

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

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

GENE LENOX GORE, )  
 )  
Appellant, )  
 )  
v. )  
 )  
STATE OF FLORIDA, )  
 )  
Appellee. )  
\_\_\_\_\_ )

Case No. 2D11-6202

Opinion filed October 19, 2012.

Appeal pursuant to the Fla. R. App. P.  
9.141(b)(2) from the Circuit Court for Collier  
County; Franklin G. Baker, Judge.

DAVIS, Judge.

Gene Gore challenges the summary denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. His motion raises three claims of ineffective assistance of counsel at the time of his violation of probation (VOP) hearing. We affirm the summary denial as to two of those claims without further comment. But because the trial court failed to address one portion of

Gore's third claim and the attached portions of the record do not conclusively refute the claim, we reverse the summary denial of that claim.

Gore was convicted of grand theft in 2005 and was placed on probation. He was found to have violated that probation by stalking a woman with whom he had two children. His rule 3.850 motion claimed that his attorney was ineffective for failing to call Ashley, Austin, and Dylan Gore who would have testified to several identified facts that would have shown he did not stalk the victim.

The postconviction court denied the claim, concluding that the testimony would have been merely cumulative to the victim's admission that she was spending many nights with Gore at the time of the alleged incident and to the testimony of Gore's neighbor regarding how often the victim spent the night at Gore's apartment. However, the postconviction court failed to address Gore's allegations that the named witnesses would have testified that he was not stalking the victim, that he was actually the victim of violence at the hands of the alleged victim, and that his only concern during that time was for the welfare of his children. Because this portion of the claim of ineffective assistance for failing to call witnesses was not addressed by the postconviction court and is unrefuted by the attached portions of the record, we reverse the summary denial of the rule 3.850 motion as related to counsel's alleged failure to call witnesses and we remand for reconsideration of that claim. See Gutierrez v. State, 27 So. 3d 192, 194 (Fla. 5th DCA 2010) ("If a motion presents a facially sufficient claim of ineffective assistance of counsel for failing to call a witness, the movant is entitled to an evidentiary hearing unless the motion is conclusively refuted by the record or is otherwise procedurally barred.").

Affirmed in part, reversed in part, and remanded.

SILBERMAN, C.J., and ALTENBERND, J., Concur.