

MAY 15 2007

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA IN AND FOR PASCO COUNTY

STATE OF FLORIDA

v.

Case No. 88-394CFAES

GREGORY KEITH CAPEHART
SPN#

**ORDER DENYING IN PART SIXTH AND SEVENTH AMENDED
MOTIONS TO VACATE JUDGMENTS OF CONVICTION AND
SENTENCES WITH SPECIAL REQUEST FOR LEAVE TO AMEND**

THIS MATTER came before this court for hearing on March 12, 2007. On July 25, 2006, the defendant filed his Seventh Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend, filed pursuant to Florida Rule of Criminal Procedure 3.850. On August 14, 2006, the court issued an order denying ground XI and directing the State to show cause on claims XII and XIII. On Sept 18, 2006, the State filed its response and on Sept 21, 2006, this court entered an order granting an evidentiary hearing on grounds XII and XIII. On March 12, 2007, an evidentiary hearing was conducted. The court also heard testimony and argument on Claims 1B2, IF and IG of the defendant's Sixth Amended Motion for Postconviction Relief, filed on July 10, 2003. The court, having considered the motions, response, testimony, argument, court file, and applicable law, the court finds as follows:

**Sixth Amended Motion to Vacate Judgments of Conviction and Sentences With
Special Request for Leave to Amend**

CLAIM 1B2: The defendant alleges that his attorney was ineffective when he conceded that defendant was guilty of the attempted robbery of Rebecca Henry, an uncharged collateral crime. Defendant argues that he never gave his attorney permission to concede that he was guilty of the attempted robbery of Rebecca Henry. To successfully argue a claim of ineffective assistance of counsel, the defendant must prove that the deficiency caused the defendant to suffer prejudice. Strickland v. Washington, 466 U.S. 668 (1984). The court finds that it is apparent upon review of counsel's opening arguments, motion for judgment of acquittal and closing argument, that counsel conceded the defendant's presence at the attempted robbery of Rebecca Henry to explain the defendant's presence at the crime scene. *See portions of trial*

transcript, attached as Exhibit A. The record shows that counsel's tactic was a valid trial strategy based on the evidence in this case. Based on the record, the court does not find merit in defendant's claim of ineffective assistance of counsel in Claim 1B2. The motion as to this issue is denied.

CLAIMS IF and IG: The defendant alleges that counsel failed to adequately investigate the criminal history of trial witnesses Diane Harrison and Carolyn McPhail to impeach their trial testimony. The court finds that the defendant failed to show at the evidentiary hearing how he suffered prejudice at trial and how the verdict would have been different in this case if counsel had impeached the testimony of these witnesses after investigating their criminal history. See Strickland v. Washington, 466 U.S. 668 (1984). Based on counsel's argument and the court's review of the entire trial transcript, the court does not find merit in this claim of ineffective assistance of counsel.

Seventh Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend

CLAIM XII: The defendant claims that witnesses Diane Harrison and Carolyn McPhail have now recanted their unfavorable trial testimony. These witnesses failed to appear and testify at the evidentiary hearing. Defense counsel represented to the court that they have left the area and could not be contacted. The motion as to this issue is therefore denied without prejudice.

CLAIM XIII: The defendant alleges that alibi witness Angela Carr was not interviewed or presented at trial, despite his informing counsel that she would testify that she was with the defendant at the time of the offense. Ms. Carr testified as to this alibi at the evidentiary hearing. In matters such as these, it is the court's prerogative to assess witness credibility and to determine the facts based on that assessment. The court finds Ms. Carr to be less than a credible witness. Ms. Carr conceded at the evidentiary hearing that she was under the influence of alcohol and drugs on the day of the crime and offered no valid reason for waiting 17 years from the date of the crime to offer an alibi for the defendant. Based on Ms. Carr's testimony, this court does not find merit in the defendant's claim of ineffective assistance of counsel. The motion as to this issue is denied.

Accordingly, it is