until after he was released from prison in 2018. "Florida courts have held that evidence can be treated as newly discovered where it is 'based on newly available testimony of defendants who were previously unwilling to testify.'" Brantley v. State, 912 So. 2d 342, 343 (Fla. 3d DCA 2005) (quoting Totta v. State, 740 So. 2d 57, 58 (Fla. 4th DCA 1999)); see also Taylor v. State, 260 So. 3d 151, 160 (Fla. 2018) ("[W]ith regard to Holton's possible involvement in the murder, we conclude that this evidence was previously unavailable to Taylor, based on Dixon's previous unwillingness to testify."); Mills v. State, 225 So. 3d 420, 420 (Fla. 5th DCA 2017) (holding that an affidavit from a third party admitting sole responsibility for the crimes for which the defendant was convicted and asserting that he was unwilling to incriminate himself at the time of trial constitutes newly discovered evidence despite the fact that the defendant knew about the third party at the time of trial). Here, it is Baker's brother's newfound willingness to testify that renders the evidence newly discovered, and the court erred in denying ground five on the basis that it was untimely. See Mills, 225 So. 3d at 420; Wilson v. State, 188 So. 3d 82, 85 (Fla. 3d DCA 2016) ("[I]t is the discovery of the existence of admissible evidence demonstrating that Wilson was not the person who committed the crime that renders such evidence 'newly-discovered' and permits him to assert this evidence in support of a motion for relief under rule 3.850." (citing Archer v. State, 934 So. 2d 1187, 1194 (Fla. 2006))).

As for the timing of the brother's affidavit, the postconviction court found that the evidence is inherently incredible in that Baker's brother did not come forward until after the statutes of limitations had run on the crimes. However, the suspect timing of the claim does not in and of itself render the evidence inherently incredible, especially when it is coupled with Baker's corroborating trial testimony that his brother committed

the crimes. See Utile, 235 So. 3d at 1048 ("[W]hile we understand that these affidavits produced approximately twelve years after the shooting may be suspect, we nonetheless conclude that the court erred in summarily denying grounds one and two of Utile's amended motion without conducting an evidentiary hearing . . . to assess the credibility of the [affiants'] statements exculpating Utile from these crimes."); Simpson, 100 So. 3d at 1260 ("We would agree that this affidavit produced by a fellow prisoner nearly fifteen years after the event is inherently suspect, but this does not support summary denial in this case."). Indeed, the postconviction court's order did not even acknowledge Baker's trial testimony implicating his brother.

Finally, the postconviction court determined that Baker's claim is conclusively refuted by the record because a detective identified him in a surveillance video of the burglary. However, Baker alleged that the video shows only the silhouette of the perpetrator from the back and that the detective identified him from his "stance" and his "walk." Baker further alleged that he and his brother share many characteristics which would make it difficult to distinguish one from the other in a video. Additionally, Baker testified at trial that he recognized his brother from the video. See Floyd v. State, 202 So. 3d 137, 140 (Fla. 2d DCA 2016) (reversing the postconviction court's summary denial of a newly discovered evidence claim and explaining that the affidavits filed with the defendant's motion were consistent with the defendant's theory of defense at trial). The record attachments affixed to the court's order, including the detective's identification of Baker, do not conclusively refute Baker's claim that his brother was the perpetrator, and the court erred in summarily denying the claim. See id. ("Because the record fails to conclusively refute Mr. Floyd's motion for relief, the postconviction court erred in summarily denying the claim.").

Accordingly, we reverse the postconviction court's order to the extent that it summarily denied ground five of Baker's motion and remand with directions to hold an evidentiary hearing at which the court can evaluate the weight of the newly discovered evidence and the evidence that was introduced at trial. See id.; Utile, 235 So. 3d at 1048. We affirm the order in all other respects.

Affirmed in part; reversed in part; remanded.

SILBERMAN, BLACK, and SLEET, JJ., Concur.