

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-107

ALWIN J. JACOBS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF RESPONDENT

CHARLIE CRIST
Attorney General
Tallahassee, Florida

JOHN D. BARKER
Assistant Attorney General
Florida Bar Number 0065056
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441

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INTRODUCTION

The Petitioner, Alwin Jacobs, was the Appellant below, and the Respondent, the State of Florida, was the Appellee below. In this brief, the parties will be referred to as they stand before this Court. The symbols "App." and "T." will refer to the appendixes to the Petitioner's brief and the excerpts from transcript. In addition to the transcript excerpts attached to Petitioner's brief the Respondent has attached one excerpt as an appendix to this brief.

STATEMENT OF THE CASE AND FACTS

The Petitioner filed a motion for post conviction relief which raised eight claims. (App. B). The trial court denied the motion finding that it was facially insufficient. (App. C). The trial court found that the Petitioner failed to allege that the witnesses were available to testify. (App. C). The trial court, relying on prior case law, found that trial counsel could not be ineffective for failing to call witnesses who allegedly would have given exculpatory testimony where there was ample evidence contradicting that testimony. (App. C). Furthermore, the trial court specifically found that the even if the two alibi witnesses would have testified as the Petitioner alleged the outcome of the trial would not have been altered because of the overwhelming evidence against the Petitioner. (App. C). The trial court's order recounted that the evidence presented at trial included an eyewitness identification and established that the Petitioner was found within two blocks of the crime scene. (App. C).

The Petitioner appealed the denial of his motion for post conviction relief and the Third District Court of Appeal affirmed the denial of the motion finding that the Petitioner had failed to satisfy the test set forth in Strickland¹ and Knight². Jacobs v. State, 800 So. 2d 322, 323 (Fla. 3rd DCA 2001). The District Court found that the

¹Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

²Knight v. State, 394 So. 2d 997 (Fla. 1981).

failure to call the alibi witnesses was a sound tactical decision. Id. at 324. The District Court found that the motion was facially insufficient and therefore summary denial was proper. Id. The District Court commended the trial judge for his detailed order in which he:

noted in finding the motion facially insufficient that: “Given the overwhelming evidence against the Defendant, consisting of an eyewitness identifying the Defendant at the scene of the crime and the at trial and the Defendant being found within two blocks of the crime scene, the outcome of the trial could not have been altered by the proposed witnesses testimony even assuming the witnesses would have testified as the Defendant alleges.” Id., note 1.

The Petitioner is now appealing the decision of the Third District Court of Appeal.

POINT ON APPEAL

WHETHER THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE MOTION FOR POST CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING WHERE THE TRIAL COURT'S RULING ACCEPTED THE PETITIONER'S ALLEGATIONS AS TRUE AND STATED ITS RATIONALE FOR DENYING THE MOTION? (Restated).

SUMMARY OF THE ARGUMENT

The trial court properly denied the motion for post conviction relief without an evidentiary hearing. The trial court, after accepting the allegations as true, stated its rationale for denying the motion and found that the outcome of the trial would not have been different even if the alleged alibi witnesses had testified. Since the trial court accepted the allegations as true and then stated its rationale it was proper to deny the motion without an evidentiary hearing. The District Court therefore properly affirmed the denial of the motion for post conviction relief. The District Court's finding that the decision not to call the alleged alibi witnesses was tactical is not fatal to its decision where it also recognized the trial court's stated rationale for denying the motion.

ARGUMENT

- I. THE DISTRICT COURT DID NOT ERR IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE MOTION FOR POST CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING WHERE THE TRIAL COURT'S RULING ACCEPTED THE PETITIONER'S ALLEGATIONS AS TRUE AND STATED ITS RATIONALE FOR DENYING THE MOTION.

The Petitioner contends that the District Court erred in affirming the trial court's summary denial of his motion for post conviction relief without an evidentiary hearing and argues that the question of whether his trial counsel made a tactical decision not to call the alibi witnesses could not be decided without an evidentiary hearing. The District Court however did not err in affirming the denial of the motion for post conviction relief without an evidentiary hearing because the trial court's order included findings that the outcome would not have been different even if the alibi witnesses had testified. This finding was based on the eyewitness identification and the fact that the Petitioner was apprehended within two blocks of the crime scene. The trial court thereby found that even if trial counsel was ineffective there was no prejudice to the Petitioner.

This court has set forth the following standard of review for summary denial of a motion for post conviction relief under Rule 3.850:

To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record. Peede v. State, 748 So.2d 253, 257 (Fla.1999) (citations omitted).

Furthermore, "[t]o support summary denial without a hearing, a 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." Anderson v. State, 627 So.2d 1170, 1171 (Fla.1993)

In the instant case the trial court found that the motion was both facially insufficient and conclusively refuted by the overwhelming evidence presented at trial. The trial court found that the Petitioner had failed to allege that the witnesses were available to testify. The trial court further found that even if these alleged alibi witnesses had testified as alleged by the Petitioner the outcome of the trial would not have been different. To support this finding the trial court noted the eyewitness identification and the fact that the Petitioner was found within two blocks of the crime scene.

The District Court held that the decision of trial counsel not to call the alibi witnesses was a tactical decision where there was an abundance of evidence contradicting their testimony. The State recognizes that this Court has recently held

in that an evidentiary hearing is required in order to determine whether a particular action by trial counsel was tactical. See Ford v. State, 825 So. 2d 358 (Fla. 2002). In Ford the trial court never reached the prejudice prong of the Strickland³ test. Id. at 360. The court in Ford held that without an evidentiary hearing the trial court was bound to accept the allegations in the 3.850 motion as true. Id. at 361.

