IN THE SUPREME COURT OF FLORIDA

MARCO NORDELO,
Petitioner,

Vs.

STATE OF FLORIDA,
Respondent.
_____/

SC11-23

Case No: _____

DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

Marco Nordelo
DC# 065315
Mayo Correctional Institution
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Petitioner, *pro se*

TABLE OF CONTENTS

Table of Citations i

Statement of the Case and Facts 1

Summary of the Argument 5

Argument

THIRD DISTRICT'S AFFIRMANCE WITH OPINION CONTRAVENE THE APPLICABLE APPELLATE STANDARD OF REVIEW OF A TRIAL COURT'S SUMMARY DENIAL OF A 3.850 MOTION ON SEVERAL ASPECTS 6

Conclusion 11

Certificate of Service 12

Certificate of Compliance 12

TABLE OF CITATIONS

Cases

Cooley v. State, 642 So.2d 108 (Fla. 3rd DCA 1994) 11

Davis v. State, 26 So.3d 519 (Fla. 2009) 11

Foster v. State, 810 So.2d 910, 914 (Fla. 2002) 7

Gatlin v. State, 24 So.3d 743 (Fla. 2nd DCA 2009) 6

Hoffman v. State, 571 So.2d 449, 450 (Fla. 1990) 7

Jacobs v. State, 880 So.2d 548 (Fla. 2004) 9

Nordelo v. State, 603 So.2d 36, 38 (Fla. 3rd DCA 1992) 2

Nordelo v. State, No. 91-1163 (Fla. 3rd DCA filed Jan. 17, 1992) 2

Peede v. State, 748 So.2d 253, 257 (Fla. 1999) 7

Spera v. State, 971 So.2d 754 (Fla. 2007) 6

STATEMENT OF CASE AND FACTS

Petitioner, Marco Nordelo, seeks review of the Third District's majority opinion affirming the trial court's summary denial of Nordelo's rule 3.850 motion for new trial based on newly discovered evidence in the form of testimony of co-defendant who previously refused to testify.

Mr. Nordelo's trial commenced on April 1, 1991. On the same day, the co-defendant Angel Lopez, plead guilty to the armed robbery charge in exchange for a twenty-five (25) year prison sentence (R. 2).

Before Lopez accepted the plea, Nordelo's defense counsel, Mr. Casabielle, stated to the court and to the state that he will be including Lopez as a witness for the defense and asked for time aside to speak with Lopez. (T. 9-19). Counsel was later given the opportunity to speak with Lopez. Lopez refused to testify (R. 47). The jury found Nordelo guilty of the armed robbery and he was sentenced to life in prison. (R. 8).

The evidence at trial was as follows:

Petitioner Marco Nordelo and co-defendant Angel Lopez were charged with holding up a Circle K convenience store on May 29, 1990. They took money from the cash register and the attendant. The clerk of the Circle K Convenience store, Francisco Benavider, immediately contacted the police when the assailants fled the store. As he was dialing "911" he noticed a white car at the end of the street,

which he believed was driven by the perpetrators (T. 149-150). Mr. Benavider identified Mr. Nordelo from a photographic lineup about one month after the robbery (T. 148). Officer Julio Pino's testimony was introduced as collateral crime evidence to help prove identity. He testified that he was involved in a high speed car chase with Nordelo and as a result he arrested him. The defense counsel objected, but was overruled. The officer said that the defendant was driving "a white Ford Taurus station wagon." The defendant crashed the car and the officer identified Mr. Nordelo as the driver and indicated that there was another person in the car (T. 180-181). There was no physical evidence tying Mr. Nordelo to the crime scene. The state's case against Mr. Nordelo was predicated solely on the victim's identification one month after the robbery, and the fact that Nordelo was arrested with Lopez the day after the robbery in a white car.

On direct appeal, the Third District court held that the collateral evidence should have been excluded. Nordelo v. State, 603 So.2d 36, 38 (Fla. 3rd DCA 1992).

The District court, however, determined that the error was harmless and affirmed Mr. Nordelo's conviction for one count of armed robbery. Id. at 38.

Nordelo's identity was an issue at trial. Brief of Appellee, Nordelo v. State, No. 91-1163 (Fla. 3rd DCA filed Jan. 17, 1992).

