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

AMENDED BRIEF OF THE PETITIONER
ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

A jury found Mr. Stephens guilty of battery on a law enforcement officer and resisting arrest with violence. He waived his right to direct appeal and sought relief from the trial court on a claim of ineffective assistance of counsel. The trial court granted the relief after a hearing. The state appealed and the Second District Court of Appeal reversed the order for new trial.

The only evidence against Mr. Stephens was the testimony of a Tarpon Springs police officer that Mr. Stephens struck him on the arm during a traffic stop. Two fellow officers said they saw Mr. Stephens take a swing at the officer but they did not see the blow land. R7.35, R7.78-79. The officers also testified that Mr. Stephens resisted arrest with violence.

Mr. Stephens' defense was that he never struck the officer. The driver of the car testified she never saw Mr. Stephens hit the officer. She did see the officers manhandle Mr. Stephens, dragging him from the car, throwing him against the car and to the ground, and getting on him, holding his head to the ground with a foot and kneeing him on the thigh where the bruise later appeared. R7.131-37. Mr. Stephens introduced evidence that he suffered a large bruise to his thigh and some minor injuries as a result of excessive force inflicted by the officers, charges denied by the officers. Mr. Stephens introduced expert testimony from a physician who examined him upon his release from jail on bail two days after his arrest. R7.153-59. In rebuttal, the state presented testimony from Dr. Wilks, the emergency room doctor who examined Mr. Stephens shortly after the arrest.

Only days after the trial, a juror told the assistant state attorney who tried the case that the jury convicted Mr. Stephens because they believed the emergency room physician had rebutted Mr. Stephen's claim that the bruise was inflicted when he was arrested. R37-38 (letter from defense counsel to Mr. Stephens relating the information provided by the assistant state attorney), R703 (assistant state attorney's ratification of the truth of the matter asserted).[1]

The trial court held a full hearing on the 3.850 claim. The trial judge, who presided over both the trial and the hearing on the claim only six weeks later, ruled that trial counsel's ineffective representation had deprived Mr. Stephens of a fair trial pursuant to the standard of *Strickland v. Washington*, 466 U.S. 668 (1984). The trial judge ordered a new trial.[2]

The basis for the finding of ineffective assistance of counsel in the order granting relief on the 3.850 motion was that the evidence was confused about when the bruise could have been inflicted. Had defense counsel effectively handled the evidence, the evidence would have actually showed that the bruise had to have been inflicted within the time frame of Mr. Stephen's

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[1] The state has never objected to the admissibility of this fact on hearsay grounds, and the fact was, therefore, properly before the trial court to support its findings. *Tallahassee Furniture Company, Inc. v. Harrison*, 583 So.2d 744, 754 (Fla. 1st DCA 1991).

[2] The opinion of the Second District and a copy of the motion for rehearing with attachments including a copy of the trial court's order granting relief, record excerpts and the principal case law cited in this brief, are appended hereto pursuant to Florida Rule of Appellate Procedure 9.220. Record references are to the trial transcript ("R76") or to volumes six and seven of the record ("R7.31").

arrest. Instead, the state's case showed that the bruise could only have been inflicted a day or two prior to the arrest.

The Second District reversed the trial court's order. The Second District agreed with the trial judge that there had, indeed, been confusion over when the bruise was inflicted, and that trial counsel "probably was less than effective in presenting this evidence or in cross-examining Dr. Wilks." But the Second District held that any ineffective counsel failed to prejudice Mr. Stephens.

On motion for rehearing, the court's attention was directed to new case law from this Court holding that an appellate court is obliged to affirm a trial court's ruling on a 3.850 motion when the trial court has properly applied the appropriate law, and when there is competent substantial evidence to support the order. The Second District denied the motion for rehearing without comment.

SUMMARY OF THE ARGUMENT

The decision below directly and expressly conflicts with decisions from this Court which hold that a reviewing court must affirm a trial court's finding of ineffective assistance of counsel when the finding is supported by competent substantial evidence. The Second District undertook a reassessment of the evidence, not a review for competency and relevancy. The record contains more than enough competent substantial evidence to support the trial court's finding of ineffective assistance under the *Strickland* standard.

ARGUMENT

The decision below directly and expressly conflicts with recent decisions from this Court requiring affirmance of a trial court's ruling on 3.850 relief when the trial court's decision is supported by competent substantial evidence.

