2017 WL 4485507 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Eleventh Judicial Circuit
Miami-Dade County

The STATE of Florida, Plaintiff,
v.
Darious DAVIS, Defendant.

No. F98-1417B.
August 28, 2017.

Order Granting Successive Motion for Postconviction Relief Pursuant to Rule 3.850 and Re-Sentencing Defendant

Miguel M. de la O, Judge.

***1 THIS CAUSE** came before the Court on Defendant, Darious Davis's ("Davis") Successive Motion for Postconviction Relief Pursuant to Rule 3.850 served on February 10, 2017 ("Motion"). The State of Florida ("State") served its Response to the Motion on June 21, 2017 ("Response"). The Court held an evidentiary hearing on August 23, 2017 ("Hearing"). The Court has reviewed the Motion, the Response, and counsels' arguments during the Hearing.

I. INTRODUCTION.

A jury convicted Davis of committing a serious and violent crime, and a judge imposed a mandatory life sentence. Davis deserved harsh punishment; but our justice system requires the State, the defense, and the court to perform their respective roles effectively so that punishment is meted out justly. That did not happen in 1998. The cause of the breakdown is clear in hindsight. A new mandatory sentencing enhancement, lawyers and a court unaware of its effects, a newly appointed lawyer unfamiliar with his client or his case, and an impatient judge. These factors formed a perfect storm which left Davis's Sixth Amendment right to effective counsel in tatters 19 years ago. Today this Court seeks to rectify, as best it can, those errors.

II. PROCEDURAL BACKGROUND.

On February 4, 1998, Davis was charged with one count of Armed Robbery and one count of Armed Burglary with an Assault/Battery. At the time, Davis was on community control. His community control violation hearing was scheduled for May 29, 1998. Prior to commencing that hearing, the State made Davis a global offer of seventeen years – which the State represented was the maximum sentence the court could impose on Davis. *See* May 29, 1998 Transcript at 8 ("May 29, 1998 Tr.") (attached to the Motion's Appendix as Exhibit 3; and to the Response as Exhibit 15). The State's offer would have resolved both the community control violation and the new charge. The presiding judge, Barbara Levenson, intervened and offered Davis 9 1/2 years "today and today only" in order to "[c]lean up everything." *Id.*

At the time, Davis's counsel was new to the case and was not familiar with Davis's circumstances. Counsel advised the trial court "[a]gain, I'm not prepared to go forward[]" when the court made an offer to Davis. *Id.* The judge told Davis's counsel that he had no choice but to proceed with the violation hearing and ordered him to explain the offer the court had made to Davis. *Id.* Counsel subsequently represented to the court, in Davis's presence, that Davis rejected the plea. *Id.*

("Mr. Risavy: Judge, [Davis] is not willing to accept the Court's offer."). At the Hearing, Davis and his counsel stipulated that Davis rejected the 9 1/2 year offer in 1998. [1]

After the community control violation hearing, [2] the case proceeded to trial. On September 11, 1998, a jury convicted Davis, and on November 6, 1998 the trial court sentenced Davis to a minimum mandatory life sentence as a Prison Release Reoffender ("PRR") and as a Habitual Felony Offender ("HO"). Davis appealed his convictions to the Third DCA. In May 17, 2000, the Third DCA affirmed Davis's conviction. [3]

***2** On August 30, 2001, Davis filed his first *pro se* Motion for Postconviction relief. The trial court appointed counsel to represent Davis. Appointed counsel filed a supplemental Motion for Postconviction Relief, amending the prior *pro se* motion, in November 2002. This motion argued that Davis's Sixth Amendment right to counsel had been violated because trial counsel failed to properly advise Davis regarding the court's 9 1/2 year plea offer. Additionally, this motion argued that trial counsel was not ready to proceed with the violation hearing and was not aware of the consequences of any plea offers, thus he could not properly advise Davis on his rights. A copy of this motion is attached to the Response as Exhibit 3.

Following an evidentiary hearing on October 29, 2003, Judge Daryl Trawick granted the motion and issued an Order Vacating Judgment and Sentence ("2003 Trawick Order") (attached to the Motion's Appendix as Exhibit 1; and to the Response as Exhibit 4). Judge Trawick found that trial counsel was deficient within the meaning of *Strickland* because he failed to properly advise Davis of "his constitutional rights, the strengths of the case, the weaknesses of the case, the advantages and disadvantages of a trial versus a plea offer, and the possible sentence for the pending probation violations." *Id.* Additionally, Judge Trawick found that trial counsel was deficient because he was "unfamiliar with the mandatory maximum sentence that was required to be imposed upon conviction after trial [pursuant to the PRR]." *Id.* Judge Trawick also found that trial counsel's performance was prejudicial to Davis after applying the then applicable *Cottle v. State*, 733 So. 2d 963 (Fla. 1999), analysis. Specifically, Judge Trawick found that had it not been for trial counsel's deficient performance, Davis would have accepted the court's offer of 9 ½ years, which was obviously less than the mandatory life sentence he was serving.

