IN THE SUPREME COURT OF FLORIDA

JAMES E. STEPHENS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

Case No. 92,639

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

DAVID R. GEMMER
PO Box 390
St. Petersburg, Florida 33731
(727)-323-3511
Florida Bar # 370541

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CASES

STATEMENT OF THE CASE AND FACTS

The state has provided an extensive restatement of the facts. The petitioner relies on the actual record and the statement of the case and facts provided in the initial brief. Petitioner also provides a copy of the trial court's order granting 3.850 relief as an appendix to this brief. The petitioner also provides the following rebuttal to some of the assertions made in the state's facts.

The state asserts at page four of it's brief (hereinafter "SB at 4") that Officer Trill rapped on the window of the car to get the passengers' attention. However, Officer Trill at one point testified he rapped on the door, V7 T52, and Lisa Stewart testified that Trill "slammed" the right front fender immediately in front of where Mr. Stephens was sitting, V7 T130-31.

The state asserts that Mr. Stephens was drunk. SB at 5. However, at the 3.850 hearing the bartender at the bar Mr. Stephens had been in the evening of his arrest testified that he only had a couple of beers because of his health. R589. Mr. Stephens' liver disorder was hepatitis contracted while he was in the military. Evidence of the diagnosis from his personal physician was introduced at the 3.850 hearing, R575, evidence available to trial counsel and yet unused to rebut any implication that the liver disorder was the result of alcoholism. This was one of the claims of ineffective assistance, that trial counsel failed to clarify that Mr. Stephens suffered from hepatitis, not alcohol-induced liver dysfunction.

The only witness at trial to testify that Mr. Stephens landed a blow was Officer Young. Officer Thornton initially claimed to have witnessed the blow, but had to admit he only saw Stephens take a swing. He testified the blow would have landed on Young's upper arm. V7 T35. Young testified he was struck on the forearm, not the upper arm. V7 T97. Officer Trill saw nothing. State's witness Jerry Insco testified that despite the fact he was sitting immediately behind Mr. Stephens when he was alleged to have hit Officer Young, Insco saw no such blow. V7 T124.

SUMMARY OF THE ARGUMENT

The standard of review is whether the trial court properly applied the correct rule of law, and whether there is substantial competent evidence to support the ruling. The state's extensive rendition of the facts from the trial fails to refute the simple fact that the record of the trial and the 3.850 hearing clearly shows that Mr. Stephens suffered a bruise to his thigh the night of his arrest, that Mr. Stephens reported it to medical personnel as having been inflicted by the police, that the police denied inflicting it, and that this evidence would have impeached the police.

Trial counsel was confused about the date of the photographs used at trial, both at trial and at the 3.850 hearing. His confusion allowed the testimony of Dr. Wilks appear to refute the defense theory that the bruise was inflicted the night of the arrest. The state's claim that the evidence could in any way show the bruise existed before the night of arrest is inconsistent with the findings of the trial court and the Second District.

ARGUMENT

The state's extensive argument of the facts invites this Court to become ensnared in the same trap as the Second District – to reevaluate the credibility of the witnesses and the weight of the evidence. Petitioner urges that the question truly before this Court is how to implement the standard of review adopted in *Grossman v. State,* 708 So.2d 249 (Fla. 1997), and *Blanco v. State,* 702 So.2d 1250 (Fla.1997). The short restatement of the standard is that an appellate court will not disturb a decision on a 3.850 motion if the trial court properly applies the correct rule of law and there is substantial competent evidence to support the decision.

While an appellate court may undertake de novo review of the question of whether the rule of law was properly applied, the appellate court is barred from substituting its judgment on questions of fact, the credibility of witnesses, or the weight of the evidence. As urged in the initial brief, the face of the Second District opinion clearly shows the Second District intruded into all three areas deemed to be within the sole province of the trial court.

The state defends the Second District's erroneous conclusion that the primary thrust of Mr. Stephens' defense was that he was a victim of police brutality who defended himself rather than resisted arrest. SB at 29. However, direct examination of trial counsel at the 3.850 hearing clearly shows that the

bruise evidence was critical to impeaching the police officers. Attorney Martin testified that he knew the bruise evidence was going to be important at trial because "that's how you were going to be able to, able to **attack at their credibility**, correct? A. Correct. Q. And **the issue was when did he get the bruising**, correct? A. Right." R701-02 (emphasis added).

The state attempts to reframe trial counsel's initial error as a tactical decision. SB at 30. That error was in accepting witness Robb's testimony that the photographs at trial were taken the day of arrest. The state then tries to claim that trial counsel's testimony at the 3.850 hearing that he didn't make the mistake about the date, it was Robb' mistake, somehow shows trial counsel's adoption of the March 6 date in error was tactical, not the result of oversight. SB at 30. The argument is unusual. Trial counsel's testimony on this point at the 3.850 hearing was virtually nonresponsive – counsel claimed his error in accepting the date was not error because Robb made the initial error.

