

IN THE
SIXTH JUDICIAL CIRCUIT COURT
PASCO COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

SHANNON STEPHEN,

Defendant.

Case No. 2006-CF-1591

AMENDED MOTION FOR POSTCONVICTION RELIEF WITH OATH¹

The Defendant, by and through undersigned counsel, and pursuant to Florida Rule of Criminal Procedure 3.850, respectfully moves this Honorable Court to grant him a new trial, and in support of said motion alleges:

1. Name and location of the court that entered the judgment of conviction under attack:
Sixth Judicial Circuit Court, Pasco County, Florida
 2. Date of judgment of conviction: July 28, 2010 (amended judgment filed February 20, 2015)
 3. Length of sentence: thirty-five years' imprisonment
 4. Nature of offenses involved: two counts of DUI manslaughter and one count of leaving the scene of an accident involving death
 5. What was your plea? (check only one)
 - (a) Not Guilty X
 - (b) Guilty ___
 - (c) Nolo Contendere ___
-

¹ This motion is amended to include the Defendant's oath for Ground 5. *See Morais v. State*, 640 So. 2d 1227 (Fla. 2d DCA 1994).

(d) Not Guilty by reason of insanity ____

If you entered one plea to one count, and a different plea to another count, give details: N/A

6. Kind of trial: (check only one) Jury

7. Did you testify at the trial or at any pre-trial hearing? No

8. Did you appeal from the judgment of conviction?

Yes X No ____

9. If you did appeal, answer the following:

(a) Name of court: Second District Court of Appeal

(b) Result: Convictions affirmed, cost portion of sentence/judgment reversed/remanded

(c) Date of result: October 29, 2014

(d) Citation (if known): Stephen v. State, 150 So. 3d 268 (Fla. 2d DCA 2014)

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc. with respect to this judgment in this court?

Yes X No ____

11. If your answer to number 10 was "yes," give the following information (applies only to proceedings in this court):

(a) (1) Nature of the proceeding: Florida Rule of Criminal Procedure 3.800(c) motion

(2) Grounds raised: Request for a reduction of sentence

(3) Did you receive an evidentiary hearing on your petition or motion, etc? No

(4) Result: Motion denied

(5) Date of result: March 10, 2015

If you did appeal, answer the following:

(1) Name of court: N/A

(2) Result: N/A

(3) Date of result: N/A

(4) Citation (if known): N/A

(b) As to any second petition, application, motion, etc., give the same information:

(1) Nature of the proceeding: N/A

(2) Grounds raised: N/A

(3) Did you receive an evidentiary hearing on your petition or motion, etc.? N/A

(4) Result: N/A

(5) Date of result: N/A

12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc. with respect to this judgment in any other court?

Yes No

13. If your answer to number 12 was "yes," give the following information:

(a) (1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition or motion, etc.? N/A

(5) Result: N/A

(6) Date of result: N/A

(b) As to any second petition, application, motion, etc., give the same information:

(1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition or motion, etc.? N/A

(5) Result: N/A

(6) Date of result: N/A

14. State concisely every ground on which you claim that the judgment or sentence is unlawful. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and the facts supporting them.

For your information, the following is a list of the most frequently raised grounds for postconviction relief. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds that you may have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you base your allegations that your conviction or sentence is unlawful.

DO NOT CHECK ANY OF THESE LISTED GROUNDS. If you select one or more of these grounds for relief, you must allege facts. The motion will not be accepted by the Court if you merely check (a) through (i).

- (a) Conviction obtained by plea of guilty or nolo contendere which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by the unconstitutional failure of the prosecution to disclose to defendant evidence favorable to the defendant.
- (c) Conviction obtained by a violation of the protection against double jeopardy.
- (d) Denial of effective assistance of counsel.
- (e) Denial of right of appeal.
- (f) Lack of jurisdiction of the court to enter the judgment or impose sentence (such as an unconstitutional statute).
- (g) Sentence in excess of the maximum authorized by law.
- (h) Newly discovered evidence.
- (i) Changes in the law that would be retroactive.

