

IN THE
SIXTH JUDICIAL CIRCUIT COURT
PASCO COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

SHANNON STEPHEN,

Defendant.

Case No. 2006-CF-1591

**DEFENDANT’S REPLY TO THE “STATE’S RESPONSE” TO HIS FLORIDA RULE OF
CRIMINAL PROCEDURE 3.850 MOTION**

The Defendant, SHANNON STEPHEN, by and through undersigned counsel, files this reply to the “State’s Response” to his pending Florida Rule of Criminal Procedure 3.850 motion. As explained below, the Defendant is entitled to an evidentiary hearing on grounds 1-3 of his rule 3.850 motion.

Standard of review.

In its Response, the State is requesting the Court to summarily deny grounds 1-3 of the Defendant’s rule 3.850 motion without an evidentiary hearing. When a trial court considers allegations in a rule 3.850 motion, Florida law “mandat[es] an evidentiary hearing unless the allegations are conclusively refuted by the record.” *McLin v. State*, 827 So. 2d 948, 956 (Fla. 2002). Additionally, as explained by the Fourth District Court of Appeal in *Simon v. State*, 997 So. 2d 490, 492 (Fla. 4th DCA 2008):

A defendant’s factual allegations in a rule 3.850 motion must be accepted as true to the extent they are not conclusively refuted by the record. If a claim sufficiently

establishes a prima facie basis for relief and is not refuted by records, the court should hold an evidentiary hearing to resolve any disputed factual matters.

(Citation omitted). In the instant case, the allegations in grounds 1-3 of the Defendant's rule 3.850 motion are *not* conclusively refuted by the record.

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

In its Response, the State asserts that an accident reconstruction "expert's testimony was not needed." Response at 2.¹ Undersigned counsel note in DUI manslaughter cases, the prosecution and the defense routinely present accident reconstruction experts as witnesses at trial. Notably, in the instant case, *the State presented its own accident reconstruction at trial* (John Murdoch), but defense counsel failed to present an accident reconstruction expert. An accident reconstruction expert was needed to properly present the Defendant's theory of defense in this case.

In support of his argument, the Defendant relies on *Wood v. State*, 143 So. 3d 493 (Fla. 1st DCA 2014). In *Wood*, the defendant argued that his attorney was ineffective for failing to present an accident reconstruction expert during his DUI manslaughter trial. The trial court, however, summarily denied this claim without first holding an evidentiary hearing. On appeal, the First District Court of Appeal reversed the trial court's order and remanded the claim for an evidentiary hearing:

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

¹ In its Response, the State appears to take the position that defense counsel made a "strategic" decision that an accident reconstruction expert was unnecessary in this case. "A trial court cannot deny a motion for post-conviction relief by finding that defense counsel's decision was tactical or trial strategy *without first holding an evidentiary hearing.*" *Button v. State*, 941 So. 2d 531, 533 (Fla. 4th DCA 2006) (emphasis added) (citation omitted).

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. *See Brantley v. State*, 912 So. 2d 342, 343 (Fla. 3d DCA 2005) (reversing summary denial of a rule 3.850 motion and remanding for an evidentiary hearing because "we are obligated to reverse 'unless the record shows conclusively that the appellant is entitled to no relief . . .'" (emphasis omitted).

Wood, 143 So. 3d at 494. As in *Wood*, in the instant case, the record does not "conclusively refute" the Defendant's claim that defense counsel was ineffective for failing to present an accident reconstruction expert as a defense witness at trial.² Accordingly, consistent with *Wood*, the Defendant is entitled to an evidentiary hearing on this claim.

² As explained in the rule 3.850 motion, 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 (with information regarding stop lights and testimony regarding test routes that were driven at the time of day in question with answers as to how long the test routes took) – 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. During the trial, defense counsel did not present any witness or expert who introduced comprehensive diagrams and visuals, maps, data regarding the timing of the routes in question, or testimony/evidence tying all of this evidence together. In its Response, the State cites to defense counsel's closing argument at trial. *See* Response at 2. Of course, during the trial (and just before closing argument), the Court instructed the jury that "what the attorneys say is *not* evidence." (T-1579) (emphasis added).