If trial counsel had the time frames clearly in mind, he would have been able to clear up Robb's confusion by the simple expedient of conducting additional examination. Instead, he got involved in a bench conference battle over the admissibility of the photographs, accepting an erroneous date which he may not even have been aware was erroneous, further indicating deficient performance, rather than resolving the mistake.

The state mischaracterizes the trial court's ruling when it argues that the trial court "determined that counsel was ineffective for allowing Dr. Wilks, the emergency room physician who examined Stephens, within hours of the incident, to testify from the defense photographs." SB at 32. The error wasn't in allowing the doctor to use the photographs, the error was in failing to recognize that Dr. Wilks essentially testified that the bruise in the photographs were more than a day old, and that, based on the fundamentally erroneous assumption that the photographs were taken the day of the arrest, the bruise could not have been inflicted by the police.

The state tries to defend trial counsel by arguing that counsel "did attempt to elicit from Dr. Wilks that he did not actually observe the bruise in the same condition as depicted in the photographs of Stephens' thigh. (V7 T183-84)." SB at 33. But the attempt **failed**. Trial counsel elicited once again from Dr. Wilks that the bruise in the photographs looked that way the night he was treated. V7 T183. For the next several pages of the transcript, defense counsel ended up nailing Dr. Wilks down on the fact that a recent bruise would not show any yellowish tint like the yellow tint observed in the photographs. The error compounded, and it is simply wrong for the state to argue that defense counsel's examination at this point somehow saves the case from error and prejudice because defense counsel tried but failed to do something. If trial counsel had competently dealt with the

witness, he would have been able to use Dr. Wilks to show that the condition of the bruise in the photographs proved the bruise was inflicted the night of the arrest.

The state then tries to argue that this Court should accept trial counsel's interpretation of the record in his 3.850 testimony, R423-24, that Dr. Wilks' objectively true testimony was that the bruise was old when he saw it the night of arrest. SB at 33. Regardless of this Court's duty to interpret the record on its own, not rely on the interpretation of trial counsel, trial counsel's interpretation cannot be given credence. His testimony at this point of the 3.850 proceeding demonstrates that even at the 3.850 proceeding he was still operating under a severe, fundamental misunderstanding of the critical dates. "Q. Did you ever ask the doctor or inform the doctor that those pictures were taken after the incident, two days after the incident? A. The witness testified they were taken after he got out of jail. Q. Mr. Rob? A. Right. Q. **On the 6th? A. Right.**" R424. Even after having the error raised in the 3.850 proceeding, trial counsel persisted in confusing the date the trial photographs were taken.

Apparently only trial counsel and the state believe the bruise could conceivably have been an old wound when Mr. Stephens was arrested. The trial court clearly accepts the tremendous weight of the evidence that the bruise was fresh after the arrest, and the Second District, for all its error, did not dispute this

fact. Despite the police officers' testimonial denials of causing the bruise, even Officer Thornton's report listed the bruise as the result of the arrest. V7 T37. For the state to argue that "The entirety of Dr. Wilks' testimony, together with trial counsel's evidentiary testimony [erroneously interpreting the same record the trial court, the Second District, and this Court have before it], undeniably indicates [sic] that Dr. Wilks observed bruising which could not have occurred within just a few hours prior to the examination," is wrong. The only way to interpret that statement as truthful is to assume that the bruising which Dr. Wilks is asserted to have observed in the statement was solely the bruising in the photographs, which, of course, undermines the argument the state is trying to make on this point.

The bottom line is that the evidence from the trial and the 3.850 hearing clearly shows that Mr. Stephens suffered a large bruise to his thigh contemporaneous with his arrest. Even the Second District conceded this point, but disagreed with the trial judge that this necessarily satisfied the deficiency prong of *Strickland v. Washington*, 466 U.S. 668 (1984).

The state argues that "Proof that Stephens may have been bruised in the struggle did not show that officer testimony was perjurious on the point that Stephens defied an arrest." SB at 40. In other words, even if the defense could have proven the officers lied at trail about inflicting the bruise, establishing that they lied at trial about that point does not establish that they lied at trial about

resisting arrest or battering an officer.

However, proving that the police lied at trial about anything certainly impeaches them far more directly and relevantly than showing that defense witnesses had prior felony convictions. The defense could have presented evidence that the police lied at trial, if only defense counsel had been able to get the bruise evidence right. Instead, the state presented evidence that two defense witnesses had prior felony convictions, far less impeaching than evidence of actual perjury at trial.