A. Ground 1: Defense counsel rendered ineffective assistance of counsel by failing to present an accident reconstruction expert as a defense witness at trial.

Supporting FACTS:

Defense counsel rendered ineffective assistance of counsel by failing to present an accident reconstruction expert as a defense witness at trial. As a result, the Defendant was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and in violation of article I, section 16 of the Florida Constitution.

The Defendant's theory of defense was that James Wallace was driving his vehicle at the time of the accident (and the Defendant was subsequently framed by Mr. Wallace and Marvin Dalzell). In order to properly present this theory of defense, the jury was required to understand and comprehend the timeframes involved, the routes driven by all parties, and the cellphone data from each of the parties. The only way to effectively present all of this information was through an accident reconstruction expert. However, at trial, defense counsel did *not* present an accident reconstruction expert as a defense witness at trial.

Had an accident reconstruction expert been presented at trial, the expert would have confirmed – through comprehensive diagrams and visuals – the accuracy of the Defendant's theory: i.e., the time that the three men left the bar; that a witness (Walter Schubart) confirmed all three men getting in the Defendant's vehicle and that the Defendant was helped into the *passenger* side of the vehicle; the route driven by Mr. Wallace which coincided with Mr. Wallace's attempt to check on the whereabouts of his wife (Kara Wallace); the initial "something happened, this is really important" message left by Mr. Wallace on Mrs. Wallace's cellphone was left at the exact time (1:09 a.m. on March 26, 2006) that Robert Bartlett called 911 to report that the victims had been hit; and that after the accident, Brian Farrow observed "two or three" men involved in an altercation next to

a truck (the Defendant's vehicle) and a van (Mr. Dalzell's vehicle). Moreover, an accident reconstruction expert would have been able to present a map detailing the path driven by Mr. Wallace in the Defendant's vehicle and the path driven by Mr. Dalzell in his vehicle and would have been able to explain the timing of each route – which would have further strengthened the Defendant's theory of defense. Absent such an expert, all of these aspects were not tied together in a way that a jury could see and understand the accuracy of the Defendant's theory. Stated another way, without an expert tying these pieces together, there was no way that the Defendant's theory of defense could be properly presented to the jury.

The Defendant has retained two reconstruction experts (Donald J. Fournier, Jr., P.E., a forensic engineer, and John Buchanan, a law enforcement officer). Mr. Fournier and Mr. Buchanan have now properly conducted the analysis set forth in the previous paragraph. Had Mr. Fournier's analysis and Mr. Buchanan's analysis been presented to the jury, there is a reasonable probability that the result of the trial would have been something other than a guilty verdict.

The Sixth Amendment right to counsel implicitly includes the right to the effective assistance of counsel. *See McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Chatom v. White*, 858 F.2d 1479, 1484 (11th Cir. 1988). “The test to be applied by the trial court when evaluating an ineffectiveness claim is two-pronged: The defendant must show both that trial counsel's performance was deficient and that the defendant was prejudiced by the deficiency.” *Bruno v. State*, 807 So. 2d 55, 61 (Fla. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Defense counsel was ineffective for failing to present an accident reconstruction expert as a defense witness at trial. *See Leonard v. State*, 930 So. 2d 749 (Fla. 2d DCA 2006) (holding that the failure to retain a defense expert is a facially sufficient postconviction claim and recognizing that

such a claim generally cannot be resolved absent an evidentiary hearing). Counsel's failure fell below the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome. *See Johnson v. State*, 921 So. 2d 490, 511-12 (Fla. 2005) (Pariente, C.J., specially concurring). The Defendant is entitled to an evidentiary hearing on this claim. *See Wood v. State*, 143 So. 3d 493 (Fla. 1st DCA 2014) ("On appeal, Appellant asserts that the trial court erred in summarily denying Ground One of his postconviction motion, as the record did not conclusively refute his claim that his trial counsel was ineffective for failing to retain and present an independent accident reconstruction expert. We express no opinion as to the merits of Appellant's claim, but find that Appellant has alleged a facially sufficient claim under Ground One. We agree with Appellant that the record before us does not conclusively refute this claim. Accordingly, we reverse and remand for an evidentiary hearing on this issue.") (citation omitted).