In 2007, Angel Lopez for the first time admitted that Mr. Nordelo was not

involved in the robbery on May 29, 1990. In a sworn affidavit he stated that the co-perpetrator was Jose Sanchez. In his affidavit Lopez also admitted that the day after the robbery, May 30, 1990, Lopez stole a white Ford station wagon from a gas station and later picked up Mr. Nordelo. (R. 47). This was the white car that Mr. Nordelo was driving when he was arrested. Lopez was never charged with the auto-theft. Police records show conclusively that the white Ford (Florida tag number GTL07G) was stolen the day after the robbery and thus could not have been the getaway car. Brief of Appellant at p. 4.

Mr. Nordelo filed a motion for postconviction relief predicated on a theory of newly discovered evidence. The affidavit from Lopez, exonerating Mr. Nordelo and stating that he took the plea and then refused to testify, was attached to the motion. The motion explained that because Lopez had been charged as a co-defendant in 1990 and was unwilling to exculpate Mr. Nordelo, Mr. Nordelo's counsel could not have compelled Lopez's admission. As a result, the evidence was undiscoverable and unavailable until Lopez voluntarily confessed several years later about who were the actual perpetrators. (R. 26-55).

The trial court ordered the state to respond to Nordelo's claims (R. 48-55), and held a hearing. At the hearing the state said that it will file a copy of the entire trial transcript, but did not do so. (R. 63-73).

The trial court summarily denied Mr. Nordelo's claim as follows:

> "The Court is finding that the evidence as to both counts is not newly discovered and could have been obtained through due diligence." (R. 57).

The order then directed the clerk of the court "to attach all necessary record excerpts from the court file that support the court's ruling in this matter." Id. The court did not state a rationale for its denial or attached record excerpts refuting the claims.

Mr. Nordelo appealed to the Third District Court citing Brantley v. State, 912 So.2d 342 (Fla. 3rd DCA 2005), for the proposition that evidence can be treated as newly discovered where it is "based on testimony of co-defendants who previously refused to testify." The District Court rebutted by saying that Nordelo failed to allege in his motion that he ever, in seventeen years, asked his co-defendant to testify. Majority op. At 4-5. The majority also concluded that Nordelo's claim is both, invalid on its face and conclusively refuted by the record. Judge Cope dissented to the denial of Nordelo's claim concluding that under established precedent, the rule 3.850 motion is legally sufficient and the matter should be remanded for an evidentiary hearing.

Alternatively, as suggested by the state, any affirmance should be with leave to amend the rule 3.850 motion. *See*, Nordelo v. State, 35 Fla.L.Weekly D2260 (Fla. 3rd DCA Oct. 13, 2010). On October 28, 2010, Nordelo field a motion for rehearing and rehearing en banc, which was denied on November 18, 2010.

SUMMARY OF ARGUMENT

The trial court's summary denial of Mr. Nordelo's postconviction motion for new trial as well as the District Court's opinion affirming its denial must be reversed and this case remanded for an evidentiary hearing. Mr. Nordelo's co-defendant, Angel Lopez, broke his silence after many years and furnished the defendant with an affidavit which exonerates Mr. Nordelo from having any involvement in the robbery. Defense attorney tried to obtain this information, but Lopez refused to testify at trial. Nordelo substantially complied with the rule by attaching co-defendant's affidavit which contained the substance of his testimony. The state has not produced, and the trial court has not heard, any prior inconsistent statements by Lopez that contradict his sworn statement that Jose Sanchez, not Mr. Nordelo, was the second assailant. In reviewing the trial court's summary denial of postconviction relief, the District Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. Florida Supreme Court's case law indicates that where the existence of newly discovered evidence has been pled, and there is a question whether the defendant exercised due diligence, the proper procedure is to conduct an evidentiary hearing at which evidence will be taken on the due diligence issue, as well as the other issues presented. Alternatively, as suggested by the state, any affirmance should be with leave to amend the rule 3.850 motion.

ARGUMENT

THIRD DISTRICT'S AFFIRMANCE WITH OPINION CONTRAVENE THE APPLICABLE APPELLATE STANDARD OF REVIEW OF A TRIAL COURT'S SUMMARY DENIAL OF A 3.850 MOTION ON SEVERAL ASPECTS

The majority opinion affirmed the trial court's summary denial on dual grounds that it was legally insufficient and conclusively refuted by the record. Majority op. At 7.

