IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ERIC LUCAS,

Respondent.

Case No. SC14-1925

****

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA

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INITIAL BRIEF ON MERITS

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PRELIMINARY STATEMENT

Petitioner is the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court. Respondent is Eric Lucas, the Appellant in the DCA and the defendant in the trial court.

In this brief, the parties will be referred to as they appear before this Honorable Court, except that the Petitioner may also be referred to as the State.

The following symbols will be used:

R = District Court Summary Record

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with burglary of a dwelling with battery and aggravated battery and violating his probation by committing these new law violations (R 1). Respondent was found guilty as charged and sentenced to life in prison as a prison releasee reoffender (R 2). Respondent appealed, and his conviction was affirmed on direct appeal. *Lucas v. State*, 67 So. 3d 332 (Fla. 4th DCA 2011), *rev. denied*, 90 So. 3d 271 (Fla. 2012).

On January 22, 2013, Respondent filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, raising four grounds to vacate his judgment and sentence (R 1-15). Relevant to this proceeding, Respondent claimed in ground 1 that trial counsel rendered ineffective assistance by failing to consult or hire an expert witness to rebut the State's claim that the victim suffered permanent injury to her eye (R 4). Respondent argued trial counsel should have presented an expert in the field of ophthalmology, and had trial counsel called such an expert, "the jury would have heard testimony that the injury was not one of permanence, but could be corrected via surgery and/or medicated." (R 5). In its response to the postconviction motion, the State asserted ground 1 was facially insufficient because Respondent did not name a specific expert witness. The State requested the trial court strike the motion without prejudice for the Respondent to file an amended motion (R 17-19). The trial court struck

Respondent's motion with leave to amend within thirty days (R 25). Respondent instead appealed (R 36) and the trial court entered an order striking the motion with prejudice. Respondent appealed, and the Fourth District Court of Appeal reversed, concluding:

> The trial court erred in failing to follow our binding precedent. We confronted this issue in *Terrell v. State*, 9 So. 3d 1284 (Fla. 4th DCA 2009), and explained:
>
> > As a threshold matter, the state asserts that this claim was facially insufficient because the defendant did not name the expert whom he wished to testify. Although the defendant is usually required to identify fact witnesses by name, we are aware of no authority requiring the defendant to provide the name of a particular expert where the defendant claims that trial counsel failed to secure an expert in a named field of expertise. We thus do not agree that the defendant's postconviction claim was facially insufficient.
>
> *Id.* at 1289. Appellant's motion sufficiently explained the relevance and substance of the expected testimony and alleged that the outcome of the proceedings would have been different.

Lucas v. State, 147 So. 3d 611, 612 (Fla. 4th DCA 2014). This Court accepted review on January 8, 2015.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal erred in holding that a defendant does not need to name an expert or allege the expert would have been available to testify at trial. The Fourth District's ruling is in direct contradiction to this Court's rulings regarding the pleading requirements for ineffective assistance for failing to call a witness as trial. The considerations requiring a specific witness be named and available to testify at trial in order to gain entitlement to an evidentiary hearing apply to lay and expert witnesses alike.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT A POSTCONVICTION MOVANT NEED NOT ALLEGE ALL THE ELEMENTS SET FORTH IN *NELSON V. STATE*, 875 SO. 2D 579 (FLA. 2004) IN CLAIMING TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO CONSULT OR CALL AN EXPERT WITNESS.

In this case, the Fourth District Court of Appeal misapplied this Court's precedents in holding that Respondent's claim was facially sufficient when it merely "explained the relevance and substance of the expected testimony and alleged that the outcome of the proceedings would have been different."

In *Nelson v. State*, 875 So. 2d 579 (Fla. 2004), this Court discussed the allegations a defendant was required to make in a motion for postconviction relief in order to state a facially sufficient claim based upon ineffective assistance of counsel for failing to call, interview, or investigate witnesses. This Court held that to satisfy the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant is required to allege the identity of the witness, what testimony counsel could have elicited from the witness, how counsel's failure to interview or present the witness prejudiced the case, and that the witness would have been able to testify at trial. *Id.* at 583. As *Nelson* points out, "[t]hat a witness would have been available to testify at trial is integral to the prejudice allegations. If a witness would not have been available to testify at trial, then the defendant will not be able to

establish deficient performance or prejudice from counsel's failure to call, interview, or investigate that witness." *Id.*

In *Bryant v. State*, 901 So. 2d 810 (Fla. 2005), this Court applied the requirements set forth in *Nelson* to a claim that trial counsel failed to present a false confession expert to testify regarding his confession. This Court held the defendant's claim was facially insufficient when the defendant failed to allege specific facts about which a confession expert would testify, failed to provide proposed testimony, and did not even claim to have obtained an expert. *Id.* at 821. The defendant's conclusory allegation that the expert could have testified his confession was typical of those that are false was insufficient to meet his burden under *Nelson*. *Id.* at 821–22.