B. Ground 2: Defense counsel rendered ineffective assistance of counsel by failing to present a cellphone tower expert as a defense witness at trial.

Supporting FACTS:

Defense counsel rendered ineffective assistance of counsel by failing to present a cellphone tower expert as a defense witness at trial. As a result, the Defendant was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and in violation of article I, section 16 of the Florida Constitution.

The first trial in this case ended in a hung jury/mistrial. The two main differences between the first trial and the second trial were (1) defense counsel's failure to introduce during the trial the receipt from the bar (as explained in Ground 4) and (2) cellphone tower witnesses that the State

presented during the second trial (Dan Jensen and Youssouf Mohamed). These cellphone tower witnesses attempted to disprove the Defendant's assertion that James Wallace was driving the vehicle at the time of the accident by giving theories regarding Mr. Wallace's location at particular times based on the cellphone tower that Mr. Wallace's cellphone was hitting. However, defense counsel failed to present a cellphone tower expert to refute this testimony. Had defense counsel properly presented a cellphone tower expert to refute the State's cellphone tower testimony, there is a reasonable probability that the result of the trial would have been something other than a guilty verdict.²

Defense counsel was ineffective for failing to present a cellphone tower expert as a defense witness at trial.³ See *Leonard v. State*, 930 So. 2d 749 (Fla. 2d DCA 2006) (holding that the failure to retain a defense expert is a facially sufficient postconviction claim and recognizing that such a claim generally cannot be resolved absent an evidentiary hearing). Counsel's failure fell below the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome. See *Johnson*, 921 So. 2d at 511-12 (Pariente, C.J., specially concurring). The Defendant is entitled to an evidentiary hearing on this claim. See *Wood v. State*, 143 So. 3d 493 (Fla. 1st DCA 2014) ("On appeal, Appellant asserts that the trial court erred in summarily denying Ground One of his postconviction motion, as the record did not conclusively refute his claim that his trial counsel was

² Unlike lay witnesses, a defendant is not required to list the name of a specific expert witness when claiming that defense counsel was ineffective for failing to present an expert witness at trial. See *State v. Lucas*, 183 So. 3d 1027 (Fla. 2016).

³ The Defendant continues to rely upon the *Strickland* analysis set forth in Ground 1 above and that analysis is incorporated by reference.

ineffective for failing to retain and present an independent accident reconstruction expert. We express no opinion as to the merits of Appellant's claim, but find that Appellant has alleged a facially sufficient claim under Ground One. We agree with Appellant that the record before us does not conclusively refute this claim. Accordingly, we reverse and remand for an evidentiary hearing on this issue.") (citation omitted).

C. Ground 3: Defense counsel rendered ineffective assistance of counsel by failing to present a toxicologist as a defense witness at trial.

Supporting FACTS:

Defense counsel rendered ineffective assistance of counsel by failing to present a toxicologist as a defense witness at trial. As a result, the Defendant was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and in violation of article I, section 16 of the Florida Constitution.

The Defendant's vehicle was driven for approximately one mile after the accident. Liquid from the vehicle leaked on the pavement, leaving visual evidence of the path that the vehicle took following the accident. The liquid path is in a straight line. Given the Defendant's intoxication level, there is no way that he could have driven the vehicle in a straight path – which further proves that James Wallace was driving the Defendant's vehicle at the time of the accident and then drove the vehicle after the accident to the intersection where he was picked up by Marvin Dalzell in Mr. Dalzell's van (after Mr. Wallace pushed the Defendant to the driver's side of the Defendant's vehicle – an altercation observed by Brian Farrow). However, defense counsel failed to present a toxicologist at trial. Had defense counsel presented a toxicologist, the toxicologist would have explained to the jury that given the Defendant's intoxication level, the Defendant could *not* have

driven the vehicle in a straight line following the accident (and had such an expert been presented, there is a reasonable probability that the result of the trial would have been something other than a guilty verdict).⁴

