

Third District Court of Appeal

State of Florida

Opinion filed November 12, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D20-1316
Lower Tribunal No. 15-25252

Carlos J. Smith,
Petitioner,

vs.

The State of Florida,
Respondent.

A Case of Original Jurisdiction – Ineffective Assistance of Appellate Counsel.

The Law Offices of Robert David Malove, P.A., and Robert David Malove (Fort Lauderdale), for petitioner.

Ashley Moody, Attorney General, and Kseniya Smychkouskaya, Assistant Attorney General, for respondent.

Before EMAS, C.J., and LOGUE and MILLER, JJ.

PER CURIAM.

Petition denied. See Russell v. State, 982 So. 2d 642, 647 (Fla. 2008) (expressly disapproving of Santiago v. State, 889 So. 2d 200 (Fla. 4th DCA 2004), Colwell v. State, 838 So. 2d 670 (Fla. 2d DCA 2003) and Colina v. State, 629 So. 2d 274 (Fla. 2d DCA 1993), and holding: “the Second District and Fourth District in these cases reversed the trial court's revocation based on the failure to establish a direct nexus between the probationer and the alleged battery. These decisions thus demonstrate that the Second and Fourth Districts require that the non-hearsay evidence independently establish that the probationer committed the battery. We disagree with such a requirement. Corroboration of every aspect should not be required in order to establish that the probationer committed a battery for the purpose of revoking probation. On the other hand, the trial court must examine the facts and circumstances of each individual case to determine whether a particular violation is willful and is supported by greater weight of the evidence. Thus, whether non-hearsay evidence, including direct testimony of an observation of victim injury, is sufficient to support a hearsay allegation of battery is dependent upon the unique facts and circumstances of each case. Consequently, the trial court must assess the credibility of the particular witnesses, the reliability of the available evidence, and the totality of the evidence under the circumstances in each individual case.”) (Internal citations omitted.)