IN THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT
STATE OF FLORIDA

CASE NO.: 5D18-1093

Hop Hieu Le,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida

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APPELLANT'S INITIAL BRIEF

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JURISDICTIONAL STATEMENT

The Appellant, Hop Le (hereafter "Le"), appeals the post-conviction court's order denying his amended post-conviction relief motion, pursuant to Florida Rule of Criminal Procedure 3.850 on March 7, 2018 (hereinafter "Amended PCR"). (R. 145-186).[1] Le filed a timely Notice of Appeal on April 5, 2018.

This Court has jurisdiction under Rule 9.141(b)(2) of the Florida Rules of Appellate Procedure. Venue is proper in the Fifth District Court of Appeal, as it maintains supervisory jurisdiction over the Fifth Judicial Circuit. FLA. STAT. § 35.02.

STATEMENT OF THE CASE AND FACTS

Le was arrested and charged in case number 2011-CF-2367-B, via information, charging Mr. Le kidnapping with intent to a commit a felony (with a firearm) in Counts 1 and 2, burglary of a dwelling with an assault (with a firearm) in count 3, robbery with a firearm in Counts 3 and 5. (R. 145).[2]

Le was convicted of Counts 1 – 5 by way of jury trial. The jury made a special finding regarding the use of a firearm. *Id*. Prior to sentencing, but after trial, trial counsel for Le-(Mr. Lafay)-moved for a competency exam ("Trial

[1] Citations to the Record on Appeal will be referred to by the letter "R." followed by the appropriate page number(s).

[2] Counts 6-10 were nolle prosequi by the State of Florida on or about October 3, 2011.

Counsel"). On December 6, 2011, the Trial Court found the Defendant Le competent to proceed with sentencing based on a doctor's report. *Id*.

Le was sentenced to a 45-year term in the Department of Corrections on December 22, 2011.[3] Le filed his initial post-conviction motion on September 15, 2015 and was provided leave of court to amend the same. Le filed an amended post-conviction, which was denied by the Trial Court without a hearing. (R. 114).

In his amended post-conviction ("Amended PCR"), Le alleged the following:

Count 1: Defense Counsel failed to properly investigate available witnesses and present such witnesses at trial. (R. 118).

Count 2: Defense Counsel failed to object to hearsay testimony presented during the suppression hearing. (R. 120).

Count 3: Defense Counsel failed to object to the Defendant's absence a competency hearing. (R. 122).

Ground 4: Defense Counsel failed to object when a juror was sleeping. (R. 123).

Ground 5: Le alleged newly discovered evidence. (R. 126).

[3] Le appealed and the Fifth District Court of Appeal per curiam affirmed; *Le v. State*, 141 So. 3d 209 (Fla. 5th DCA 2014). A mandate issued on July 16, 2014.

Count 6: Defense Counsel rendered ineffective assistance of counsel by failing to advise Le regarding a mistrial option after the State committed discovery violations. (R. 128).

Count 7: Defense Counsel failed to investigate witnesses and present the witnesses at trial. (R. 129).

Count 8: Defense Counsel rendered ineffective counsel by failing to object to a recorded jail phone call. (R. 131).

Count 9: Le complained of cumulative error, or that such error by trial counsel compounded the injury to Le, causing him to lose at trial.

The trial court denied all Counts of Le's Amended Post-Conviction Motion without a hearing.

The appeal of the Trial Court's summary denial follows.

SUMMARY OF THE ARGUMENT

The post-conviction court erred by summarily denying Le's claims as to Count 1 of Le's Amended PCR which claims Trial Counsel was ineffective for failing to fully procure an alibi defense for Le at trial. Le contends that Trial Court improperly denied Le a hearing as to his claim that Trial Counsel was ineffective for failing to call alibi witnesses, Khuu and Kay.

The post-conviction court erred by summarily denying Le's claims as to Count 3, competency issues. First, the post-conviction court failed to address Le's

claim that Trial Counsel provided ineffective assistance of counsel by failing to have him present at the competency hearing. At a hearing, the Trial Court orally adjudicated Le competent to proceed to sentencing. The case proceeded to sentencing. Le contends that Trial Counsel was ineffective for failing to have him present at such a critical stage of the proceedings, knowing there is a possibility of incompetency. Had the post-conviction court applied the correct standard, it would have granted Le an evidentiary hearing on the competency issues.

Le adds he should have been granted a hearing as to whether the "sleeping juror" was not listening to in court trial testimony. The post-conviction court erred by summarily denying Le's claims as to Count 4 of the Amended PCR as Florida law requires an evidentiary hearing on the issues of a sleeping juor.