This ruling is in express and direct conflict with the decision of the Second District court in Gatlin v. State, 24 So.3d 743 (Fla. 2nd DCA 2009), which held that:

> "Remand was required of trial court's denial of defendant's postconviction claims on dual grounds that they were legally insufficient and refuted by the record, for trial court to determine whether each claim was legally insufficient or refuted by the record, as effect of rulings was significant, in that denial or dismissal based on insufficiency of pleadings was not a ruling on the merits, such that defendant will be allowed to re-plead, whereas a denial based on record attachments was a ruling on the merits." Id.

Where defendant's initial motion for postconviction relief is determined to be legally insufficient for failure to meet either the postconviction relief rules or other pleading requirements, the trial court abuses its discretion when it fails to allow defendant at least one opportunity to amend the motion. Spera v. State, 971 So.2d 754 (Fla. 2007). To 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. Hoffman v. State, 571 So.2d 449, 450 (Fla. 1990)(Hoffman I).

In Nordelo's case, the Third District affirmed the trial court's summary denial on dual grounds that it was legally insufficient, without an opportunity to re-plead, and that it was conclusively refuted by the record, without a clear trial record basis identified by the trial court or a stated rationale in its order.

This basis for summary denial also misapplied the Florida Supreme Court's precedent in Foster v. State, 810 So.2d 910, 914 (Fla. 2002), and Peede v. State, 748 So.2d 253, 257 (Fla. 1999), as to the proper standard of appellate review.

> "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be [either] facially insufficient [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."

Foster, *id.*

Co-defendant Lopez states in his affidavit that he "did not come forward with this information (exonerating Nordelo) sooner, as I was afraid that the office of the state attorney would take away my plea offer. I took the plea and then refused to testify. I was ignorant of the law and was afraid that if I had not cooperated with the state attorney, then my plea would have been refused." (R. 47).

For pleading purposes, the District court is required to accept that statement as true.

The majority opinion says that this statement is nonsensical. Majority op. at 5. Although Lopez's belief may seem unreasonable to a legal expert, it was what he believed at the time, and the District court was required to accept the proposition that the defendant did not know the law–which is what his affidavit says–and believed that any cooperation would jeopardize his plea. He states that he refused to testify. Lopez's affidavit is not inherently incredible. Lopez admitted his involvement in the robbery, identified the actual co-perpetrator and explained how and why he and Mr. Nordelo were together when they were arrested. It is also not the case that Lopez's statement was immaterial to the verdict. Mr. Nordelo was identified by the victim from a photographic line-up which was administered one month after the robbery. There was no physical evidence tying Mr. Nordelo to the crime scene (e.g., fingerprints, video, etc...). Therefore, Lopez's exculpation of Mr. Nordelo cannot be deemed irrelevant to the outcome of the trial. In this case, because there was no evidentiary hearing to determine the truthfulness of Lopez's statements, the standard of review set forth by the Supreme Court in *Foster* and *Peede* required the Third District to accept the allegations of Lopez's affidavit as true. Instead, the District Court made a credibility determination that Lopez's statements are nonsensical. This basis for

summary denial is in conflict with the standard set forth in *Foster* and *Peede* Id., which held that where no evidentiary hearing is held below, defendant's factual allegations must be accepted to the extent they are not refuted by the record.

The majority opinion also conflicts with Jacobs v. State, 880 So.2d 548 (Fla. 2004), where the Supreme Court held that "when determining the facial sufficiency of a motion for postconviction relief, the court does not examine the record for evidence refuting the claim, disapproving of Cooley v. State, 642 So.2d 108 (Fla. 3rd DCA 1994), to the extent it may be construed to hold that the facial sufficiency of the motion may be determined based on an examination of the record to refute the claim.

In affirming the trial court's summary denial as legally insufficient, the majority opinion relied upon the "overwhelming evidence against the defendant" a clear indication that the court had reviewed not only facial sufficiency of the claim itself, but also the record of the trial. Majority op. at 7.

Further, the mere existence of evidence of guilt is insufficient to conclusively rebut a claim of newly discovered evidence in the form of statement from co-defendant exonerating the defendant and naming the actual co-perpetrator. Rather, the record evidence must conclusively rebut the claim if the claim is to be resolved without an evidentiary hearing. For example, if the record demonstrated that Lopez had actually testified, the claim would obviously be conclusively

rebutted.

