IN THE SUPREME COURT OF FLORIDA

ALWIN J. JACOBS,

Petitioner,

v. CASE NO. SCO2-107

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREFACE

Petitioner ALWIN J. JACOBS will be referred to as “Mr. JACOBS.”

The Respondent, the State of Florida, will be referred to as “the State.”

The opinion of the Third District is the opinion on review by this Court and is attached to this Initial Brief as Appendix A.

Mr. JACOBS’ motion for post-conviction relief is attached to this Initial Brief as Appendix B, and, will be referred to as “Appendix B” followed by the page number where the information may be found.

The trial court’s order denying the motion for post-conviction relief is attached to this Initial Brief as Appendix C, and, will be referred to as “Appendix C” followed by the page number where the information may be found. The record excerpts attached to the trial court’s order contained in Appendix C will be referred to as “Appendix C transcript” followed by the original trial transcript number where the information may be found.

STATEMENT OF THE CASE AND FACTS

This proceeding comes before the Court from the summary denial of a post-conviction motion. The facts are taken from the Motion for Post-Conviction Relief, Appendix B, and the transcript appended to the Order Denying Defendant's Motion for Post-Conviction Relief, attached as Appendix C to this brief.

On June 9, 1999 a Dade County jury convicted Mr. JACOBS of three counts: burglary of an unoccupied dwelling, petit theft, and criminal mischief. (Appendix B at 1-2).

On April 19, 2000 the Third District affirmed the judgment and sentence on direct appeal. (Appendix B at 2).

On November 6, 2000 Mr. JACOBS timely filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. (Appendix B at 1). On January 31, 2001 the trial court summarily denied the post-conviction motion without evidentiary hearing. (Appendix C).

On November 14, 2001 the Third District affirmed the summary denial of the post-conviction motion through written opinion. (Appendix A).

The facts of the case are as follows. On December 17, 1998 a woman noticed a unknown man riding a bicycle in her daughter's

neighborhood as she was unloading groceries from her car into her daughter's home. (Appendix C transcript at 130,132-34). It was 4:30 in the afternoon. (Appendix C transcript at 132). The witness worked part-time in a law office; that day she was watching her daughter's children until her daughter returned. (Appendix C transcript at 131). The witness testified the man went to at least two houses in the neighborhood calling out: "Is anyone home?" (Appendix C transcript at 132-33). The witness saw him call at a house at the end of the street. (Appendix C transcript at 133). The next time the witness emerged from her daughter's house she saw the bicycle propped against the fence at the house at the end of the street. (Appendix C transcript at 134). She then saw the man walk around from the back of house inside the fence, remount his bicycle, and ride past her from a distance of about fifty feet to within five feet of her. (Appendix C transcript at 134-36). The witness testified they spoke briefly as he rode past; she asked him if he knew the people at that house and he replied yes. (Appendix C transcript at 136). He then rode off. (Appendix C transcript at 136). The witness identified the man in the courtroom as the defendant, Mr. JACOBS. (Appendix C transcript at 132).

The witness testified that later that evening the homeowner came to neighbors saying her house had been broken into.

(Appendix C transcript at 137). They called the police, who arrived around six-forty p.m. that evening. (Appendix C transcript at 137, 163). The witness gave the police a description of what she had seen. (Appendix C transcript at 138). She described the unknown man as five foot eight, in his fifties, very short grayish white hair, no visible scars, missing teeth, wearing a plain maroon T-shirt. (Appendix C transcript at 140-41, 143-45). She told the police that he rode "a very straight forward bicycle, no special hand grips or anything special like a red bike." (Appendix C transcript at 140).

Police stopped Mr. JACOBS on his bicycle at 9:10 p.m., two blocks from the burglarized house. (Appendix C transcript at 160-61).

Police contacted the witness later that evening and told her that "they had found the gentleman" and asked for her to identify him. (Appendix C transcript at 139, 145-46, 161, 163-64). Police drove the witness to a place where the defendant was being held by police. (Appendix C transcript at 139-40). Police shone a spotlight on the handcuffed Mr. JACOBS standing alone and the witness confirmed from the front seat of the police cruiser at a distance of thirty feet that Mr. Jacobs was

the man she had seen earlier. (Appendix C transcript at 139, 147, 161-62, 164).