In the instant case the trial court addressed the prejudice prong of Strickland and found no prejudice. In reaching this decision the trial court, as required by Ford, assumed the allegations in the Petitioner's motion were true. The court then, in conformity with Anderson, stated its rationale for denying the motion.

The trial testimony of the eyewitness was that she observed the Petitioner approach two different houses as she was unloading her car. (T. 132-133). The Petitioner was calling out "Is anyone home?" (T. 133) The witness did not notice anything in his hands. (T. 134) She then saw the Petitioner come out from behind the

³ The proper test to analyze an ineffective assistance of counsel claim was set out by the United States Supreme Court as follows:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

home which was later discovered to have been burglarized. (T. 134) The Petitioner had a small black case in his hands.(T. 134) The witness's attention was directed at the Petitioner as she watched him ride away from the burglarized home.(T. 135). She watched as he approached on his bicycle and spoke to him as he rode past her.(T. 135-136) At the time she spoke to him he was within five feet of her. (T.) The witness got a good look at him. (T. 136) The witness was able to identify the Petitioner after he was apprehended by the police later that evening. (T. 139-140) She saw the Petitioner against the fence with his bicycle. (T. 139) The witness had no doubt whatsoever that the Petitioner was the man she had observed at the scene of the burglary.(T. 140). It was based on this eyewitness testimony, along with the fact that the Petitioner was found within two blocks of the crime scene, that the trial court found that the alleged alibi witnesses' testimony would not have affected the outcome of the trial.

The Third District in affirming the denial of the motion specifically commended the trial judge for his detailed order supporting the finding that the motion was facially insufficient. Jacobs v. State, 800 So. 2d 322 (Fla. 3rd DCA 2001)(Footnote 1). The footnote contained the trial court's rationale for finding that even if the alibi witnesses had testified the outcome of the trial would not have been altered. While the District Court held that the decision not to call the alleged alibi witnesses was a tactical

decision, its reference to the trial court's rationale on this point shows that it was also affirming the decision that the Petitioner had not shown any prejudice.

By accepting the allegations in the motion as true the trial court satisfied the requirement for denying a 3.850 motion without an evidentiary hearing as set forth in the Ford decision. The trial court then stated its rationale for denying the motion, as required by Anderson. The rationale was that the Defendant had not been prejudiced because even if the witnesses testified the outcome of the trial would not have been different. This rationale was essentially a finding that the Petitioner could not meet the second prong of Strickland. Therefore the Third District did not err in affirming the trial court's denial of the motion for post conviction without an evidentiary hearing.

Although not relied upon by the trial court or the District Court there is further record support to deny the Petitioner's motion for post conviction relief. At the close of the state's case the defense informed the trial court that it would not be putting on any testimony. (T. 180)⁴. The Petitioner was questioned about this decision. (T. 180). The following colloquy occurred:

COURT: I have just been told by [counsel] that you have chosen not to testify or present any defenses in this case.

PETITIONER: Yes, sir.

⁴Excerpt attached as appendix to this brief.

COURT: You have had an opportunity to discuss that *tactical* decision with [counsel]?(Emphasis added).

PETITIONER: Yes.

COURT: They have explained to you their reasons for doing that?

PETITIONER: Yes, sir.

COURT: And you have concurred with their reasons for doing that?

PETITIONER: Yes, I have.

COURT: You believe it's in your best interest not to testify or present any defenses at this time?

PETITIONER: Yes, I do. (T. 180).

The above colloquy supports the finding that trial counsel's decision not to present evidence was tactical. It is shows that the Petitioner was advised of the reasons for this decision and agreed that it was in his best interest not to present evidence.

To the extent that the Petitioner is also challenging the trial court's finding that there was no prejudice for failing to call the fingerprint technicians this court should reject this argument as meritless. The testimony presented at trial was that only "one latent of value was lifted" at the house, that this print came from a plastic box, and that this print was not identified. (T. 168-169). It is evident from this testimony that there were no fingerprints obtained from the hedge clippers and that the Petitioner's

fingerprints were not found at the scene. Any testimony from the fingerprint technicians would have been cumulative.

CONCLUSION

Based upon the arguments and authorities cited herein, the appellee respectfully requests this Court to affirm the District Court's decision affirming the denial of the motion for post conviction relief.

Respectfully Submitted,

CHARLIE CRIST
Attorney General

JOHN D. BARKER
Assistant Attorney General
Florida Bar Number 0065056
Office of the Attorney General
Department of Legal Affairs
444 Brickell Ave., Suite 950
Miami, Florida 33131
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee was mailed this ___ day of January, 2003, to R. Mitchell Prugh, Middleton & Prugh, P.A., 303 State Road 26 Melrose, Florida, 32666

JOHN D. BARKER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that the font used in this brief is in compliance with Fla. App. R. Proc. 9.210(a)(2) and is times new roman 14 point font.

JOHN BARKER
Assistant Attorney General

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APPENDIX TO
RESPONDENT'S BRIEF ON THE MERITS

CHARLIE CRIST
Attorney General
Tallahassee, Florida

JOHN D. BARKER
Assistant Attorney General
Florida Bar No. 0065056
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131

Phone (305) 377-5441
Fax (305) 377-5655

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I HEREBY CERTIFY that a true and correct copy of the foregoing Appendix was mailed this ___ day of January, 2003, to R. Mitchell Prugh, Middleton & Prugh, P.A., 303 State Road 26 Melrose, Florida, 32666

JOHN D. BARKER
Assistant Attorney General