The majority opinion ruled that in Nordelo's case, "an evidentiary hearing is not required here: one is required, if at all, for the sole purpose of allowing the trial court to determine whether the newly discovered evidence is of "such nature that it would probably produce an acquittal on retrial." Jones, 591 So.2d at 915. Majority op. at 6.

This ruling is in express and direct conflict with Davis v. State, 26 So.3d 519 (Fla. 2009), where the court held:

> "...the determination of whether the statements [which constitute the newly discovered evidence] are true and meet the due diligence and probability prongs of *Jones II* usually requires an evidentiary hearing to evaluate credibility unless the affidavit is inherently incredible or obviously immaterial to the verdict and sentence."

The *Davis* court noted:

> "The postconviction trial court's first and primary substantive pleading basis for denying relief was that Davis failed to properly plead due diligence. This was in error. Under the first prong of *Jones II*, the statements made during the *Huff* hearing in conjunction with the assertions in the motion established a prima facie case of diligence sufficient to require an evidentiary hearing.

Similarly, counsel's statements made during the hearing that Lopez refused to testify when asked by trial counsel (MR. Casbielle) in combination with Nordelo's assertions that Lopez could not be compelled to testify and Lopez's allegations that he took the plea and then refused to testify established a prima facie case of diligence.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Petitioner respectfully requests this Honorable Court to grant jurisdiction on this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing document was placed in the hands of Mayo Correctional Institution officials for mailing via U.S. Mail to: Office of the Attorney General, Third DCA, Rivergate Plaza, Suite 650, 444 Brickell Avenue, Miami, Florida 33131, on this 29 day of December, 2010.

Marco Nordelo.
Marco Nordelo, *pro se*

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition was typed using Microsoft Word in Times New Roman 14-Point Font, in compliance with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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APPENDIX

Third District Court of Appeal

State of Florida, July Term, A.D. 2010

Opinion filed October 13, 2010.
Not final until disposition of timely filed motion for rehearing.

No. 3D09-1269
Lower Tribunal No. 90-25016-A

Marco Nordelo,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Marisa Tinkler-Mendez, Judge.

Silvia M. Gonzalez, for appellant.

Bill McCollum, Attorney General, and Nicholas A. Merlin, Assistant Attorney General, for appellee.

Before COPE, WELLS, and CORTIÑAS, JJ.

CORTIÑAS, J.

Nineteen years ago, a jury found Marco Nordelo guilty of armed robbery of a convenience store and sentenced him to life in prison as a habitually violent offender. Before Nordelo's trial began, his codefendant entered a plea of no contest and was sentenced to twenty-five years in state prison.

Two years ago, Nordelo filed a Motion for New Trial Based on Newly Discovered Evidence and Prosecutorial Misconduct Pursuant to Rule 3.850. Attached to the motion was an affidavit from Nordelo's codefendant, a nineteen-time convicted felon, alleging that Nordelo had not participated in the robbery and naming a different co-perpetrator. The codefendant claimed that he did not come forward with this information sooner because he was afraid that the State would take away his plea offer.

At a hearing on the motion, the trial court ruled that "[t]he evidence could have been obtained through due diligence simply" and that just because the codefendant's custodial status changed and he "decided to come forward does not render the evidence newly discoverable." The trial court entered a written order "finding that the evidence as to both counts is not newly discovered and could have been obtained through due diligence" and that the allegation of prosecutorial misconduct was successive to one of Nordelo's prior Motions for Post-Conviction relief. The order directed the clerk to attach necessary record excerpts from the file to support the ruling. Nordelo now appeals the part of the trial court's order

denying his motion for a new trial based on newly discovered evidence, arguing that the case must be remanded for an evidentiary hearing.

In Jones v. State, 591 So. 2d 911 (Fla. 1991), the Florida Supreme Court "articulated a two-step inquiry for determining whether a defendant is entitled to relief for newly discovered evidence." McLin v. State, 827 So. 2d 948, 956 (Fla. 2002) (citing Jones, 591 So. 2d at 915-16). The first prong is that "in order to be considered newly discovered, the evidence 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence.'" Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (quoting Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-25 (Fla. 1994)).

The second prong "requires that 'in order to provide relief, the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial.'" McLin, 827 So. 2d at 956 (quoting Jones, 591 So. 2d at 915). "To reach this conclusion the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial.'" Jones, 709 So. 2d at 521 (citing Jones, 591 So. 2d at 916). The trial court thoroughly considers the evidence so that an "appellate court can 'fully evaluate the quality of the evidence which demonstrably meets the definition

of newly discovered evidence.'" McLin, 827 So. 2d at 956 (citing Jones, 591 So. 2d at 916).