The Second District's decision expressly and directly conflicts with decisions from this Court and others which hold that an appellate court may not overturn a trial court's finding of prejudice under *Strickland* when there is competent substantial evidence to support the finding. The opinion below does not state that the record lacks competent substantial evidence. Instead, it states that the Second District's own reassessment of the evidence fails to support a finding of prejudice.

This Court recently established a standard of review recognizing the deference owed the trial court:

> [The defendant/appellant] first claims that trial counsel provided ineffective representation during the penalty phase of the trial. We disagree. This Court set out the standard for reviewing such claims following an evidentiary hearing in *Blanco v. State*, 22 Fla. L. Weekly S570 (Fla. Sept. 18, 1997) [*now reported at* 702 So.2d 1250]:
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> > **In reviewing a trial court's application of the [relevant] law to a rule 3.850 motion following an evidentiary hearing, this Court applies the following standard of review: As long as the trial court's findings are supported by competent substantial evidence, "this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.' "**
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> *Id.* at S570 (*quoting Demps v. State*, 462 So.2d 1074, 1075 (Fla.1984)). In the present case, the trial court addressed this first claim at length . . . :
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> . . . .
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> The trial court applied the right rule of law governing ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and

competent substantial evidence supports its finding. We find no error.

Grossman v., Dugger, 23 Fla. L. Weekly S16 (Fla. Dec. 18, 1997) [emphasis added, footnote deleted].

Despite these provisos, the Second District substituted its judgment for that of the trial court on questions of fact, the credibility of the witnesses, and the weight to be given to the evidence. Given this conclusion, the decision below is in direct and express conflict with *Grossman,Blanco, et al.*

The trial judge found trial counsel to be deficient on the following matters:

- Counsel failed to correct the witness who photographed the bruise when he testified he took the pictures on the day of the injury rather than two days later. A correction made during the state's cross-examination of the witness was insufficient to cure the deficiency.
- Counsel failed to recognize the existence, let alone the gravity of the error compounded in Dr. Wilks' testimony. The trial judge specifically found that the doctor's testimony showed the doctor was testifying from the photographs rather than his independent recollection when he testified that the bruise was a day or two old. The trial judge found this error to be "crucial." The trial judge expressly found that had trial counsel caught this error and communicated it to the jury, the jury would have realized that the doctor had no independent recollection. In fact, Dr. Wilks ' testimony corroborated the defendant's position that the bruise was fresh. Dr. Wilks testified the bruise in the photographs

was two days old, consistent with the true state of the facts, that the photographs, taken two days after the arrest, showed a two-day-old bruise. The order below notes the doctor's testimony that the brown tinge to the bruise in the photographs showed it to be more than a day old.

- The trial judge expressly found that this confusion in Dr. Wilks' testimony, compounded by his testimony that the bruise in the photographs could not have been recent, adversely affected the outcome of the verdict.

Despite the competent and substantial evidence cited by the trial judge in his order granting relief, the Second District rejected his findings of fact and held:

> **Our assessment of the evidence** leads us to the conclusion that any alleged deficiency on the part of Stephens' counsel did not affect the fairness and reliability of the trial so as to undermine confidence in the outcome. *See Kennedy v. State*, 547 So.2d 912 (Fla. 1989). Our conclusion is only bolstered by the **extremely weak nature** of Stephens' **questionable** police brutality defense, which was **uncorroborated** by any other evidence.

Stephens v. State, No. 97-569, *Slip op.* at 4 (Fla. 2d DCA Jan. 9, 1998) [emphasis added].

The only "assessment" a reviewing court is permitted under this Court's standard in *Blanco* and *Grossman* is to review the record to determine whether competent, substantial evidence supports the trial court's factual findings. Instead, the Second District reweighed the evidence and reached its own de novo and independent decision that the errors of trial counsel did not result in *Strickland* prejudice. The Second District directly and expressly states that a trial court's finding of prejudice under

Strickland may be overturned if the appellate court's own assessment of the facts leads to a contrary conclusion. This directly and expressly conflicts with this Court's holding in *Blanco* and *Grossman* that such a reassessment is not allowed.

Mr. Stephens respectfully urges that jurisdiction should be accepted in this case to correct the Second District's error, and to prevent a fundamental injustice. Mr. Stephens faces a substantial number of years of incarceration in this case. To impose this burden after the Second District incorrectly thwarted the decision of the judge who presided over both the trial and the 3.850 hearing only six weeks after trial would amount to a fundamental injustice and deprivation of due process.