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

In its Response, the State relies substantially on the transcript of the deposition of Steven Smoot. *See* Response at 4. However, based on undersigned counsel’s review of the Court’s “progress docket,” the transcript of Mr. Smoot’s deposition had *not* previously been filed with the Court.³ As such, the transcript of Mr. Smoot’s deposition is not a part of the “record” and it cannot be relied upon by the State in an effort to refute the Defendant’s ground. *See Cruz v. State*, 824 So. 2d 291, 293 (Fla. 4th DCA 2002) (“The deposition excerpt was not made part of the trial court record before being supplied in the state’s response, and the trial court should not have relied upon this non-record submission to summarily deny appellant’s motion.”); *Harrell v. State*, 79 So. 3d 231, 232-33 (Fla. 2d DCA 2012) (“It is impossible to tell from the record provided to this court whether the deposition excerpts were part of the trial court record on which the postconviction court could properly rely. There is only one entry on the progress docket attached to the record on appeal which would indicate that any pretrial depositions were filed with the trial court. Based on this court’s authority in *Harvester v. State*, 817 So. 2d 1048 (Fla. 2d DCA 2002), we ordered the appellate record to be supplemented with the transcripts from the depositions filed with the trial court on January 16, 2006. After reviewing these transcripts, it is clear that they do not match the transcript excerpts from the October 3, 2005, deposition that is attached to the State’s response. Accordingly, we remain

³ The cover page of Mr. Smoot’s deposition transcript (which was filed as an attachment to the State’s Response to the Defendant’s rule 3.850 motion) indicates that the deposition was taken on August 16, 2010 – but this must be a typographical error because the trial in the Defendant’s case was in May of 2010. The “Reporter’s Deposition Certificate” at the conclusion of the transcript indicates that the deposition was transcribed on April 21, 2010. Based on undersigned counsel’s review of the “progress docket,” there no entries on the docket following April 21, 2010, demonstrating the Mr. Smoot’s deposition transcript had been previously filed (i.e., prior to the State attaching it to its Response).

unable to ascertain whether the State's attachments could be used to conclusively refute the claims of ineffective assistance in a summary denial.") (footnote omitted).⁴

As explained above, Florida law "mandat[es] an evidentiary hearing unless the allegations are conclusively refuted by the record." *McLin*, 827 So. 2d at 956. Pursuant to *McLin*, because the Defendant's ground is not refuted by the record, the Defendant is entitled to an evidentiary hearing on this ground. *See Pierre v. State*, 923 So. 2d 1193, 1193 (Fla. 3d DCA 2006) ("As there is nothing in the record to affirmatively and conclusively refute Pierre's claim, we reverse and remand this matter for an evidentiary hearing on the merits of the claim.").

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

The Defendant relies on the arguments set forth in his rule 3.850 motion in support of this ground. For the reasons set forth in Ground 1, the Defendant submits that he is entitled to an evidentiary hearing on this ground.

The conclusion of the State's Response.

At the conclusion of the Response, the State asserts that during the trial, the "Defendant acknowledged to the trial court that he was satisfied with counsel's representation." Response at 6. However, as explained by the Second District Court of Appeal in *Evans v. State*, 737 So. 2d 1167, 1168 (Fla. 2d DCA 1999), "[a] client's acquiescence in trial counsel's conduct does not necessarily insulate the lawyer's performance from judicial review in a postconviction proceeding."

⁴ The State also attached to its Response the deposition transcript of Heather Diaz. There is a docket entry that references Ms. Diaz' deposition (docket entry 409), but it is not clear from the docket whether this entry refers to a notice of deposition or refers to the actual transcript of the deposition (and undersigned counsel note that other entries on the docket seem to specify when a transcript of a deposition is actually being filed). *See* Docket Entry 459 ("Notice of Filing Transcript Depo of Lisa Taranto"). Regardless, Ms. Diaz' deposition transcript alone does not refute the Defendant's ground and therefore an evidentiary hearing is required for this ground.

CERTIFICATE OF SERVICE

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

to:

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by email delivery this 16th day of April, 2018.

Respectfully submitted,

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