On July 12, 2006, the Third DCA reversed Judge Trawick's Order. *See State v. Davis*, 932 So. 2d 1246 (Fla. 3d DCA 2006). The court held that the trial court's "proposed plea offer included a sentence [the 9 1/2 years] which could not have been lawfully imposed, even if accepted." *Id.* at 1247. In short, because the State sought to enhance Davis as a PRR, "the trial court lacked the discretion to offer Davis a non-PRR sentence as a matter of law." *Id.* at 1249. Because this sentence would have been illegal and should not have been available, it could not form the basis for satisfying the prejudice prong of the *Strickland* test. *Id.* at 1249-50.

After the Third DCA's decision, Davis filed a *pro se* habeas petition on May 6, 2011, which was denied August 8, 2011. Afterwards, Davis filed another *pro se* "Petition for Writ of Habeas Corpus-Manifest Injustice-New Precedent in the Law-Alcorn Test and Loss of a Right as a Result of Action Attributable to the Court" on July 22, 2015. This Court denied that motion on August 21, 2015. Davis's appealed this Court's denial and the Third DCA affirmed *per curiam* on February 17, 2016. *See Davis v. State*, 185 So. 3d 1247 (Fla. 3d DCA 2016).

On February 10, 2017, Davis filed the Motion and this Court granted an evidentiary hearing.

III. APPLICABLE LAW.

Florida Rule of Criminal Procedure 3.850 states that a "judgment [that] was entered or [a] sentence [that] was imposed in violation of the Constitution or laws of the United States or the State of Florida" can be grounds for a claim for "release

from custody by a person who has been tried and found guilty … [in] a court established by the laws of Florida." Fla. R. Crim. P. 3.850(a)(1).

To prevail on a claim of ineffective assistance of counsel, a defendant must show both that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) ("*Strickland*"); *Crain v. State*, 78 So. 3d 1025, 1033 (Fla. 2011).

***3** To establish the deficiency prong under *Strickland*, the defendant must prove that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, at 687. Under the prejudice prong, "*Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." *Wong v. Belmontes*, 558 U.S. 15 (2009) (quoting *Strickland*, 466 U.S. at 694).

In *Alcorn v. State*, 121 So. 3d 419 (Fla. 2013), the Florida Supreme Court addressed the applicable standard for evaluating claims of ineffective assistance of counsel in the context of plea offers. The court adopted a four-part test defendants must meet to establish prejudice in the context of rejected plea offers.

> We hold that in order to show prejudice, the defendant must demonstrate a reasonable probability, defined as a probability sufficient to undermine confidence in the outcome, that (1) he or she would have accepted the offer had counsel advised the defendant correctly, (2) the prosecutor would not have withdrawn the offer, (3) the court would have accepted the offer, and (4) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Alcorn, 121 So. 3d at 422.

IV. DAVIS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant establishes the deficiency prong of *Strickland* by providing proof that his counsel failed to properly advise him of the maximum sentence he faced if convicted. *See Alcorn v. State*, 121 So. 3d at 426 ("counsel's failure to advise a defendant of his or her exposure to an enhanced life sentence under Florida's HFO sentencing statute during plea negotiations amounts to deficient performance."); *Parenti v. State*, 2017 WL 3567501, at *3 (Fla. 5th DCA, Aug. 18, 2017) (counsel's performance was deficient when he failed to advise defendant he faced an enhance penalty as a habitual felony offender); *Lester v. State*, 15 So. 3d 728, 731 (Fla. 4th DCA 2009) (counsel was ineffective because he did advise defendant of the potential of habitualization and the potential sentence of thirty to forty years.).

It is indisputable that Davis's trial counsel was deficient within the meaning of *Strickland.* His lawyer admitted it in 2003; the State does not contest it; and a predecessor judge so found in 2003. [4] Therefore, this Court finds that Davis's counsel was ineffective in failing to advise Davis that he was facing a mandatory life sentence as a PRR. The only remaining question is whether Davis is able to satisfy the prejudice prong of *Strickland* under the *Alcorn* test.