Defense counsel was ineffective for failing to present a toxicologist as a defense witness at trial.⁵ *See Leonard v. State*, 930 So. 2d 749 (Fla. 2d DCA 2006) (holding that the failure to retain a defense expert is a facially sufficient postconviction claim and recognizing that such a claim generally cannot be resolved absent an evidentiary hearing). Counsel's failure fell below the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome. *See Johnson*, 921 So. 2d at 511-12 (Pariente, C.J., specially concurring). The Defendant is entitled to an evidentiary hearing on this claim. *See Wood v. State*, 143 So. 3d 493 (Fla. 1st DCA 2014) ("On appeal, Appellant asserts that the trial court erred in summarily denying Ground One of his postconviction motion, as the record did not conclusively refute his claim that his trial counsel was ineffective for failing to retain and present an independent accident reconstruction expert. We express no opinion as to the merits of Appellant's claim, but find that Appellant has alleged a facially sufficient claim under Ground One. We agree with Appellant that the record before us does not conclusively refute this claim. Accordingly, we reverse and remand for an evidentiary hearing on this issue.") (citation omitted).

⁴ Unlike lay witnesses, a defendant is not required to list the name of a specific expert witness when claiming that defense counsel was ineffective for failing to present an expert witness at trial. *See State v. Lucas*, 183 So. 3d 1027 (Fla. 2016).

⁵ The Defendant continues to rely upon the *Strickland* analysis set forth in Ground 1 above and that analysis is incorporated by reference.

D. Ground 4: Defense counsel rendered ineffective assistance of counsel by failing to admit the bar receipt into evidence.

Supporting FACTS:

Defense counsel rendered ineffective assistance by failing to admit the bar receipt into evidence (because defense counsel failed to subpoena a witness who could properly authenticate the receipt). As a result, the Defendant was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and in violation of article I, section 16 of the Florida Constitution.

As explained above, the first trial in this case ended in a hung jury/mistrial. One of the main differences between the first trial and the second trial was defense counsel's failure to introduce during the trial the receipt from the bar. The bar receipt shows the time that Defendant left the bar (and confirms the Defendant's timeline and is therefore consistent with the Defendant's theory that James Wallace was driving the Defendant's vehicle at the time of the accident). Notably, during the jury's deliberation, the jury asked "what was the time registered on the bar tab" (T-1721), but because defense counsel failed to introduce the bar receipt, the Court was required to answer the jury's question by saying "all of the evidence that has been entered in this trial is back with you." (T-1722). Had defense counsel properly admitted the bar receipt into evidence (as he did during the first trial), and had the jury been able to view the time on the receipt to see that it was consistent with the Defendant's theory of events, then there is a reasonable probability that the result of the trial would have been something other than a guilty verdict.

Defense counsel was ineffective for failing to admit the bar receipt into evidence.⁶ Counsel's

⁶ The Defendant continues to rely upon the *Strickland* analysis set forth in Ground 1 above and that analysis is incorporated by reference.

failure fell below the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome. *See Johnson*, 921 So. 2d at 511-12 (Pariente, C.J., specially concurring). The Defendant is entitled to an evidentiary hearing on this claim.

E. Ground 5: Defense counsel rendered ineffective assistance of counsel by failing to obtain a protective order for witness Kara Wallace's cell phone texts.

Supporting FACTS:

Defense counsel rendered ineffective assistance of counsel by failing to obtain a protective order for witness Kara Wallace's cell phone texts. As a result, the Defendant was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and in violation of article I, section 16 of the Florida Constitution.

During the trial, defense counsel moved for a mistrial because State witness Kara Wallace violated the rule of sequestration by texting – during her testimony (in front of the jury while she was on the witness stand) – with her husband James Wallace, who was also a State witness. The Court denied the motion for mistrial and stated that defense counsel had to provide the Court with proof that Mrs. Wallace was, in fact, discussing the substance of testimony when she was texting with Mr. Wallace.