To illustrate the compound error found in the Second District's opinion, this Court need only examine the Second District's further observation that "Our conclusion is only bolstered by the extremely weak nature of Stephens' questionable police brutality defense, which was uncorroborated by any other evidence." This statement embodies several misconceptions: that Mr. Stephens' defense theory was solely police brutality; that this defense was extremely weak; that such a defense is somehow questionable; and that it was uncorroborated. None of these observations is accurate.

Police brutality was not the sole theory of defense-the excessive force issue also served to impeach the police officers, who denied using excessive force. If the officers were impeached on this point, then the state's entire case, which was based solely on the testimony of the police officers, would have

fallen. The impact of the issue is emphasized by the juror's post-trial statement that the jury did not believe Mr. Stephens' claim because they thought Dr. Wilks had refuted the claim that the bruise was inflicted at the time of arrest. Thus, if Dr. Wilks' testimony had been properly handled by defense counsel, the jury would have known the bruise was inflicted within the time frame of the arrest, they would have believed Mr. Stephens' witnesses, and they would have concluded that he was innocent.

The impeachment went beyond simply arguing over the justification and degree of force used to arrest. The police officers testified that Mr. Stephens volunteered to them at the arrest scene that he suffered some injuries during the arrest, but that he had a preexisting leg injury. R66, 101. If the jury were to believe the police inflicted the bruise, then they would have to believe the police had fabricated Mr. Stephens' volunteered absolution. A verdict tainted by perjury not entitled to protection. *State v. Glover*, 564 So.2d 191 (Fla. 5th DCA 1991).

The Second District relied on the officers' testimony when observed that Mr. Stephens "stated that an unobserved bruise on his leg and the cut on his arm were old injuries." *Slip op.* at 3. While it would be appropriate to rely on this fact to **affirm** an order, viewing the evidence in the light most favorable to the prevailing party, the Second District, instead, viewed the evidence in the light most favorable to the state, the **losing** party. The Second District's reliance on evidence most favorable to the state is also apparent from its observation that "[t]he third passenger also testified that he did not see the officers

beat Stephens." *Slip op.* at 3. This statement completely ignores the testimony of the **second** passenger (actually the driver), discussed *infra*. Also, the "third passenger" couldn't see the violent police encounter because he had been removed to a vantage point out of sight of the arrest. R7.122-24.

The defense of police brutality was not extremely weak or uncorroborated. The driver of the car said Mr. Stephens complied with police as best he could (the victim-officer gave conflicting orders to keep hands on the dashboard and to exit the vehicle, which would have required reaching to unbuckle the seatbelt), that she did not see him strike at the officer, that she saw police jerk Mr. Stephens from the car, slam him against the car, throw him to the ground, and that they were "on him," one officer with a foot on Mr. Stephens' face, another with his knee on Mr. Stephens' leg. R7.131-37. For the Second District to find this did not amount to corroboration can only mean the Second District reweighed the credibility of this witness and found her not credible. There was further corroboration as to the timing of the bruise in the testimony of a "before and after" witness, R7.140-41, and medical reports which showed the bruise had doubled in size and begun to swell from the time Dr. Wilks saw it shortly after the arrest, R25 ("moderate [bruise] approximately 15x20 cm,") to six hours later in the jail infirmary, R27 ("very large (30 cm) . . . with edema [swelling]"). The reports also showed that Mr. Stephens complained that the bruise had been caused by the police during his arrest.

Finally, a police brutality defense is not "questionable."

The theory of relief apparently would be grounded on the principle of jury pardon, a principle which is not "questionable." *Hayes v. State*, 564 So.2d 161 (Fla. 2d DCA 1990).

CONCLUSION

The Second District Court of Appeal opinion is in direct and express conflict with opinions of this Court. By assessing the evidence de novo rather than by determining whether the trial court's findings of ineffective assistance of counsel and prejudice are supported by competent substantial evidence, the lower appellate court has brought itself into conflict with the new standard of review announced by this Court in *Blanco* and *Grossman*.

The appellate court agrees with the trial court that Mr. Stephens suffered from mistakes his lawyer made at trial. The only debate is whether the mistakes deprived Mr. Stephens of a fair trial. The Second District has thwarted the will of the circuit judge who sat in judgment at trial and, a short while later, at the 3.850 hearing. The trial court and Mr. Stephens, deserve a review that properly honors the will and the findings of fact of the trial judge as required by the decisions of this Court.

Mr. Stephens respectfully urges that the ends of justice require that he be given a full review of the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this date, April 3, 1998, to:

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