IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

RICHARD SULLINS, JR.,

Appellant,

v.

Case No. 5D20-2112
LT Case No. 2014-CF-12959-O

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed October 8, 2021

3.850 Appeal from the Circuit Court for Orange County,
Dan Traver, Judge.

Brett S. Chase, of Chase Law Florida, P.A., St. Petersburg, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Whitney Brown Hartless and Kellie A. Nielan, Assistant Attorney Generals, Daytona Beach, for Appellee.

LAMBERT, C.J.,

Richard Sullins, Jr., challenges the postconviction court's summary denial of the third ground of his three-ground Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. Sullins alleged in this ground that his trial counsel was ineffective for failing to advise him that the State had extracted information from his cell phone that would severely contradict his alibi defense. Sullins averred that, had counsel provided this information, he would have accepted the State's pretrial plea offer of a twenty-year mandatory minimum prison sentence, which was less severe than the sentence that he received after trial. For the following reasons, we reverse the denial order and remand for further proceedings.

Sullins was charged with second-degree murder with a firearm. His cell phone was determined to be in the vicinity of the murder at the time it took place, suggestive that Sullins was present at the scene when the crime was committed. Sullins's defense at trial was that someone else was in possession of his cell phone as he was with his girlfriend, at a separate location and without his phone, when the victim was murdered. This defense was mentioned during Sullins's opening statement, and Sullins's girlfriend later provided this alibi testimony at trial.[1]

[1] Sullins elected not to testify at trial.

During its case-in-chief, the State sought to introduce into evidence a report of a digital extraction of Sullins's cell phone that the State believed refuted his alibi defense. Sullins's counsel objected and requested a sidebar, at which she advised the court that "I could be wrong, but I don't remember seeing this report before." This prompted the trial court to hold a "*Richardson*" hearing[2] to address whether the State had committed a discovery violation for not having previously turned over this report to Sullins's counsel.

The State represented to the court during this hearing that the extraction report had been sent to Sullins's counsel essentially seven months earlier. The State also advised that it had separately filed with the clerk of court a notice of supplemental discovery listing this report and had emailed a copy of this notice to Sullins's counsel. The notice's certificate of service showed that it was emailed to counsel. Sullins's counsel did not directly challenge the prosecutor's representations. Instead, counsel suggested that her failure to see the extraction report previously could have been "her error," explaining that she "was getting a lot of stuff at the time." Counsel also speculated that, perhaps, "the report did not arrive."

[2] *See Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

The trial court specifically found that the State had not committed a discovery violation. The court observed that "it appears that the [report] was provided" but queried whether Sullins's counsel had seen the report, commenting that it may have been "lost in [counsel's] office" or "lost in the mail." Counsel was provided with an opportunity to review the extraction report before the trial resumed, which she did. The report was thereafter admitted into evidence without objection.

Sullins was convicted, as charged, and was sentenced to serve forty years' imprisonment, with a twenty-five-year mandatory minimum provision resulting from the jury's specific findings that Sullins actually possessed and discharged a firearm that caused the victim's death. His direct appeal was affirmed without opinion. *Sullins v. State*, 222 So. 3d 1232 (Fla. 5th DCA 2017).

Sullins then timely filed his rule 3.850 motion for postconviction relief. Under the familiar requirements of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), Sullins's burden was to show that his trial counsel's performance was deficient and that the deficient performance prejudiced him. For counsel's performance to be prejudicial, it must be of such a nature that "there is a reasonable probability that 'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Bradley v.*

*State*, 33 So. 3d 664, 672 (Fla. 2010) (quoting *Strickland*, 466 U.S. at 694). In the context of a defendant's rejection of a plea based on the alleged ineffective assistance of counsel, the prejudice prong under *Strickland* "is determined based upon a consideration of the circumstances as viewed *at the time of the offer* and what would have been done *with proper and adequate advice*." *Alcorn v. State*, 121 So. 3d 419, 432 (Fla. 2013).

Sullins alleged in ground three of his rule 3.850 motion that at the time that he rejected the State's final plea offer, his counsel had advised that Sullins had a viable alibi defense "that had a probable chance of winning." Sullins described that the plea offer was made by the State at a pretrial proceeding held shortly before the case went to trial, at which the trial court asked the prosecutor for "the State's last, best, final offer that [it] would make for [Sullins] to resolve this case without a trial." The prosecutor responded that the State "has offered Sullins the 20-year minimum-mandatory rather than the 25 to life" that Sullins mandatorily faced if convicted, as charged, at trial. Sullins then advised the court that he had an opportunity to discuss this offer with his attorney and that he was rejecting it. Sullins later averred in this ground that he would have accepted this offer had his counsel advised him of the extraction report from his cell phone as that "would have refuted [my] whole alibi defense."