The codefendant's affidavit cannot be deemed newly discovered evidence because it was either known to or easily discoverable by Nordelo and his counsel: the court allowed them both to speak with the codefendant after his plea was accepted and before Nordelo's trial began. Put in the context of due diligence, if Nordelo had believed that he was innocent, then he would have had a reasonable basis for believing that his codefendant would provide exculpatory testimony and would have sought to elicit such testimony. Indeed, the record is clear that neither side called the codefendant as a witness.

Nordelo cites Brantley v. State, 912 So. 2d 342 (Fla. 3d DCA 2005), for the proposition that evidence can be treated as newly discovered where it is "'based on newly available testimony of defendants who were previously unwilling to testify.'" Totta v. State, 740 So. 2d 57, 58 (Fla. 4th DCA 1999) (citing Kendrick v. State, 708 So. 2d 1011 (Fla. 4th DCA 1998)). However, in Brantley, "[a]ccording to the Rule 3.850 motion, defense counsel tried to obtain the cooperation of [the] co-defendant . . . but [he] refused[, and] . . . defense counsel could not have procured [his] testimony on account of the Fifth Amendment privilege against selfincrimination." Brantley, 912 So. 2d at 342-43. In contrast, Nordelo failed to

allege in his motion that he ever, in seventeen years, asked his codefendant to testify.

The codefendant now claims in his affidavit that the reason he did not come forward with this information sooner is because he "was afraid that the Officer of the State Attorney would take away [his] plea offer." This is nonsensical: as the court had already accepted his plea, which required him neither to testify for the State nor to refrain from testifying for Nordelo, he could have come forward with this supposed information at any time, and the State would have had no discretion or authority to withdraw the plea offer or vacate the plea. Furthermore, the codefendant does not state in his affidavit, nor does Nordelo allege, that he was coerced or threatened by anyone, including the State. [1]

This case is also distinguishable from the line of cases involving recanted testimony, such as Keen v. State, 855 So. 2d 117 (Fla. 2d DCA 2003). There, the witness testified against the defendant at trial, and the defendant could not have known that the witness would eventually change his testimony; here, it is unknown

[1] For the first time on appeal, Nordelo argues that he could not have compelled his codefendant's exonerating testimony because that would have required the codefendant to implicate himself, in contravention of the Fifth Amendment's right to silence, in the theft of the white car the two drove in a high-speed chase two days after the robbery. Although we cannot consider this argument for the first time on appeal, see Castor v. State, 365 So. 2d 701, 703 (Fla. 1978), we note that there is no reason why the codefendant could not have exonerated Nordelo without mentioning the white car; in fact, Nordelo's 1992 direct appeal held that evidence of the high speed chase was irrelevant and should have been excluded.

what Nordelo's codefendant would have said since neither side ever asked him to testify. Nordelo suggests that because his codefendant made no prior inconsistent statements contradicting the statement in his affidavit that someone other than Nordelo committed the robbery, his credibility must be evaluated in an evidentiary hearing.

However, an evidentiary hearing is not required here: one is required, if at all, for the sole purpose of allowing the trial court to determine whether the newly discovered evidence is of "such nature that it would *probably* produce an acquittal on retrial." Jones, 591 So. 2d at 915. Furthermore, such a hearing is not required when "the affidavit is inherently incredible or obviously immaterial to the verdict." Stephens v. State, 829 So. 2d 945, 946 (Fla. 1st DCA 2002); see Taylor v. State, 877 So. 2d 842, 843 (Fla. 3d DCA 2004); Evans v. State, 843 So. 2d 938, 940 (Fla. 3d DCA 2003). "Such rulings must be made on a case-by-case basis." Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994).

Nordelo complains that the trial judge failed to attach portions of the record to her order in contravention of rule 3.850(d), Florida Rules of Criminal Procedure. See Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993) (citing Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990)) ("To 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."). However, that

portion of Rule 3.850(d) regards only "those instances when the denial is not predicated on the legal insufficiency of the motion on its face." As Nordelo's motion is legally insufficient, the trial court's summary denial is adequate.