The state's insistence on reiterating the criminal records of two defense witnesses, SB at 41, again invites this Court to determine the credibility of witnesses and reweigh their testimony. In addition, Mr. Stephens presented several witnesses at the 3.850 proceeding who were not impeachable on the basis of prior felony convictions who could have testified that Mr. Stephens did not have a thigh bruise or limp within a day or two before the arrest, and that he did limp or show a bruise in the days after. R609-15. Trial counsel had not spoken with them or called them as witnesses at trial.

The state reminds this Court that all three police officers denied inflicting the bruise. SB at 42. This serves to once again make crystal clear the relevancy and the importance of the evidence that they did inflict the bruise. The bruise evidence makes out a clear case of police perjury.

The state argues there was no eyewitness testimony of a beating. SB43. This ignores Stewart's testimony of Mr. Stephens being slammed and thrown around by the police. To then argue that the evidence of the thigh bruise was inconclusive, SB at 43, serves to highlight the prejudice – the evidence was inconclusive at trial because of the deficient representation of counsel. The evidence regarding the bruise was certainly not inconclusive at the 3.850 hearing. Dr. Wilks' hospital report shows a bruise 15 to 20 centimeters long. The jail report, which trial counsel did not seek, showed a bruise of 30 centimeters in length requiring application of ice four or five hours after the emergency room examination. R578. The report from the personal physician two days after the arrest advised treating the old bruise with heat. R579. Trial counsel Martin testified he was not aware that the jail report showed the bruise had grown in size over a few hours, nor did he remember obtaining the jail report before trial. R689-91.

The state argues that the trial court's use of the word "conceivably" in its decision brings it within the proviso of *Strickland* that errors which only conceivably could prejudice the outcome of the proceeding do not require relief. SB at 36. However, the context of the trial court's statement makes clear that the trial court did not intend or find that the errors in this case fall within the *Strickland* proviso: "This deficiency on Mr. Martin's part conceivably prejudiced

the Defendant by allowing Dr. Wilks' testimony to adversely affect the outcome of the verdict for the Defendant." The trial court found that the testimony adversely affected the outcome of the verdict, and this conceivably prejudiced the defendant. Inartful, not an incorrect application of the law.

Two paragraphs later the trial court cures any possible ambiguity by finding, without qualification, that the error in Dr. Wilks' testimony "prejudiced the Defendant to the extent that the Defendant was deprived of a fair trial. *Strickland*." R296. This statement alone is sufficient to constitute a proper finding of deficiency and prejudice. The trial court found that the error adversely affected the outcome of the verdict, and that it deprived Mr. Stephens of a fair trial. Surely this is sufficient to exceed the standard of *Strickland*: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Obviously the Second District found this so, or it would have based its reversal on the alleged application of the incorrect rule of law.

CONCLUSION

The Second District erred, inter alia, when it selectively presented the facts of the case, it erred when it failed to accept the finding of the trial court that Dr. Wilks testified from the photographs when he said the bruise was more than a day old, it erred when it found the police brutality defense to be uncorroborated. These errors and the others argued in the Initial Brief constituted an invasion of the trial court's province vis-a-vis questions of fact, the credibility of the witnesses, and the weight of the evidence.

Respectfully submitted,

_____

DAVID R. GEMMER
PO Box 390
St. Petersburg, Florida 33731
(727)-323-3511
Florida Bar # 370541

CERTIFICATE OF TYPE FACE AND STYLE

I HEREBY CERTIFY that this document was prepared in WordPerfect 8 using Times New Roman set at 14 points, pursuant to *In Re: Briefs in the Supreme Court of Florida Administrative Order* of this Court dated 7/13/1998.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this date, November 14 1998, to

Robert A. Butterworth
Patricia McCarthy
Attorney General
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

_____

DAVID R. GEMMER
Counsel for Petitioner

IN THE SUPREME COURT OF FLORIDA

JAMES E. STEPHENS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

Case No. 92,639

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

APPENDIX
TO
PETITIONER'S REPLY BRIEF ON THE MERITS

1. Copy of Trial Court's Order on 3.850 Motion, R292-97.

DAVID R. GEMMER
PO Box 390
St. Petersburg, Florida 33731
(727)-323-3511
Florida Bar # 370541

COUNSEL FOR PETITIONER

David R. Gemmer
Attorney at Law

2701 Fifth Avenue North
St. Petersburg, Florida 33713

Office: 813-323-3511

Address all
correspondence to:
Post Office Box 390
St. Petersburg, Florida
33731
Fax: 813-323-3255

November 14 1998

The Honorable Sid J. White
Clerk of the Court
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1925

RE: Stephens v. State, No. 92,639

Dear Mr. White,

Enclosed please find the original and seven copies of the Petitioner's Reply Brief for filing in the above-referenced case.

Thank you.

Sincerely,

David R. Gemmer
Florida Bar Number 370541

The Honorable Sid J. White
Clerk of the Court
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1925

Robert A. Butterworth
Patricia A. McCarthy
Attorney General
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366