Le also argues that the Trial Court erred in summarily denying Count 5 of Le's Amended PCR: Le's newly discovered evidence claim.

Finally, this Court should remanded an evidentiary hearing as to Count 8 of Le's Amended PCR as Le should be afforded a hearing as to an officer's identification of Le's voice on a recorded jail line.

ARGUMENT

I. THE POST-CONVICTION COURT ERRED BY SUMMARILY DENYING LE'S CLAIMS AS TO THE AMENDED MOTION FOR POST-CONVICTION RELIEF.

Standard of Review

When a trial court denies a motion for post-conviction relief without an evidentiary hearing, Florida Rule of Appellate Procedure 9.141 sets the standard for review as follows: "[u]nless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief." FLA. R. APP. P. 9.141.

In *McLin*, the Florida Supreme Court explained, when reviewing the summary denial of a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, an appellate court should overturn the trial court's denial when the appellant's claims are either facially valid or not conclusively refuted by the record. *McLin v. State*, 827 So. 2d 948, 954 (Fla. 2002).

Florida courts have also explained, when a trial court summarily denies a claim made pursuant to Rule 3.850, the trial court must "either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." *Id*. (citing *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993)). Specifically, "when the denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and

records should be attached to the order." *Id*. (citing FLA. R. CRIM. P. 3.850(d)). Indeed, the post-conviction court's order must demonstrate the "motion, files and records in the case conclusively show that the movant is entitled to no relief." *Id*.

Argument on the Merits

(A)The post-conviction court erred by summarily denying Count 1 of the Amended PCR.

The Trial Court denied Le's contention that trial counsel was ineffective for failing to call two alibi witnesses, Tony Khuu and "Kay".

According to Le, the witnesses were material because the alleged crime occurred between 11 p.m. and midnight. On the night of the alleged crime, Kay was with Le at 11:30 p.m. (R. 147). Kay would have added that Le did not approach or enter the victim's apartment between 10 p.m. and midnight. *Id*. The Trial Court cited to parts of the record where Le mentions Kay and another witness named "Navash". The Trail Court also added that following the jury trial, Le announced that Trial Counsel performed effectively. *Id*. Such announcement is not grounds to refuse Le a hearing as to the nature of Khuu's testimony and Kay's in court testimony at a post-conviction hearing. Le alleged a facially sufficient claim and should have been afforded an evidentiary hearing because the attached record does not conclusively refute the claim as to the alibi witnesses.

To establish deficient performance, Le asserted Trial Counsel should have investigated and interviewed the witnesses, Khuu and Kay. Le asserted he was prejudiced by Trial Counsel's deficient performance because, after proper investigation and interviews of these witnesses were conducted, a complete alibi would have been presented at trial. Because the post-conviction court did not address this claim and nothing in the record conclusively refutes it, this Court should reverse the post-conviction court's summary denial. The matter should be remanded for an evidentiary hearing.

In support of this argument Le submits the case of *Youmans v. State*, 222 So.3d 1 (Fla. 4th DCA 2017). In *Youmans*, the Fourth District Court of Appeal reversed and remanded an appeal of the denial of a 3.850 post-conviction claim based on a trial court's summary denial of such claim. In this case, Le stated a facially sufficient claim based on counsel's alleged failure to call two witnesses because he: (i) identified the witnesses, Kay and Khuu; (ii) specified the content of their testimony, namely, that each witness would have testified that Le was not at the victim's apartment between 10 p.m. and midnight; (iii) alleged that both Khuu and Kay were available to testify at trial; and (iv) sufficiently alleged that failure to call Khuu and Kay to testify resulted in prejudice. *Youmans v. State*, 222 So. 3d 1, 2 (Fla. 4th DCA 2017).

Le alleges a sufficient alibi that warrants an evidentiary hearing. With respect to prejudice, any other evidence that Le was "happy" with Trial Counsel's performance is insufficient to deny him a hearing. In addition, the Trial Court cited the testimony of Le's co-defendant, Freeman, to deny Le's alibi claims. (R. 147). Freeman's claims that Le is guilty was misapplied by the Trial Court when it denied Le as hearing on the alibi issue. "[T]he mere existence of evidence of guilt is insufficient to conclusively rebut a claim of ineffectiveness in failing to present evidence of innocence in the form of known and available alibi witnesses." *Jacobs v. State*, 880 So. 2d 548, 555 (Fla. 2004). Le's claim as to Count 1 should be remanded for an evidentiary hearing.

(B) The post-conviction court erred by summarily denying Count 3: Le's competency claim.