In order for an appellate court "[t]o 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." Peede v. State, 748 So. 2d 253, 257 (Fla. 1999) (citing Fla. R. Crim. P. 3.850(d)). Nordelo's claims are both. First, his claim that his codefendant's affidavit is newly discovered evidence is invalid on its face: as explained above, the affidavit provides no information that neither Nordelo nor his counsel could have discovered at the time of trial through the exercise of due diligence. Second, his claim is conclusively refuted by the record: the State presented overwhelming evidence of Nordelo's guilt during the trial, including the victim's identification of both defendants from photo lineups with one hundred percent certainty. Furthermore, under Taylor v. State, 877 So. 2d 842, 843 (Fla. 3d DCA 2004), "the trial court could properly reject the affidavit, for it is 'inherently incredible'": therein, the codefendant claims he was the driver of the white car, while the record shows that the arresting officer testified—and Nordelo never disputed—that Nordelo was driving at the time of his arrest.

We agree that this alleged evidence cannot meet the first prong of the newly discovered evidence test. We therefore affirm the trial court's summary denial of

the newly discovered evidence claim. We find that the record shows conclusively that Nordelo is entitled to no postconviction relief, and we affirm the trial court's order.

Affirmed.

WELLS, J., concurs.

COPE, J. (dissenting).

The only issue before us is a narrow one: whether the claim of newly discovered evidence should have been denied without an evidentiary hearing. Respectfully, as a matter of pleading, this motion is sufficient to call for an evidentiary hearing. Whether the defendant will ultimately be entitled to any relief is an entirely different matter.

The affidavit of codefendant Angel Lopez maintains that he (Lopez) committed the charged crime with a man named Jose Sanchez, not this defendant. Where the claim is that the defendant is actually innocent of the crime charged, the court should err on the side of granting an evidentiary hearing.

Alternatively, if there is any pleading deficiency, then the State is correct that leave to amend should be granted.

I.

Defendant-appellant Marco Nordelo and codefendant Angel Lopez were charged with holding up a Circle K convenience store on May 29, 1990. They took money from the cash register and the attendant. About one month after the

robbery, the police showed the victim photo lineups, and the victim identified the defendant and codefendant. The victim felt certain of his identification.

The case proceeded to trial in 1991. On the day of trial, the codefendant accepted a plea offer in exchange for a twenty-five year prison sentence. The plea agreement did not require codefendant Lopez to testify at the defendant's trial. The defendant and his attorney, Mr. Casabielle, were given the opportunity to speak with codefendant Lopez after the acceptance of the plea but prior to the start of the defendant's trial. According to codefendant Lopez' affidavit, "I took the plea and then refused to testify." Neither side called codefendant Lopez to testify at trial.

The defendant's identity was an issue at trial. Brief of Appellee, Nordelo v. State, No. 91-1163 (Fla. 3d DCA filed Jan. 17, 1992). The defendant was convicted and sentenced to life imprisonment as a habitual violent felony offender. The conviction was affirmed on appeal. Nordelo v. State, 603 So. 2d 36 (Fla. 3d DCA 1992).

Codefendant Lopez completed his twenty-five year sentence and was released. He contacted Nordelo's family about the case. Lopez stated that he held up the Circle K with another man, Jose Sanchez, and the defendant was not involved.

Nordelo's counsel filed the current Florida Rule of Criminal Procedure 3.850 motion, supported by an affidavit from codefendant Lopez. The affidavit states:

AFFIDAVIT OF ANGEL LOPEZ

I, Angel Lopez, do swear under penalty of perjury, that the following statements are true and correct:

I was involved in the armed robbery of the Circle-K convenience store on May 29, 1990, at approximately 6:45 am, located at 595 SE Okeechobee Road. I entered this convenience store with an accomplice named Jose Sanchez, not Mr. Marco Nordelo.

Mr. Nordelo was not present at the time of the robbery, and was not involved in any way.

I was then involved in the Grand Theft of a Ford Taurus on the next day, May 30, 1990. I was driving this stolen car when I came into contact with Mr. Nordelo.

Mr. Nordelo was the passenger in this car when we were both arrested on May 31, 1990. Any items from the robbery that were in the car were placed there by me.

I did not come forward with this information sooner, as I was afraid that the Office of the State Attorney would take away my plea offer. I took the plea and then refused to testify. I was ignorant of the law and was afraid that if I had not cooperated with the State Attorney, then my plea would have been refused.

