

Third District Court of Appeal

State of Florida, July Term, A.D. 2008

Opinion filed October 15, 2008.

Not final until disposition of timely filed motion for rehearing.

No. 3D08-1327

Lower Tribunal No. 01-12763

Steven Flanders,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, Antonio Marin, Judge.

Steven Flanders, in proper person.

Bill McCollum, Attorney General, for appellee.

Before GERSTEN, C.J., ROTHENBERG, J., and SCHWARTZ, Senior Judge.

PER CURIAM.

Steven Flanders (“Flanders”) appeals the trial court’s summary denial of his Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. We

find merit in ground one of Flanders' motion, and, therefore, affirm in part, reverse in part, and remand for further proceedings.

In ground one, Flanders argues he received ineffective assistance of counsel because defense counsel, among other things, failed to call an alibi witness. To assert a facially sufficient claim of ineffective assistance of counsel for failure to call a witness, the defendant must (1) identify the prospective witness, (2) describe the substance of the witness' testimony, (3) state that the witness was available to testify, and (4) describe the prejudice resulting from omitting the witness' testimony. See Nelson v. State, 875 So. 2d 579 (Fla. 2004).

Here, Flanders' motion fails to make the necessary allegations. Thus, the trial court correctly determined the motion to be facially insufficient. However, because this is Flanders' first motion for postconviction relief, the trial court should have given Flanders an opportunity to amend his motion to cure the pleading defect. See Spera v. State, 971 So. 2d 754 (Fla. 2007).

Accordingly, we reverse the trial court's order summarily denying Flanders relief as to ground one. On remand, the trial court should allow Flanders a reasonable time to file an amended and legally sufficient motion. If Flanders does not file an amended motion, the denial may be reinstated. If Flanders cures the defects on an amended motion, the trial court should either hold an evidentiary hearing on whether trial counsel was ineffective for failing to call the alibi witness

or attach to any subsequent order summarily denying relief those portions of the record conclusively refuting his claim.

We affirm as to grounds two and three. See Parker v. State, 611 So. 2d 1224, 1226 (Fla. 1992).

Reversed in part, affirmed in part, and remanded with instructions.