In summarily denying this part of the motion, the postconviction court[3] made two findings. First, it found that counsel could not be ineffective for failing to advise Sullins of the contents of a report that she had not received. Second, the court found that "the record did not necessarily support [Sullins's] claim that the State offered a 20-year plea" and that, instead, "it shows that the prosecutor offered him a 20-year minimum mandatory instead of the 25-to-life minimum."

Our standard of review of a summary denial of a rule 3.850 motion is de novo. *Hird v. State*, 204 So. 3d 483, 484 (Fla. 5th DCA 2016). Two principles are pertinent to our standard of review here. First, the record attachments to the denial order must conclusively show that Sullins is entitled to no relief. *See* Fla. R. Crim. P. 3.850(f)(5). Second, the factual allegations in Sullins's motion must be accepted as true to the extent that they are not refuted by the record. *See Foster v. State*, 810 So. 2d 910, 914 (Fla. 2002).

The pertinent factual allegations made by Sullins in his motion that must be accepted as true if not conclusively refuted by the record are that (1) his counsel advised him of the viability of his alibi defense; (2) counsel did not advise him of the extraction report that negatively impacted this defense; and (3) had counsel so advised, Sullins would have accepted the

[3] The postconviction judge did not preside over the trial.

State's pretrial plea offer, resulting in significantly less prison time than he is now serving.

The State does not dispute that Sullins's counsel did not advise him of the extraction report adverse to his alibi defense. Nor is it debatable that, under Florida Rule of Criminal Procedure 3.171(c)(2), Sullins's counsel should have advised him of the report as it was a "pertinent matter" that Sullins needed to consider before deciding whether to accept or reject the State's offer.[4]

While we acknowledge the postconviction court's logical premise that counsel cannot be ineffective for failing to advise Sullins of a document that she had not received, we conclude that the record attachments to its denial order do not conclusively show that Sullins's counsel did not receive the report. First, during the trial, the court found that the State had sent the report to counsel. Second, Sullins's counsel raised the issue herself during the *Richardson* hearing held during the trial that she may have received the extraction report but did not review it because it may have been misplaced

[4] Florida Rule of Criminal Procedure 3.171(c)(2) sets forth a criminal defense counsel's responsibilities regarding plea offers. In addition to notifying a defendant as to the existence of all plea offers, this rule requires that counsel advise a defendant of "all pertinent matters bearing on the choice of which plea to enter and the particulars attendant upon each plea and the likely result thereof, as well as any possible alternatives that may be open to the defendant."

in her office with numerous other discovery documents she was receiving at the time. Third, the record does not conclusively refute that Sullins's counsel separately received the State's email notice of supplemental discovery in which the existence of Sullins's cell phone report was specifically identified. At that point, counsel had a duty to make a reasonable investigation into the nature of this discovery provided, *see Sullivan v. Sec'y, Fla. Dep't of Corr.*, 837 F.3d 1195, 1204 (11th Cir. 2016), which, had she done so, should have resulted in counsel's viewing of the report and thereafter advising Sullins of its adverse impact on his alibi defense well in advance of the State's plea offer.

Accordingly, we reverse the denial of ground three and remand with directions for the postconviction court to conduct an evidentiary hearing to address whether counsel was ineffective for failing to advise Sullins of this extraction report. If the postconviction court finds that counsel knew or should have known about this report, it should thereafter determine whether Sullins has met his burden of showing, by a reasonable probability, that (1) he would have accepted the State's plea offer had counsel advised him correctly about this report; (2) the prosecutor would not have withdrawn the twenty-year mandatory-minimum prison plea 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. *See Alcorn*, 121 So. 3d at 430 (citing *Missouri v. Frye*, 566 U.S. 134, 148–49 (2012)).

We also reverse the postconviction court's denial based on its separate finding that "the record did not necessarily support [Sullins's] claim that the State offered a 20-year plea" and that "it shows that the prosecutor offered him a 20-year minimum mandatory instead of the 25-to-life minimum." First, a twenty-year minimum mandatory sentence would have been less severe than the twenty-five-year minimum mandatory sentence that Sullins actually received. Second, while Sullins averred in his motion that "the State offered him a twenty-year mandatory minimum sentence . . . rather than the minimum mandatory sentence required by statute of 25-to-life," Sullins also referred to the plea offer as simply a "Plea of Twenty Years." Whether one interprets Sullins's motion as alleging that the State offered him a twenty-year minimum mandatory sentence as his total sentence or as alleging that the plea offer only reduced the minimum mandatory portion of the sentence to twenty years while leaving open the possibility of receiving a longer non-mandatory sentence, the attached records do not conclusively refute either possible interpretation of Sullins's claim, both of which sufficiently allege that

Sullins would have received a less severe sentence under the plea offer than he actually received after trial.

REVERSED and REMANDED for further proceedings consistent with this opinion.

EVANDER, J., concurs.
HARRIS, J., dissents, without opinion.