It is clear from the record, and the State agrees, that Davis easily satisfies prongs 2 through 4 of *Alcorn.* That is, the prosecution would not have withdrawn the offer [5]; the trial court would have accepted the offer in light of its own lower offer; and obviously 17 years is less than a life sentence.

***4** The only disputed prong is the first – whether Davis would have accepted the 17 year offer. In the Hearing, Davis testified credibly and unequivocally that he would have accepted the State's 17 years offer had he been advised by anyone

that he faced a mandatory life sentence as a PRR if convicted at trial. The Court finds Davis' testimony to be both subjectively and objectively credible.

The State counters that because Davis rejected a 9½ year offer from the trial judge, he would have definitely rejected the 17 year offer from the State. As presented, this argument is irrefutable. It is a truism that a defendant unwilling to plead to 9 1/2 years is not going to turn around and plead to 17 years. Indeed, this is the very argument upon which this Court based its denial of Davis' *pro se* postconviction motion filed on July 22, 2015. And, in a vacuum – without the context of the State's, the trial judge's, and his own lawyer's material misadvice – this Court would deny the Motion based solely on this argument.

But this Motion does not come before this Court lacking context. Quite the contrary. This Motion was ably presented by skilled counsel who was able to show this Court that the information Davis was presented by his lawyer, the State, and the trial judge in 1998 was fundamentally, materially, and egregiously wrong. To properly evaluate Davis' rejection of the State's 17 year offer (and the judge's 9 1/2 year offer), we must place it in the context of Davis being affirmatively (not intentionally, but affirmatively) misled into thinking the longest sentence he would receive if he lost at trial was 17 years. In this context, it would only make sense that Davis did not accept the State's offer. Indeed, he would have been a fool to plead to 17 years. He would always be better off going to trial and hoping for a jury acquittal. As the United States Supreme Court recently observed in *Lee v. United States*, 137 S. Ct. 1958 (2017):

> The decision whether to plead guilty … involves assessing the respective consequences of a conviction after trial and by plea. When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20–year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years.

Id. at 1966-67.

The State's argument simply does not refute Davis's credible claim that he would have accepted the State's 17 year offer had he known that losing at trial would mean an automatic life sentence without possibility of parole.

V. PROCEDURAL BARS AND MANIFEST INJUSTICE.

If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice.

Jamason v. State, 447 So. 2d 892, 895 (Fla. 4th DCA 1983), *approved*, 455 So. 2d 380 (Fla. 1984) (quoting *Anglin v. Mayo*, 88 So. 2d 918, 919 (Fla. 1956)).

Rule 3.850 motions must be filed within 2 years after a judgment and sentence becomes final. Otherwise, unless a defendant can make a showing that his claims fall under the exceptions provided by the Rule, the motion is procedurally barred. *See* Fla. R. Crim. P. 3.850(b)(1-3).

Similarly, successive motions may be procedurally barred if a defendant cannot make a showing of good cause. *See* Fla. R. Crim. P. 3.850(h)(1-2); *Koons v. State*, 165 So. 3d 718, 719 (Fla. 5th DCA 2015) ("Under the current version of Rule 3.850(h)(2), a trial court *cannot* deny a successive motion simply because it is successive; instead, the court may deny it provided that certain conditions are met.") (emphasis added); *Carbajal v. State*, 148 So. 3d 539, 540 (Fla. 2d DCA 2014) ("Rule 3.850(h)(2) *permits* a court to dismiss a postconviction motion as successive if it finds there was 'no good

cause for failure of the defendant… to have asserted those grounds in a prior motion.”’) (citing Fla. R. Crim. P. 3.850(h)(2)) (emphasis added)). [6]

***5** Nevertheless, as recognized in *Jamason*, Florida law recognizes that courts may disregard procedural bars in order to correct a manifest injustice. Indeed, where “a manifest injustice has occurred it is the responsibility of the court to correct that injustice, if it can.” *Lago v. State*, 975 So. 2d 613, 614 (Fla. 3d DCA 2008). *See generally Morrison v. State*, 932 So. 2d 533, 534 (Fla. 3d DCA 2006) (it would be a manifest injustice to enforce procedural bars in a case where the defendant was sentenced under unconstitutional sentencing guidelines).