Federal courts and other states also require experts to be named. For example, in *Day v. Quarterman*, 566 F.3d 527 (5th Cir. 2009), the Fifth Circuit Court of Appeal held that to prevail on a claim of failing to call a witness, a habeas petitioner must "name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense." *Id.* at 538. This requirement applies to "uncalled lay and expert witnesses alike." *Id.* These requirements are imposed as part of the prejudice analysis of *Strickland* because allegations of how a witness would testify are

largely speculative and decisions regarding the presentation of evidence are typically a matter of trial strategy. *Id.* at 538, 539. In *Yeomans v. State*, 2013 WL 1284361 (Ala. Crim. App. 2013), the defendant alleged that trial counsel was ineffective for failing to hire a mental health or intelligence expert to testify during the guilt phase of his trial regarding his low IQ scores and how his low intelligence decreased his culpability. The court of criminal appeals held the defendant's claim was insufficiently pled when the defendant failed to identify any expert who could have been hired and failed to allege how such expert testimony could help during the guilt phase of the trial. *Id.* at *7.

In its decision below, the Fourth District held Respondent's claim of ineffective assistance for failing to call an expert witness was sufficient merely because the Respondent alleged what the expert could have testified to and that the proceedings would have been different. This ignores two of the four elements set forth in *Nelson*: that a defendant must name a witness and allege the witness would have been available to testify at trial. There is no logical reason why these elements should not be alleged in an expert witness claim as opposed to a lay witness claim.

The same considerations that apply to lay witnesses apply to expert witnesses. If a defendant cannot name an expert that would be available to testify at a trial, the defendant will not be able to establish either the deficient performance or the

prejudice prong of *Strickland* when the matter comes before the trial court for an evidentiary hearing. "[T]he mere fact a defendant can find, years after the fact, a[n] . . . expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial." *Ward v. Hall*, 592 F.3d 1144, 1173 (11th Cir. 2010). Rather, a trial court must determine if failing to obtain an expert is such an unreasonable trial strategy as to fall "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. A trial court will not be able to undertake this analysis without evaluating a specific expert's testimony against the actual testimony and strategies employed in the case. Further, trial counsel cannot be ineffective if the defendant cannot name an expert that would have actually been available to testify at the defendant's trial, as counsel cannot be ineffective for failing to present evidence not in existence at the time of trial. *See Clark v. State*, 35 So. 3d 880, 888 (Fla. 2010).

Requiring a defendant to name a particular witness is particularly availing in regard to expert witness claims because "experts are not fungible," *State v. Delgado*, 718 A.2d 437, 440 (Conn. App. 1998), as any given expert has a unique set of qualifications and experience and thus brings a unique viewpoint to a case. Also, one expert may have more "presence" and thus be more persuasive to a jury than another witness. *See State v. Cavell*, 670 A.2d 261, 265 (1996). Thus, a

defendant must name a particular witness in order for a trial court to effectively review whether a defendant has been prejudiced.

Further, requiring a defendant to name an available expert prior to the trial court granting an evidentiary hearing ensures that a trial court's hearing time is not wasted by speculative claims. Defendants have two years after the exhaustion of direct appeals to file a motion for postconviction relief, *see* Fla. R. Crim. P. 3.850(b), which is sufficient time to find an expert to evaluate a defendant's case to determine if there are genuine grounds for postconviction relief.

Therefore, the Fourth District Court of Appeal erred in holding Respondent's claim of ineffective assistance for failing to call an expert witness was facially sufficient. This case should be remanded to the trial court to grant Respondent an opportunity to file a facially sufficient claim and for the trial court to rule on Respondent's remaining claims.

CONCLUSION

WHEREFORE, based on the arguments and authorities cited in this brief, the State respectfully requests this Honorable Court quash the decision of the Fourth District Court of Appeal and remand for further proceedings.

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CERTIFICATE OF TYPEFACE COMPLIANCE AND SERVICE

I CERTIFY that (1) this brief has been prepared in Times New Roman font, 14 point, and double spaced, and (2) a true and accurate copy of this brief was served on Michael March Brownlee, Esq., Fisher Rushmer, P.A., 390 N. Orange Ave., Ste 2200, Orlando, FL 32801 by email at mbrownlee@fisherlawfirm.com on February 2, 2015.

_____
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