The Trial Court denied Le's contention that he has a right to be present at the competency hearing. (R. 148). According to the Trial Court's reasoning, there is no evidence that Le would have been found incompetent had he been provided the opportunity to be present at the competency hearing. The Trial Court noted that both State of Florida and Le's original Trial Counsel "stipulated" to various reports offered by two different doctors, stating that Le is competent to proceed. (R. 149).

The Trial Court misconstrues Le's main argument which is that he did not waive his right to be present at the competency hearing. Had Le been present at

the competency hearing he would not have allowed for such a "stipulation" as to his competency, compelling a full hearing and ruling on the same. In addition, Le contends he has a right to be present at all critical stages of the trial and due process compels that he presence at the competency hearing is mandatory.

Le argues that a criminal defendant's Sixth and Fourteenth Amendment right to be present at all critical stages of the proceeding against him is a settled question, compelling reversal of the Trial Court's summary denial at to Count 3. *See, e.g., Francis v. State*, 413 So.2d 493 (Fla. 1982); *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *Hopt v. Utah*, 110 U.S. 574, 579 (1884); *Diaz v. United States*, 223 U.S. 442 (1912); *Proffit v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982); *see also* Rule 3.180 Fla. R. Cr. P. The standard announced in *Hall v. Wainwright*, 805 F.2d 945, 947 (11th Cir. 1986), is that "[w] here there is any reasonable possibility of prejudice from the defendant's absence from at any stage of the proceedings, a conviction cannot stand." *Estes v. U.S.*, 335 F.2d 609, 618 (5th Cir. 1964), cert. denied, 379 U.S. 964 (1965); *Proffit*, 685 F.2d at 1260. Unfortunately, Le was involuntarily absent from critical stages of the proceedings which resulted in his 45-year sentence.

Le never validly waived his right to be present, or to a stipulation by Trial Counsel as the contents of the competency reports. However, during his involuntary absence, important matters were attended to, discussed and resolved.

In fact, contrary to the Fifth, Sixth, Eighth, and Fourteenth Amendments, Le was not present in conferences where his attorney and the prosecutor agreed to stipulate to critical issues surrounding his competency. The denial of Le's right to be present violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Trial counsel did not object to his client's absence and appellate counsel failed to argue the fundamental error caused by his absence. Both of these errors were ineffective and prejudiced Le by denying him the relief he was entitled. *See Atkins v. Attorney General*, 932 F.2d 1430 (11th Cir. 1991).

The circumstances surrounding Trial Counsel's agreement with the State of Florida as to Le's competency and the stipulation as to the contents of the doctor's reports are sufficient to raise a legitimate doubt as to nature of the Le's representation and require an evidentiary hearing.

(C)The post-conviction court erred by summarily denying Count 4 of the Amended PCR: Le's sleeping juror claim.

The Trial Court denied Le's contention that trial counsel was ineffective for failing to object to a sleeping juror. The Trial Court should have granted a hearing on this issue as Le alleged that both Le's lawyers as well as the Court's Bailiff knew about the sleeping juror. The Trial Court contended that the claim lacks merit as there "is no indication that the juror slept through any testimony, only

closing arguments." (R. 149). Since the Trial Court believed that that the juror was not sleeping during the presentation of evidence, it denied the claim.

Le asserts that the case should be remanded for an evidentiary hearing on the issue of whether the juror was sleeping "during trial" and whether trial counsel did nothing about it. Florida appellate court consistently reverse the summary denial of rule 3.850 motions in which the defendant alleged his trial counsel was ineffective in failing to object to a sleeping juror. *See, e.g.*, *Erlsten v. State*, 842 So. 2d 967 (Fla. 4th DCA 2003); *Simo v. State*, 790 So. 2d 1190 (Fla. 4th DCA 2001); *McGraw v. State*, 796 So. 2d 1205 (Fla. 4th DCA 2001); *Wilson v. State*, 828 So. 2d 1086 (Fla. 1st DCA 2002).

In the instant appeal, Le alleged that a specific juror, Perry, was sleeping during his trial, that he informed his trial counsel of the sleeping juror, and that his counsel failed to call the bailiff in to "establish that the juror was sleeping." (R. 60). According to Le's Amended PCR, Le alleged that Trial Counsel did not inform the court about the sleeping juror until well after he first notice the issue. (R. 61). These allegations, in accordance with the aforementioned cases, are sufficient for an evidentiary hearing.

Accordingly, this Court should reverse the summary denial of this ground for either an evidentiary hearing.

(D)The post-conviction court erred by summarily denying Count 5, newly discovered evidence claim.