After the sentencing hearing, there was a hearing on August 3, 2010, during which the Court indicated that if defense counsel provided the Court with a protective order directed towards Mrs. Wallace's cell phone, the Court would sign the order (so that the text messages would be preserved, thereby allowing defense counsel to obtain the text messages from Mrs. Wallace's cell phone

carrier). However, defense counsel failed to present the protective order to the Court (i.e., defense counsel failed to get the signed protective order). Defense counsel was ineffective for failing to get the protective order (and failing to subsequently get access to Mrs. Wallace's cell phone texts). Had defense counsel obtained the protective order (and then the texts), defense counsel would have been able to prove that Mrs. Wallace did, in fact, violate the rule of sequestration by discussing the substance of her testimony in her texts with her husband (i.e., but for defense counsel's ineffectiveness, the Court would have granted a post-trial motion for new trial based on new evidence).

Defense counsel was ineffective for failing to obtain the protective order for witness Mrs. Wallace's cell phone texts.⁷ Counsel's failure fell below the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome. *See Johnson*, 921 So. 2d at 511-12 (Pariente, C.J., specially concurring). The Defendant is entitled to an evidentiary hearing on this claim.

F. Ground 6: Cumulative error.

Supporting FACTS:

When considering the cumulative effect of defense counsel's representation and/or the other errors raised in this motion, it is clear that defense counsel's level of representation fell below that of reasonably competent counsel. Furthermore, it is also discernible that there is a reasonable probability that but for the errors in this case, the outcome of the proceeding would have been

⁷ The Defendant continues to rely upon the *Strickland* analysis set forth in Ground 1 above and that analysis is incorporated by reference.

different – even if the outcome would not have changed but for any one particular error. Relief is therefore warranted under these circumstances. *See State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996).

15. If the grounds listed in 14 were not previously presented on your direct appeal, give your reason they were not so presented: A claim of ineffective assistance of counsel is generally not cognizable on direct appeal and is properly raised for the first time in a motion for postconviction relief, pursuant to Florida Rule of Criminal Procedure 3.850. See Kelly v. State, 486 So. 2d 578, 585 (Fla. 1986).

16. Do you have any petition, application, appeal, motion, etc., now pending in any court, either state or federal, as to the judgment under attack?

Yes No

17. If your answer to number 16 was “yes,” give the following information:

- (a) Name of Court: N/A
- (b) Nature of the proceeding: N/A
- (c) Grounds raised: N/A
- (d) Status of the proceedings: N/A

18. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein.

- (a) At preliminary hearing: N/A
- (b) At arraignment and plea: N/A
- (c) At trial: Ken Foote, PO Box 2285, New Port Richey, Florida 34656-2285
- (d) At sentencing: Mr. Foote
- (e) On appeal: undersigned counsel Ufferman
- (f) In any postconviction proceeding: undersigned counsel
- (g) On appeal from any adverse ruling in a post-conviction proceeding: N/A

WHEREFORE, the Defendant requests that the Court grant all relief to which he may be entitled in this proceeding, including but not limited to (here list the nature of the relief sought):

1. An evidentiary hearing to determine the merits of this motion for postconviction relief
2. Such other and further relief as the Court deems just and proper.

OATH

Under penalties of perjury and administrative sanctions from the Department of Corrections, including forfeiture of gain time if this motion is found to be frivolous or made in bad faith, I certify that I understand the contents of the foregoing motion, that the facts contained in the motion are true and correct, and that I have a reasonable belief that the motion is timely filed. I certify that this motion does not duplicate previous motions that have been disposed of by the Court. I further certify that I understand English and have read the foregoing motion.


SHANNON STEPHEN
DC # R67120

OUTGOING LEGAL MAIL
PROVIDED TO TAYLOR C.I. FOR
MAILING ON
12-8-16 1 R
DATE (MAILROOM-MAIN UNIT) OFFICER INT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished

to:

Office of State Attorney
West Pasco Judicial Center
7530 Little Road
New Port Richey, Florida 34654
Email: SA6eservice@co.pinellas.fl.us

by email delivery this 20th day of December, 2016.

Respectfully submitted,

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