Procedural bars grounded in arbitrary deadlines are particularly susceptible to the manifest injustice exception. *See Kerney v. State*, 217 So. 3d 138, 143 (Fla. 3d DCA 2017) (untimely petition granted to avoid manifest injustice); *McKay v. State*, 988 So. 2d 51, 52 (Fla. 3d DCA 2008) (untimely petition considered and granted to avoid a manifest injustice); *Adams v. State*, 957 So. 2d 1183, 1186-87 (Fla. 3d DCA 2006) (manifest injustice to preclude relief because of timeliness to a defendant sentenced in violation of his plea agreement). [7]

In *Martinez v. State*, 935 So. 2d 28 (Fla. 3d DCA 2006), the court was faced with a nearly identical claim to that raised by Davis. Martinez's lawyer advised him, on the record, that he faced a maximum of 30 months in prison if his probation was revoked. Relying on this advice, Martinez rejected the State's 15 month prison offer and proceeded to a probation hearing. After the hearing, the trial court revoked Martinez's probation, advised Martinez that his maximum exposure was actually 15 years in prison, and sentenced him to 12 years. [8] After one unsuccessful motion for postconviction relief, Martinez filed a second motion, this time alleging counsel was ineffective due to misadvising Martinez of his maximum exposure if he rejected the State's 15 month offer and proceeded to a revocation hearing. The trial court denied the second motion as successive and the Third DCA reversed and remanded. Despite acknowledging that the trial court was technically correct that the motion was successive, the Third DCA found that “the case falls within the manifest injustice exception.” *Id.* at 29.

Davis's claim does not fall under any of the exceptions of Rule 3.850(b)(1-3). However, it would be a manifest injustice for this Court to preclude relief based upon these procedural bars because Davis has otherwise raised a valid, cognizable claim of ineffective assistance of counsel and is entitled to relief from this Court.

VI. CONCLUSION.

For the foregoing reasons, this Court vacates the sentence in this cause, and re-sentences Davis to 17 years in State prison with credit for all the time he has served.

DONE and ORDERED in Miami-Dade County, Florida this 28th day of August, 2017.

<<signature>>

Miguel M. de la O

Circuit Judge

Footnotes

1 Although neither Davis nor his lawyer ever expressly rejected the State's offer, they did not accept it either. Moreover, by rejecting the trial court's 9 1/2 year offer, Davis implicitly rejected the State's offer.

2 Davis was sentenced to 15 years in State prison on November 6, 1998 for having violated his community control, concurrent with his minimum mandatory life sentence.

3 The appellate court remanded the case for resentencing, ordering that Davis be sentenced only as a PRR, finding it was error to sentence Davis both as a PRR and as an HO. *See Davis v. State*, 760 So. 2d 977, 978 (Fla. 3d DCA 2000). The Florida Supreme Court subsequently quashed the Third DCA's decision, holding that the trial court did not err in sentencing Davis as a PRR and a HO because "[s]uch sentencing does not constitute double jeopardy." *State v. Davis*, 791 So. 2d 1085, 1086 (Fla. 2001).

4 This finding comes to this Court as the law of the case. *See* 2003 Trawick Order at 2 ("Davis's trial counsel failed to communicate a plea offer or misinformed defendant concerning the penalty he faced.").
This court makes a specific finding that trial counsel was unfamiliar with the mandatory maximum sentence that was required to be imposed upon conviction after trial. In addition, the transcript of the plea offer shows that Judge Levenson informed Davis of his guidelines but never informed Davis of the possible enhancements under the PRR Act. Consequently, Davis did not know he was facing a mandatory life sentence when he rejected the plea offer.
Id. at 1-2.

5 This fact is evident because the prosecution did not withdraw its offer when Judge Levenson intervened with her own offer, nor when Davis rejected Judge Levenson's offer.

6 Independent of its conclusion that it would be a manifest injustice for this Court not to address the Motion on the merits, the Court declines to exercise its discretion to deny the Motion as successive. Although Davis previously raised similar issues, the primary issue raised in the Motion was not previously litigated by Davis. Moreover, there is sufficient good cause, as outlined in the Motion, to warrant this Court considering the Motion even if Davis had previously raised the issue.

7 Successiveness claims fare no better. *See, e.g., Johnson v. State*, 2017 WL 3616438, at *2 (Fla. 4th DCA, Aug. 23, 2017) ("Johnson agrees that we have discretion to dismiss the petition as successive, but maintains that we must grant relief to prevent a manifest injustice. We agree.").

8 There is no explanation in the opinion as to why neither the trial court nor the State corrected defense counsel's misadvice to Martinez.

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