The Trial Court denied Count 6 of Le's Amended PCR on the basis that Le's co-defendant, Artwell Freeman, did not receive a "deal" to testify against Le at trial, but rather, obtain a downward departure during his July 21, 2011 sentencing hearing. (R. 149). The Trial Court noted that Freeman testified against the Le at trial, which lead to Le's conviction. *Id*. The Trial Court concluded that although the exhibits attached to Le's Amended PCR indicated a "negotiated plea agreement" between Freeman and the State of Florida, Freeman, however, seems to qualify for relief or a lower sentence under §921.0026(2)(1), Florida Statutes. [4]

This conclusion is incorrect as a matter of law. Under Florida law "where no evidentiary hearing is held below, [the appellate court] must accept the defendant's factual allegations to the extent they are not refuted by the

[4] Defendant argues that the State committed a violation by failing to disclose that, at the time of trial, co-defendant Artwell Freeman had been charged with a felony, and discussions had occurred between him and a prosecutor regarding the possibility of a better sentence if he testified "favorably" for the State. The focus of a Brady analysis "should be on whether a tentative promise of leniency might be interpreted by the witness as contingent upon the nature of his testimony." *Marrow v. State*, 483 So. 2d 17, 19-20 (Fla. 2d DCA 1985) (internal quotation omitted); see also *Floyd v. State*, 18 So. 3d 432, 451 (Fla. 2009) ("There is no Brady violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence."). Le argues that the State should have properly informed Le about Freeman's deal prior to trial.

record." *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999). In this case, the Trial Court misapplied this precedent when it failed to accept the factual allegations of the motion, including the affidavit, in determining if the motion was legally sufficient. In spite of the fact that the record of Freeman's sentencing was not before the Trial Court, it proceeded to make factual determinations as a basis for summary denial of Le's motion. The Trial Court's ruling is based in part on a factual finding that Freeman's sentence was lawful under §921.026, Florida Statutes. The fact that Freeman was provided a lower sentence in exchange for his testimony against Le was not calculated in the Trial Court's Order denying the Amended PCR. Le contends the entire record of Freeman's sentencing was not made part of the summary denial and therefore cannot be used a basis of denial of the Amended PCR. [5]

Without an evidentiary hearing, the Trial Court's conclusions that Freeman seems to have qualified for a lower sentence is simply speculation. Whether Freeman truly obtained a lower sentence in exchange for testifying against Le is

[5] "[T]he fact that the witness was unaware of the exact terms of the agreement only increased the significance, for the purpose of assessing his credibility, of his expectation of favorable treatment." *Porterfield v. State*, 472 So. 2d 882, 884 (Fla. 1st DCA 1985) (citing *Campbell v. Reed*, 594 F.2d 4, 7 (4th Cir. 1979)). Essentially, "[s]ince a tentative promise of leniency could be interpreted by the witness as being contingent on his testimony, there would be an even greater incentive for him to 'make his testimony pleasing to the prosecutor.'" Id.

not a factual matter that can be determined from the exhibits attached to Le's Amended PCR alone, or the sentencing documents of Freemen.

In the instant case, the facts set forth in the motion and Freeman sentencing documents are the type of facts which, if true, would subject the judgment to a legitimate collateral challenge. Such evidence, if presented at trial, would have been important evidence for consideration by the jury, and impeachment of Freeman at trial. Only after holding an evidentiary hearing can the Trial Court determine if the evidence is credible and newly discovered, and whether it would probably produce a different result on retrial—a separate issue requiring the Trial Court to review the new evidence and the evidence that was presented at the original trial.

Accordingly, an evidentiary hearing is required on his claim of newly discovered evidence. The factual allegations in the Freeman's sentencing could be used to impeach Freeman at trial must be tried and tested in an evidentiary hearing where they are subject to credibility determinations. Further, as part of the evidentiary hearing, "the trial judge should consider all newly discovered evidence which would be admissible and determine whether such evidence, had it been introduced at the trial, would have probably resulted in an acquittal. In reaching this conclusion, the judge will necessarily have to evaluate

the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones v. State*, 591 So.2d 911 (Fla. Sup. Ct. 1991).

For all the reasons set forth above, this Court must quash the decision of the Trial Court and remand for an evidentiary hearing on the claims associated with the Freeman's sentencing agreement with the State of Florida.

(E) The post-conviction court erred by summarily denying Count 6 of the Amended PCR: discovery violation.