Marco Nordelo was mis-identified by Mr. Benavides, the victim in the robbery. He should have never been convicted because he is innocent of this crime.

I feel it is now time to come forward with the truth.

Respectfully submitted,

/s/
Angel Lopez

The motion came before the trial court for hearing. After hearing argument of counsel, the trial court summarily denied the motion, ruling that the evidence "is not newly discovered and could have been obtained through due diligence." The defendant has appealed.[2]

In order to obtain a new trial based on newly discovered evidence, a defendant must meet two requirements:

> First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must also appear that neither the defendant nor defense counsel could have known of such evidence by the use of diligence. Second, the newly discovered evidence must be of a nature that it would probably produce an acquittal on retrial or yield a less severe sentence.

Davis v. State, 26 So. 3d 519, 526 (Fla. 2009) (citing Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (Jones II); Jones v. State, 591 So. 2d 911, 915 (Fla. 1991) (Jones I)).

[2] The State said that it would file a copy of the entire trial transcript, but did not do so. The trial court's order contemplated that excerpts from the court record would be attached, but neither the order nor the State identifies anything specific that was to be attached.

The Rule 3.850 motion in this case was dismissed at the pleading stage. "In reviewing a trial court's summary denial of postconviction relief, this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record." Hunter v. State, 29 So. 3d 256, 261 (Fla. 2008), cert denied, 130 S. Ct. 76 (2009). Where deficiencies in a motion can be cured by amendment, an opportunity to amend should be given. Davis, 26 So. 3d at 527.

"The determination of whether the statements [which constitute the newly discovered evidence] are true and meet the due diligence and probability prongs of *Jones II* usually requires an evidentiary hearing to evaluate credibility unless the affidavit is inherently incredible or obviously immaterial to the verdict and sentence. Id.

It is certainly true that codefendant Lopez has come forward with his affidavit many years after the crime was committed in 1990, and after he entered a plea in 1991. However, the amount of time which elapsed is not dispositive. In Davis, the defendant had been convicted of first degree murder in 1987. In 2008, twenty-one years later, he filed a postconviction motion alleging newly discovered evidence, namely, that two trial witnesses recanted portions of their trial testimony. The trial court ruled that the evidence was not newly discovered. The Florida Supreme Court said that this ruling was error:

> Here, as in Swafford [v. State, 679 So. 2d 736 (Fla. 1996),] the State's only argument to dispute due diligence was that defense counsel had "years" to find the witness. See id. Regardless of the time span from the time of trial to the discovery of the new testimony, **recanted testimony cannot be "discovered" until the witness *chooses* to recant**. See Burns v. State, 858 So.2d 1229, 1230 (Fla. 1st DCA 2003) ("Even though the appellant knew at trial that the codefendant was lying, the appellant could not have gotten the codefendant to admit that he was lying earlier, and thus the recantation is newly discovered evidence that could not have been obtained earlier with due diligence."). Logically, even if counsel had or could have located these witnesses at an earlier date such earlier date does not conclusively establish that the witnesses would have recanted their testimony at that earlier time.

Davis, 26 So. 3d at 528 (emphasis added). The same logic applies in the present case.

II.

The Davis court explained that there is an important distinction between the requirements (a) to plead the existence of newly discovered evidence, versus (b) the heightened requirements to establish due diligence during an evidentiary hearing. The pleading requirement is lower; the proof requirement is higher. The Davis Court said:

> The postconviction trial court appears to have **incorrectly applied the heightened requirements to establish due diligence during an evidentiary hearing to evaluate the allegations at a pleading stage.** However, permitting a newly discovered evidence claim to proceed to an evidentiary hearing does *not* establish

> that the recanted testimony qualifies as newly discovered evidence as a matter of law. See Swafford, 679 So.2d at 739. The newly discovered evidence claim remains to be factually tested in an evidentiary hearing to determine whether the defendant has demonstrated that the successive motion has been filed within the time limit for when the statement was or could have been discovered through the exercise of due diligence. See id. The motion here was sufficiently pled to allow the opportunity to prove through the testimony of witnesses that the threshold requirement of due diligence was satisfied. Accordingly, the postconviction trial court erred in summarily denying this claim on the basis that the pleading failed to sufficiently satisfy the due diligence requirement at that stage of the proceeding.

