DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

KAHEEM BENNETT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D22-768

November 30, 2022

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Polk County; Sharon M. Franklin, Judge.

Kaheem Bennett, pro se.

PER CURIAM.

Kaheem Bennett appeals from the final order summarily denying his second amended motion filed pursuant to Florida Rule of Criminal Procedure 3.850 in which he alleged a claim of cumulative error under ground one and several ineffective assistance of trial counsel claims under grounds one through five.

We affirm the portions of the postconviction court's order denying grounds one, three, and four without further comment. We reverse the denial of grounds two and five.

The postconviction court denied ground two as facially insufficient. However, while the various parts of the claim were split between the "Supporting Facts" and "Memorandum of Law" sections of Mr. Bennett's second amended motion, his claim that trial counsel misadvised him to reject the State's plea offer was sufficiently pled. Mr. Bennett alleged how "trial counsel's assessment of the chances of success at trial was unreasonable under the facts and circumstances of the case." *Morgan v. State*, 991 So. 2d 835, 841 (Fla. 2008), *receded from on other grounds by Alcorn v. State*, 121 So. 3d 419, 419 (Fla. 2013). He also alleged the four *Alcorn* prejudice factors. *See Alcorn*, 121 So. 3d at 430. Accordingly, we reverse the postconviction court's denial of ground two. On remand, the court must either attach portions of the record conclusively refuting the claim or hold an evidentiary hearing.

In ground five, Mr. Bennett alleged that after Officer Branch testified at trial that she could not recall whether the victim

described where in the car a six-foot-tall occupant was sitting, trial counsel should have refreshed her recollection with her report in order to elicit favorable testimony regarding the victim's description of the driver and shooter. The report was not made part of the record on appeal, and so the postconviction court accepted Mr. Bennett's allegations as true. However, the court denied the claim on the basis that the testimony Mr. Bennett sought to elicit would have been inadmissible.

As the court correctly noted, a statement providing a physical description is not an "identification" within the meaning of section 90.801(2)(c), Florida Statutes (2018), and is therefore hearsay. *See Puryear v. State*, 810 So. 2d 901, 903-06 (Fla. 2002). However, the statement Mr. Bennett alleged trial counsel should have elicited was likely admissible under the excited utterance exception pursuant to section 90.803(2). *See Hayward v. State*, 24 So. 3d 17, 29-30 (Fla. 2009).

We note that Officer Branch's report actually refutes Mr. Bennett's claim.[1] But because the report was not made part of the

[1] The State attached a copy of the report to its response to Mr. Bennett's motion. Per the report, the victim told Officer Branch

trial court record prior to the filing of the rule 3.850 motion, we cannot affirm the postconviction court's denial on that basis. *See* Fla. R. Crim. P. 3.850(f)(4); *Barnes v. State*, 38 So. 3d 218, 219-20 (Fla. 2d DCA 2010). Accordingly, we must reverse the denial of ground five. On remand, the court must either attach a portion of the trial court record refuting the claim or hold an evidentiary hearing.

Affirmed in part, reversed in part, and remanded.

KELLY, LUCAS, and VILLANTI, JJ., Concur.

Opinion subject to revision prior to official publication.

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that one of the people in the car was a skinny black male who was at least six feet tall. However, the victim did not state that this person was the driver. The victim later told Officer Branch that the driver was wearing a black shirt and black shorts. However, the victim did not state it was the tall skinny black male who was wearing the black shirt and black shorts.