The Trial Court denied Le's contention that Defense Counsel was ineffective for failing to argue for a mistrial after the State's discovery violation. (R. 150). Le argues that during the testimony of Deputy Garcia-Pagan, it was established that the deputy had authored a police report that had not been disclosed to the defense. Le's attorney stated he would not move for a mistrial based on that issue. In Le's Amended PCR, he argued the report was material because it claimed Timothy Hawkins was repacking cannabis for individual sales with the victim, Jordan Gonzalez. Le argues that the report would have impeached Gonzalez' claim at trial that he was an innocent victim. *Id*. The Trial Court denied Le's claim stating that neither the State nor the defense was aware of the deputy's supplemental report. Therefore, a willful discovery violation did not occur.

Le contends that the Trial Court erred when it concluded that the because the State had no knowledge of the report, the violation is not willful. The State

Attorney is responsible for evidence which is being withheld by other state agents, such as law enforcement officers, and is charged with constructive knowledge and possession thereof. *State v. Coney*, 294 So.82 (Fla. 1974). The Trial Court denied Le's claim based on a lack of knowledge from one State agency to another. Le should have been afforded an evidentiary hearing on the issue of the discovery violation and its prejudice to Le at trial.

(F) The post-conviction court erred by summarily denying Count 8 of the Amended PCR.

The Trial Court denied Le's contention that trial counsel was ineffective for failing to suppress a jail call or object to the introduction of the jail call at trial. The Trial Court should have granted a hearing on this issue as the witness, Deputy Garcia-Pagan, that identified Le's voice had no familiarity with Le prior to trial or testifying that Le was on the phone recording. [6]

[6] Le contends that, because the voice identification was made by police, the verification was unauthorized. *Evans v. State*, 177 So. 3d 1219, 1229 (Fla. 2015). In *Evans*, a 911 operator received and recorded a brief conversation between two victims and an unidentified assailant during a heated confrontation immediately preceding the murders. To prove that the unidentified assailant was the defendant, the state presented the testimony of a police detective who had compared what she heard on the 911 recording to a later-obtained sample of the defendant's voice retrieved from recorded jail phone calls made by the defendant after his arrest. On appeal, the supreme court concluded that the "detective usurped the role of the jury by being permitted to opine that a voice heard on a 911 call-back recording belonged to the defendant." *Evans*, 177 So. 3d at 1224. In its discussion on this point, the *Evans* court relied heavily on the Florida Supreme Court opinion in *Ruffin v. State*, 549 So. 2d 250, 251 (Fla. 5th DCA 1989). In *Ruffin*, three police

The Trial Court denied Le's claim on the basis that Adrian Jones, the custodian of inmate phone records, testified that he "pulled" the call made by Defendant Le. (R. 152). Jones also stated that he personally spoke with Le and recognized his voice on the call. Id. The Trial Court concluded that such an "objection would have been sustained." Therefore, the claim as to Count 8 was denied.

Le argues that the Trial Court erred in denying Count 8 based on the holding in *Lamb v. State*, 2018 Fla. App. Lexis 6086 (Fla. 4th DCA 2016). In *Lamb*, the Fourth District Court of Appeal affirmed a trial court's decision to allow officers to indentify the voice of Defendant Lamb on the basis that "[…] the two investigating detectives were in a better position than the jury to identify the defendant and codefendants" in a video […] "because the detectives were familiar with the defendant and codefendants through their investigation and interviews, and because the codefendants were not jointly tried with the defendant and did not testify before the jury." *Lamb*, 2018 Fla. App. Lexis 6086 at 24.

In Le's case, the officers never worked with Le or testified that they conducted interviews with Le prior to identifying his voice. Under Florida law,

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officers who had not witnessed a drug transaction in person, testified that, in their opinions, the man depicted in the video recording of the transaction was indeed the defendant. The Supreme Court held that the lay opinion testimony erroneously "invad[ed] . . . the province of the jury." *Ruffin*, 549 So. 2d at 251.

an officers' identification of a defendant's voice on a recording is admissible where officers have worked with a defendant in the past and are familiar with his voice. *State v. Cordia*, 564 So. 2d 601, 601-02 (Fla. 2d DCA 1990). Le contends he should have been granted a hearing on this issue as neither Deputy Garcia-Pagan nor Adrian Jones testified that they had worked with Le in past or conducted interviews with Le, sufficient to warrant an opinion that they could identify his voice.

CONCLUSION

Based upon the foregoing arguments and legal authority, Hop Le, respectfully requests that this Court reverse the post-conviction court's order denying his amended motion to post-conviction relief and hold an evidentiary hearing.

DATED this ___ day of July, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Court and furnished, via electronic mail, this ___ day of July, 2018 to the Office of the Attorney General at crimapptlh@myfloridalegal.com.

_____
Robert Sirianni, Jr., Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
Robert Sirianni, Jr., Esquire