Mr. JACOBS alleged in his sworn post-conviction motion, citing transcript pages from the trial, that he is six feet tall, weighs 230 pounds, has a scar on his chin, and has medium length hair. (Appendix B at 3). The State's arresting officer testified at trial that when they stopped Mr. JACOBS at 9:10 p.m. he was riding a mountain bike, characterized by bigger, wider tires and particularly shaped handlebars. (Appendix C transcript at 164-65).

Mr. JACOBS further alleged in Ground 3 of his sworn motion that he advised his defense attorney that he was at the home of Mike and Nika Lee at the time of the burglary and that they could testify to that. (Appendix B at 7). Defense counsel assured Mr. JACOBS that his office had contacted the Lees, and "that they were prepared to testify on behalf of the Defendant." (Appendix B at 8). The Lees would testify that Mr. JACOBS worked on their car in Coconut Grove from 10:30 a.m. to 6:00 p.m. (Appendix B at 8). Defense counsel listed them as alibi witnesses and successfully defended the right to call them as witnesses against the State's motion to strike. (Appendix B at 8).

Mr. JACOBS also alleged in Ground 3 of his motion that defense counsel failed to investigate and call the police detectives who developed fingerprints at the burglary scene, and that they could have testified that Mr. JACOBS' fingerprints did not match a fingerprint found at the burglary scene, nor did his fingerprints appear on a set of hedge clippers found at the burglary scene used to break glass to enter the house. (Appendix B at 8-9). Mr. JACOBS alleges prejudice in this omission as the jury returned a question during deliberation asking whether the hedge clippers were ever dusted for fingerprints, and the court ruled that the question would not be answered. (Appendix B at 9-10).

SUMMARY OF ARGUMENT

Mr. JACOBS is entitled to an evidentiary hearing on his claim of ineffective assistance of trial counsel for failure to call alibi witnesses because he filed a well-plead motion that was sufficient on its face, and trial record evidence does not conclusively prove Mr. JACOBS is entitled to no relief.

There is a split among district courts whether a claim for failure to call alibi witnesses must allege the witnesses were available to testify. This Court should rule the technical pleading requirement is not necessary based on the language and history of Rule 3.850.

Importantly, the Third District alone resolves the credibility of conflicting testimony without an evidentiary hearing. The Third District infers a strategic choice by trial counsel in not calling alibi witnesses in the face of conflicting trial testimony. This Court should hold that the issues of credibility and weight of conflicting testimony, and whether a trial decision to not call certain witnesses is reasonable trial strategy, require an evidentiary hearing.

ARGUMENT

The conflict issue in this appeal is whether a court can deny a post-conviction evidentiary motion by resolving the credibility of conflicting testimony not yet developed in an evidentiary hearing. The answer is no. Accordingly, this Court should quash the decision in *Jacobs v. State*, 800 So. 2d 322 (Fla. 3rd DCA 2001) and hold that Mr. JACOBS is entitled to an evidentiary hearing on Ground 3 of his post-conviction motion.

Standard of Review.

This case presents a summary denial of a post-conviction motion and is reviewed as to whether the record shows conclusively that Mr. JACOBS is entitled to no relief. *Fla. R. App. P.* 9.141(2)(D).

Issue 1: Whether An Evidentiary Hearing Should Be Granted.

In this case, Mr. JACOBS filed a 3.850 post-conviction motion that alleged in Ground 3 that he received ineffective assistance of trial counsel when two declared alibi witnesses were not called to testify at trial. (Appendix B at 7). Mr. JACOBS names the alibi witnesses, provides a telephone number for the alibi witnesses, and alleges they were listed as alibi witnesses in court filings by his defense counsel. (Appendix B

at 7-8). Mr. JACOBS alleges the alibi witnesses "were prepared to testify on behalf of the Defendant," and would testify that he was at their home in Coconut Grove, Miami during the time of the burglary which occurred elsewhere in Miami. (Appendix B at 8). Mr. JACOBS alleges this omission prejudiced his trial by omitting testimony that he was not at the burglary scene. (Appendix B at 8).

Mr. JACOBS also raises an ineffective assistance of trial counsel claim in Ground 3 for failure to investigate and present at trial two named police witnesses who would testify that the burglary tool, a set of hedge clippers, was dusted for fingerprints and Mr. Jacob's fingerprints were not found. (Appendix B at 9). Mr. JACOBS alleges this omission prejudiced his defense because the jury returned with a question whether the hedge clippers were ever dusted for fingerprints and were advised the question could not be answered. (Appendix B at 8-10).

