

Third District Court of Appeal

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

Opinion filed November 5, 2008.
Not final until disposition of timely filed motion for rehearing.

No. 3D08-2456
Lower Tribunal No. 05-8744

Recardo Clayton,
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, Peter R. Lopez, Judge.

Recardo Clayton, in proper person.

Bill McCollum, Attorney General, for appellee.

Before WELLS, SHEPHERD, and ROTHENBERG, JJ.

ROTHENBERG, J.

Recardo Clayton (“Clayton”) appeals the trial court’s order denying his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm.

Clayton claims that his trial counsel provided ineffective assistance of counsel by failing to file a post-trial motion for new trial or make an ore tenus motion to reduce his robbery conviction to theft. The defendant, who was charged with robbery with a firearm, but found guilty of robbery, argues that there was no evidence presented regarding an essential element of the crime—that force, violence, or fear was used in the course of the taking. Clayton additionally argues that his trial counsel’s failure to raise these issues at the trial level constituted a waiver of the issue on appeal.

A review of the record on direct appeal, however, conclusively refutes these claims. Clayton’s trial counsel did file a Motion for Judgment Notwithstanding the Verdict on July 13, 2006, specifically raising this argument. The briefs filed on direct appeal reflect that Clayton’s appellate counsel also raised this issue, and that the Attorney General’s Office did not claim that the issue had not been preserved below and addressed the merits of this claim. Additionally, the opinion issued on direct appeal reflects that this Court decided the appeal on the merits and rejected defense counsel’s argument that Clayton was improperly convicted of robbery where the jury found no firearm was involved.

Affirmed.