IN THE SUPREME COURT OF FLORIDA

CLARENCE FORD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Supreme Court Case No. SC01-690
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0396664
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(386) 252-3367

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE

In February of 2001, the Fifth District Court of Appeals affirmed the Seminole County Circuit Court's summary denial of the Petitioner's motion for post-conviction relief, which, pursuant to Fla. Rule Crim. Pro. 3.850, had alleged ineffective assistance of trial counsel. (See, Appendix to this brief, hereinafter "A", at Pp. 1,2). The Petitioner filed a brief on jurisdiction in this Court, and on September 12, 2001, this Court issued an Order Accepting Jurisdiction and Dispensing with Oral Argument. In that same Order, this Court appointed the Public Defender as Petitioner's counsel in this case. The instant brief on the merits follows.

STATEMENT OF THE FACTS

The Petitioner was originally tried and convicted of resisting an officer and "other offenses". (A 1) The convictions were affirmed in a direct appeal, and in a subsequent 3.850 motion, the Appellant sought to attack the convictions on the grounds that his trial counsel had rendered ineffective assistance. (A 1,2) Specifically, he alleged that trial counsel had failed to depose and/or summon witnesses for trial testimony. He alleged that trial counsel had erroneously advised him not to testify at trial; and also claimed that trial counsel had conducted an insufficient cross-examination of a purported witness to on of the charged offenses. (A 1,2) The trial court denied the Petitioner's 3.850 motion without an evidentiary hearing. (A 1)

SUMMARY OF THE ARGUMENT

The trial court denied a motion for post-conviction relief, absent an evidentiary hearing upon factual assertions which, if proven, would have entitled the Petitioner to relief. The district court affirmed the summary denial of the Petitioner's motion, and in so doing assumed numerous facts to have been proven, although trial counsel was never called to testify, as there had been no evidentiary hearing. The trial court, and, in turn, the district court, made rulings which were in conflict with the substantial body of decisional law which dictates that the denial of a 3.850 motion is to be supported by record evidence and/or testimony to support the ruling.

ARGUMENT

THE DISTRICT COURT ERRED BY AFFIRMING THE SUMMARY DENIAL OF THE PETITIONER'S MOTION FOR POST-CONVICTION RELIEF.

This Court has repeatedly and unambiguously stated that the summary denial of a motion for post-conviction relief is unwarranted unless the motion and the allegations therein, are patently without merit:

> Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. [...] The movant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if he alleges specific "facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant." [...] Upon review of a trial court's summary denial of postconviction relief without an evidentiary hearing, we must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record. [...] While the postconviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief. ***In essence, the burden is upon the State to demonstrate that the motion is legally flawed or that the record conclusively demonstrates no entitlement to relief.*** The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion. To the contrary, the "rule was promulgated to establish an effective procedure in the courts best

> equipped to adjudicate the rights of those originally tried in those courts." (Citations omitted, emphasis added.)
>
> ***Gaskin v. State, 737 So.2d 509,516,517 (Fla. 1999)***

Under the aforesaid standard, the ruling in question was erroneous. Neither the trial court nor the appellate court could reasonably conclude, without hearing from trial counsel, whether the failure to depose witnesses or elicit their testimony at trial was a tactical decision or an act of misfeasance. See, ***Jackson v. State, 711 So.2d 1371, 1372 (Fla. 4th DCA 1998),*** (The failure to call witnesses can constitute ineffective assistance of counsel if the witnesses may have been able to cast doubt on the defendant's guilt, and the defendant states in his motion the witnesses' names and the substance of their testimony, and explains how the omission prejudiced the outcome of the trial.) The Petitioner apparently named the potential witnesses in his motion for post-conviction relief, as indicated by the district court's statement that two of the three were the Petitioner's relatives. (A 2)

Moreover, the Petitioner complained not only of the failure to call the witnesses at trial; he also alleged that trial counsel failed to even contact or attempt to locate potential witnesses. Since at least one of the witnesses was not a family member, only trial counsel could testify as to whether or not the failure to investigate the

potential witness was a tactical decision.

Likewise, neither the trial court nor the appellate court could reasonably conclude that the Petitioner's waiver of his right to testify at trial was knowing and voluntary, without either the testimony of trial counsel regarding that issue, or reference to the portion of the trial transcript reflecting said waiver:

> Although the colloquy conducted by the court in this case indicates Tyler was asked whether he was waiving his right to testify freely and voluntarily, there was no inquiry of Tyler regarding whether he had been threatened or coerced in any way. The colloquy does not conclusively refute Tyler's assertion that his attorney threatened to withdraw if he testified, therefore we reverse and remand for an evidentiary hearing as to this part as well.
>
> ***Tyler v. State, 26 Fla. L. Weekly D925,926 2001 WL 322041 (Fla. 2nd DCA April 4, 2001)***

And, finally, without the testimony of trial counsel, it cannot be determined conclusively that the limited cross-examination of the prosecution's witness was a strategic choice:

> It is clear that where the record does not indicate otherwise, trial counsel's failure to impeach a key witness with inconsistencies constitutes ineffective assistance of counsel and warrants relief.
>
> ***Tyler, supra, 26 Fla. L. Weekly at D927.***

CONCLUSION

Based on the foregoing argument, and the authorities cited therein, the Petitioner respectfully requests the decision of the Fifth District Court of Appeal be reversed, and this case remanded to the trial court for an evidentiary hearing on the Petitioner's motion for post-conviction relief.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0396664
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(386) 252-3367

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal and mailed to: Mr. Clarence Ford, DC# 741211, Everglades Correctional Institution, 1601 SW 187th Avenue, Miami, Florida 33185, on this 4th day of October, 2001.

_____

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

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APPENDIX