In remarkably similar language, the State, the trial court, and two judges of the appellate court all rejected Mr. JACOB's 3.850 motion by asserting the motion was facially insufficient because he failed to allege the alibi witnesses were available to testify, and that there was "overwhelming" evidence against

Mr. JACOBS so any decision to not call the witnesses was strategic. (Appendix C at 2-3).

To the contrary, Mr. JACOBS' motion was both facially sufficient and required an evidentiary hearing when reviewed against the trial record.

Issue I(A): The Motion Was Facially Sufficent.

Florida Rule of Criminal Procedure 3.850(d) directs: "In those instances 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 that conclusively shows that the movant is entitled to no relief shall be attached to the order." *Fla. R. Crim. P.* 3.850(d). The trial court then requires the state attorney to file an answer. *Fla. R. Crim. P.* 3.850(d).

Contrary to the majority opinion of the Third District, Mr. JACOBS' motion was facially sufficient. First, the state attorney answered the motion, and the trial court relied on record excerpts to deny the motion. Both these steps are utilized under Rule 3.850(d) only if the motion is facially sufficient. *Fla. R. Crim. P.* 3.850(d). Second, as Judge Cope in dissent correctly observes,[1] Mr. JACOBS specifically

[1] *Jacobs v. State*, 800 So. 2d 322, 324 (Fla. 3d DCA 2001) (Cope dissenting).

identifies the alibi witnesses by name and telephone number, specifically alleges that "they were prepared to testify on behalf of the Defendant," alleges their testimony would be that Mr. JACOBS was at their home in Coconut Grove during the time period of the burglary, and alleges the absence of their exculpatory testimony is what prejudiced the outcome of the trial. (Appendix B at 7-8). This Court has previously held that such allegations are treated as true except as conclusively rebutted. *Harich v. State*, 484 So. 2d 1239, 1241 (Fla. 1986). Indeed, Mr. JACOBS' pleading is explicit regarding the evidence to be given by the alibi witnesses.

The Florida appellate courts are expressly divided about the pleading requirement that alibi witnesses were available to testify. The First, Third, and Fifth Districts require a pleading allegation that the alibi witness was available to testify. *E.g.*, *Highsmith v. State*, 617 So. 2d 825, 827 (Fla. 1st DCA 1993); *Puig v. State*, 636 So. 2d 121, 122 (Fla. 3d DCA 1994); *Nelson v. State*, 816 So. 2d 694, 695 (Fla. 5th DCA 2002). Diametrically opposite, the Second District has ruled the 'availability' allegation is not required, and, recognized conflict with the other district courts. *Odom v. State*, 770 So. 2d 195, 196 (Fla. 2d DCA 2000). The Fourth District has held that all that is required for a failure to investigate claim is

a brief statement of facts even though the alibi witnesses are not even identified. *Barnes v. State*, 757 So. 2d 1217, 1218 (Fla. 4th DCA 2000); *but see, Nelson v. State*, 816 So. 2d 694, 695 (Fla. 5th DCA 2002) (citing *Catis v. State*, 741 So. 2d 1140 (4th DCA 1998), *rev. denied*, 735 So. 2d 1284 (Fla. 1999) as requiring the allegation of availability).

The conflict should be resolved through the language and history of Rule 3.850. The language of Rule 3.850 requires in pertinent part: "[A] brief statement of the facts (and other conditions) relied on in support of the motion." *Fla. R. Crim. P.* 3.850(c)(6) (West Supp. 2001). Perhaps most telling is the court-approved post-conviction form appearing in Florida Rule of Criminal Procedure 3.897. The instructions stress brevity: "State concisely every ground on which you claim that the judgment or sentence is unlawful. Summarize briefly the facts supporting each ground." *Fla. R. Crim. P.* 3.897, ¶ 14 (underlining supplied). The form lists frequently raised grounds for relief, which include: "Denial of effective assistance of counsel." *Fla. R. Crim. P.* 3.897, ¶ 14(d). The movant is instructed again to list facts. *Fla. R. Crim. P.* 3.897, ¶ 14. In the section for itemizing grounds for relief the form states: "Support FACTS (tell your story briefly without

citing cases of law)." *Fla. R. Crim. P.* 3.897, ¶ 14 (underlining supplied).

