

Third District Court of Appeal

State of Florida, July Term, A.D. 2010

Opinion filed August 4, 2010.
Not final until disposition of timely filed motion for rehearing.

No. 3D10-1434
Lower Tribunal No. 04-33909B

Olson Pierre,
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 Arzola, Judge.

Carlos J. Martinez, Public Defender, and Marti Rothenberg, Assistant Public Defender, for appellee.

Bill McCollum, Attorney General, for appellee.

Before RAMIREZ, C.J., and COPE and ROTHENBERG, JJ.

PER CURIAM.

Affirmed.

COPE, J. (concurring).

This is an appeal of an order summarily denying a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. The Rule 3.850 motion was filed by counsel. The conviction of defendant-appellant Olson Pierre was affirmed by this court in Pierre v. State 990 So. 2d 565 (Fla. 3d DCA 2008).

The defendant, through counsel, filed the Rule 3.850 motion now before us. In one of the points of the Rule 3.850 motion, the defendant alleges that his trial counsel was ineffective for failing to call four specifically named individuals, including one police officer, in support of his alibi defense. The State's response argued that the Rule 3.850 motion was not sufficiently specific. See Nelson v. State, 875 So. 2d 579, 582-83 (Fla. 2004).

In response defense counsel filed a supplement which stated the substance of the testimony. Attached to the supplement is an excerpt of the trial proceedings in which the court asked the defendant whether there were any other witnesses that he wished his attorney to call. The defendant's answer was no. The unsworn supplement stated that the defendant had been told by his trial counsel that the four witnesses could not be located for trial. The supplement appears to allege that the witnesses were, in fact, available for trial. The Rule 3.850 motion states that three

of the witnesses had testified at the Arthur¹ hearing and the deposition of the officer was taken prior to trial.

If the defendant has a factual basis for alleging that his trial counsel wrongly stated that the four witnesses were unavailable for trial, when in fact they were available, then the motion should be amended to so state and should be sworn. Spera v. State, 971 So. 2d 754 (Fla. 2007). As this part of the defendant's motion is less than clear and unsworn, I join in the affirmance on the denial of the claim of failure to call witnesses. I join in the affirmance on the remaining issues without comment.

¹ State v. Arthur, 390 So. 2d 717 (Fla. 1980).