26 So. 3d at 528-29.

Codefendant Lopez's affidavit states that he "did not come forward with this information [exonerating the defendant] sooner, as I was afraid that the Office of the State Attorney would take away my plea offer. I took the plea and then refused to testify. I was ignorant of the law and was afraid that if I had not cooperated with the State Attorney, then my plea would have been refused." For pleading purposes, we are required to accept that statement as true. The majority opinion says that this statement is nonsensical, majority op. at 5, by which the majority opinion means that codefendant Lopez was wrong about the law. For present purposes, however, we are required to accept the proposition that the defendant did not know the law—which is what his affidavit says—and believed that any cooperation would jeopardize his plea. He states that he refused to testify.

Notwithstanding the codefendant's ignorance of the law, it is in theory possible that this defendant's counsel could have called codefendant Lopez to the stand and requested an order from the judge to compel him to testify. Given that the codefendant believed testimony would jeopardize his plea agreement, we must assume for present purposes (based on the affidavit) that the defendant would have persisted in his refusal to testify or at least, declined to testify in a way that would assist the defense.

In its brief, the State contends that the Rule 3.850 motion should have more allegations than it does. The State argues:

> [T]he Rule 3.850 motion alleges there was contact between the defendant or defendant's counsel and codefendant Lopez shortly prior to the start of Nordelo's trial. Allegations as to what transpired at that time— whether Lopez said he would cooperate after his own case was over; whether he said he would incriminate the defendant; or whether he said nothing at all— would be essential to any determination of whether Nordelo exercised due diligence when failing to contact Lopez some 17 years after Nordelo's trial.

Answer Br. of Appellee at 15. The State continued by saying, "The State notes that insofar as the motion was denied as legally insufficient, the denial should have been without prejudice, under Spera v. State, 971 So. 2d 754, 761 (Fla. 2007), to file an amended motion with further allegations regarding due diligence."

While the State sees the issue as a pleading matter which should be resolved by conferring leave to amend, this writer believes the case law indicates that where

the existence of newly discovered evidence has been pled, and there is a question whether the defendant exercised due diligence, the proper procedure is to conduct an evidentiary hearing at which evidence will be taken on the due diligence issue, as well as the other issues presented. The Hunter case, previously cited, is illustrative. James Hunter, Eric Boyd and several other individuals committed multiple crimes, culminating in multiple murders. Hunter was convicted. He requested postconviction relief claiming newly discovered evidence that codefendant Boyd had recently confessed to shooting Cooley, one of the surviving victims. Defendant Hunter alleged that Boyd previously refused to give a statement because he was promised by prosecutors that they would clear the matter up and that he should keep quiet. Id. at 262-63. The Hunter Court said:

> In similar circumstances, Florida courts have found post-trial confessions from codefendants to qualify as newly discovered in the sense that the evidence was not known at the time of trial and could not have been known by the use of due diligence. See Brantley v. State, 912 So. 2d 342, 342-43 (Fla. 3d DCA 2005) (remanding for an evidentiary hearing based on the affidavit of a codefendant which stated the defendant was not present and was not involved in the shooting and based on the postconviction motion which alleged that defense counsel tried to obtain the codefendant's cooperation but was refused); Roundtree v. State, 884 So. 2d 322, 323 (Fla. 2d DCA 2004) (holding that the defendant's allegations that his codefendant admitted that the defendant had no role in the robbery and that the codefendant had not testified on the defendant's behalf because he had been coerced by the State were sufficient to state a prima facie claim of newly discovered

> evidence); Kendrick v. State, 708 So. 2d 1011, 1012 (Fla. 4th DCA 1998) (stating that a codefendant's sworn post-trial testimony that he lied to police and that he was told by police to say he got the cocaine from the defendant in order to keep his own prison time to a minimum qualified as newly discovered evidence because it was unknown, the codefendant was unwilling to give the testimony previously, and the testimony could not have been secured through due diligence); State v. Gomez, 363 So. 2d 624, 626-28 (Fla. 3d DCA 1978) (treating as newly discovered evidence the post-trial affidavit of a codefendant confessing to having committed the robbery without the defendant's assistance).

Id. at 263. The circumstances present here are comparable.

In conclusion, I respectfully suggest that under established precedent, the Rule 3.850 motion is legally sufficient and the matter should be remanded for an evidentiary hearing. Alternatively, as suggested by the State, any affirmance should be with leave to amend the Rule 3.850 motion.