The language of Rule 3.850 and the court-approved form therefore stress simplicity and brevity. The additional allegation that alibi witnesses were available to testify is artificial, and likely to mislead *pro se* prisoners. For example, a witness may be dead, but the witness' testimony available through former court testimony or deposition in a criminal trial. § 90.804(2), *Fla. Stat.* (2002). More precisely, the alibi witnesses need not be available, but their statements need to be available through one of many hearsay exceptions. §§ 90.803, 90.804, *Fla. Stat.* (2002) (exceptions with declarant available or unavailable). For post-conviction pleading, the preferable rule would simply require a brief statement of facts showing entitlement to relief. At the most stringent, the pleading requirement should be that set by the Second District: witness identity, substance of expected testimony, and the prejudice accruing by its absence. *Odom v. State*, 770 So. 2d 195, 196 (Fla. 2d DCA 2000).

The history of Rule 3.850 also favors simplicity and brevity, and discourages technical pleading. The 3.850 motion is a substitute for the constitutional writ of habeas corpus. *Allen v. Butterworth*, 756 So. 2d 52, 60-61 (Fla. 2000); Art, I,

§ 13, *Fla. Const*. (habeas corpus). Mr. JACOBS' pleading would suffice for a petition for writ of habeas corpus. *Sullivan v. State ex rel. McCrary*, 49 So. 2d 794, 796 (Fla. 1951); *Chase v. State*, 93 Fla. 963, 113 So. 103 (1927); § 79.01, *Fla. Stat.* (2001). It is illogical for a rule 3.850 motion to introduce a more difficult standard of pleading than that of a habeas petition. Otherwise, a rule 3.850 motion becomes a barrier to the Florida writ of habeas corpus and not merely a procedural substitute.

Second, the federal courts rely extensively on a State's fact-finding determination for federal habeas relief under the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996. 28 USC § 2254(e), (f) (Supp. III 1997). A state fails to provide a fact-finding opportunity when it summarily denies a post-conviction motion, and the federal courts must hold an evidentiary hearing. *See* 28 USC § 2254(f) (Supp. III 1997). Comity between state and federal judicial systems, and a policy interest in minimizing federal involvement in the state courts, all support simple and straightforward pleading requirements for a Rule 3.850 motion.

This Court, therefore, should resolve the conflict between district courts and hold that a brief, plain statement of facts showing the defendant is entitled to relief is all that is

required. This Court should decline to adopt "magic words" or technical pleading requirements for what, essentially, is a constitutional form of access to the courts. Under this standard, Mr. JACOBS' motion clearly was sufficient on its face.

Issue 1(B): Conflicting Evidence Required an Evidentiary Hearing.

In addition to simple pleading sufficiency, the real core of this appeal is whether the trial files and records "conclusively" showed Mr. JACOBS was not entitled to relief. The Third District found "overwhelming" evidence against Mr. Jacobs. *Jacobs v. State*, 800 So. 2d 322, 323-24 (Fla. 3d DCA 2001). The overwhelming evidence created an automatic inference of a strategic decision by defense counsel to not call the alibi witnesses: "We agree with the State that the failure to call these [alibi] witnesses where there was an abundance of evidence contradicting their testimony constituted a sound tactical decision and not ineffectiveness of counsel." *Jacobs v. State*, 800 So. 2d 322, 323-24 (Fla. 3d DCA 2001). Both conclusions are wrong.

There was not "conclusive" or "overwhelming" evidence against Mr. JACOBS, but simply a conflict between the State's only identification witness and the expected testimony of the

two alibi witnesses. The "overwhelming" evidence against Mr. JACOBS was a single eyewitness identification of Mr. Jacobs in the area of the burglary scene at a time the burglary was assumed to have taken place. No State witness saw Mr. Jacobs burglarize the unoccupied house. No State witness had knowledge of the actual time of the burglary. No stolen items were reported in Mr. JACOBS' possession. The State's identification witness mis-described Mr. JACOBS and his bicycle, and the police used a suggestive identification procedure capable of producing an entirely wrong identification. Indeed, the thrust of Mr. JACOBS' defense at trial was mis-identification by the sole State witness, and, the suggestive identification tactics used by law enforcement to lead that witness to make an identification. The State's evidence is not conclusive, but is shaky.

The mere conflict between the testimony of the State's identification witness and the expected testimony of the alibi witnesses, therefore, does not "conclusively refute" the alibi testimony. The conflict creates a need under both constitutional due process and Rule 3.850 for an evidentiary hearing at which the credibility of each witness may be assessed and the total evidence weighed. Art. I, § 9, *Fla. Const.* (Due Process Clause); Amend. XIV, *U.S. Const.* (same). In this case,

there was no hearing whatsoever afforded Mr. JACOBS on the trial court's evaluation of the trial record. Unquestionably, "[t]he essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered." *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993) (citation omitted). At the very least, the alibi evidence presents a true jury question at trial, and a true evidentiary issue on the post-conviction motion.

So, too, the conclusion regarding trial strategy also requires an evidentiary determination. It is well-settled that the presence or absence of a reasoned tactical decision is almost always determined through an evidentiary hearing. *Dauer v. State*, 570 So. 2d 314, 314 (Fla. 2d DCA 1990); *see also*, *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L. Ed. 2d 985 (2000) (in assessing tactical explanations the "relevant question is not whether counsel's choices were strategic, but whether they were reasonable."). While it is Mr. JACOBS' burden to overcome a presumption that trial choices were strategy, it is also Mr. JACOBS' right to a hearing to present that evidence. For that reason, the First District, citing this Court's *Downs* decision, held a plethora of cases require there must be an adequate record to make a fact-finding determination on whether trial counsel's conduct is reasonable. *Williams v. State*, 642

So. 2d 67, 68-69 (Fla. 1st DCA 1994) (citing *Downs v. State*, 453 So. 2d 1102 (Fla. 1984)). Treating newly discovered evidence, the Fourth District has similarly held: "[W]here there is conflicting evidence of the defendant's guilt, it is necessary for the trial court to evaluate the weight of the newly discovered evidence and the evidence which was introduced at the trial" and often "this analysis will require an evidentiary hearing." *Kendrick v. State*, 708 So. 2d 1011, 1012 (Fla. 4th DCA 1998) (citing *Roberts v. State*, 678 So. 2d 1232 (Fla. 1996)).

The Third District marches to its own drummer, however, when there is conflicting evidence in the record. The *Jacobs* majority cites the earlier *Cooley* decision as support for contending summary denial is correct when there exists "evidence contradicting the testimony the witness would have given." *Jacobs v. State*, 800 So. 2d 322, 323 (Fla. 3d DCA 2001). *Cooley*, however, does not support the broader generalization. In the short *Cooley* decision, another Third District panel upheld a summary denial because the alleged exculpatory testimony would be that another person directed Mr. Cooley to murder the victims, and, another witness would corroborate Mr. Cooley's own assertion that Mr. Cooley told the law enforcement investigator that the victims were in the truck of the investigator's cousin on the night of the murders. *Cooley v.*

State, 642 So. 2d 108, 108-109 (Fla. 3d DCA 1994). Here, Mr. JACOBS' alibi witnesses directly contradict his presence at the burglary site, which is unlike the indirect suggestions that someone else committed the murders in *Cooley*.

The majority also cites another Third District decision, *Jones v. State*, 747 So. 2d 982 (3d DCA 1999), *quashed on other grounds*, 759 So. 2d 681 (Fla. 2000), as support for summary denial in the face of conflicting evidence. In *Jones*, as here, Judge Cope dissented and found an evidentiary hearing was required.

The panel majority in *Jones* upheld the summary denial based on an eyewitness identification of the defendant, and the defendant twice offering to return the stolen toolbox after being detained by police. *Jones*, 747 So. 2d at 983, 984. Judge Cope dissented because the defendant identified an alibi witness who would testify the defendant was with her at the relevant time, and that there were inconsistencies in the testimony of State witnesses. *Jones*, 747 So. 2d at 986-87. Judge Cope urged that an evidentiary hearing should be granted because the inconsistent testimony "were the subject of multiple jury questions" and the appellate record did not conclusively refute the defendant's claim. *Jones*, 747 So. 2d at 987.

Judge Cope is correct both in *Jones* and in this case. In this case, the proceeding must be remanded for an evidentiary hearing because the record does not conclusively show that Mr. JACOBS is entitled to no relief. *Fla. R. App. P.* 9.141(2)(D).

CONCLUSION

This Court should quash the decision in *Jacobs v. State*, 747 So. 2d 982 (Fla. 3d DCA 1999) and hold that the conflicting testimony demands an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing Initial Brief On the Merits was sent to MEREDITH L. BALO, ESQ., Assistant Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida, 33131, by U.S. Mail on December 16, 2002.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using font style Courier New type size 12.

_____
R. MITCHELL PRUGH, ESQ.