DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2007

JASON A. PEASE,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D06-4954

[July 5, 2007]

PER CURIAM.

Jason A. Pease appeals the summary denial of his motion for post-conviction relief, filed pursuant to Florida Rule of Criminal Procedure 3.850. His motion alleged that his plea of admission to violation of probation was induced by his trial counsel's mistaken advice concerning the length of the sentence he would receive. Because appellant's claims are not conclusively refuted by the record, we reverse the trial court's summary denial of his motion for post-conviction relief.

Appellant pled guilty to charges of aggravated fleeing and eluding, grand theft of a motor vehicle, and aggravated assault on a law enforcement officer in three separate cases (02-9712 CF10A, 02-8610 CF10A, and 02-7693 CF10A). The trial court sentenced him to three years in prison followed by four years probation. Later, the trial court held a hearing to determine if appellant had violated his probation. At the hearing, the court appointed counsel for appellant. The court then held the following discussion with appellant:

> The Court: According to this scoresheet based upon the charges, based upon the record, the minimum penalty that you can get if I revoke your probation is 28.5 months.
>
> Do you understand?
>
> The Appellant: Yes, sir.

> The Court: The most that you can get is 15 years. All of these aggravated fleeing charges carry 15 years. The aggravated assault on a law enforcement officer and two grand thefts each carry five years in jail as the maximum penalty.
>
> I just want you to know that you don't have to do this. You can have a final hearing where the State has to convince me that you did violate your probation. You can question the witnesses. You can bring in your own witnesses. You can raise defenses in the case. If you lost the case, you can appeal. Once you plead guilty, you will give up all of those rights.
>
> Do you understand?
>
> The Appellant: Yes, sir.
>
> The Court: Is there anyone that is forcing you or threatening you or promising you anything to make you plead guilty?
>
> The Appellant: No.
>
> The Court: How about your lawyer? Are you satisfied with her?
>
> The Appellant: Yes.

The trial court found appellant to be "alert and intelligent," and said, "He understands the nature of the charges. He understands the rights that he is giving up. He is satisfied with his lawyer. He understands the consequences of his plea." The court then revoked appellant's probation in the three cases and sentenced him to ten years on the second degree felonies and awarded him credit for time served.

Thereafter, appellant filed a motion to vacate his judgments of conviction and sentence on the ground that his guilty plea was not knowingly, voluntarily, and intelligently made and that his appointed counsel provided ineffective assistance. In his motion, appellant alleged that his attorney informed him that his most serious charges carried a maximum penalty of fifteen years, but she incorrectly advised him that he had a scoresheet sentencing range between 28.5 months and 66 months in prison, and that "there was no reason" for the judge to sentence him outside of this range. Appellant alleged in his motion that his attorney "advised Defendant that since this was defendant's first

'technical' violation of probation, 'the judge will want to re-instate probation. She then told Defendant that she could seek and likely obtain a straight 365-day county jail sentence with credit time served and that this outcome would have the benefit of defendant avoiding any further probation." Appellant alleged that he relied on his counsel's advice "that the judge would be lenient," and agreed to admit to the violation and waive his right to an evidentiary hearing. Appellant further alleged that his counsel told him that the judge would likely reinstate his probation and sentence him to a 365-day jail sentence. Appellant asserted that, but for his counsel's mistaken advice, he would not have pled guilty.

The state responded that the record conclusively refuted appellant's claims, because the transcript showed that appellant acknowledged that he understood the minimum and maximum penalties that could be imposed if the court revoked his probation. The state argued that appellant failed to show ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Adopting the state's reasoning, the trial court denied appellant's motion to vacate the judgments of conviction and sentence.

"To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." *Kimbrough v. State*, 886 So. 2d 965, 981 (Fla. 2004) (quoting *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999)). Unless his claims are conclusively rebutted by the record or do not demonstrate a deficiency in performance by counsel that prejudiced him, the defendant is entitled to an evidentiary hearing on his claim. *See id.*; *see also* Fla. R. Crim. P. 3.850(d). When reviewing a trial court's summary denial of post-conviction relief, we must accept the allegations in the motion as true so long as they are not conclusively rebutted by the record. *See Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999), *receded from on other grounds*, *Nelson v. State*, 875 So. 2d 579 (Fla. 2004).

Florida Rule of Criminal Procedure 3.850(a)(5) provides that a defendant may be released from judgment if his plea was involuntary. The United States Supreme Court held that the two-pronged *Strickland* test applies to challenges to guilty pleas based on ineffective assistance of counsel. First, the defendant must show that his "counsel's advice 'was not within the range of competence demanded of attorneys in criminal cases.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Then, the defendant must demonstrate that he was prejudiced, i.e., that "there is a reasonable

probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59 (footnote omitted).

As stated above, appellant alleged in his motion that his counsel misrepresented to him that he was subject to a sentencing range between 28.5 months and 66 months in prison. However, appellant was not subject to a "sentencing range" because he was sentenced after passage of the Criminal Punishment Code.[1] The Florida Supreme Court has held that "[m]isrepresentations by counsel as to the length of a sentence or eligibility for gain time can be the basis for postconviction relief in the form of leave to withdraw a guilty plea." *State v. Leroux*, 689 So. 2d 235, 236 (Fla. 1996).

"To defeat a claim that a defendant entered a plea based on erroneous advice of trial counsel concerning the length of the prison sentence that will be imposed, the court must have addressed this specific issue with the defendant." *Johnson v. State*, 757 So. 2d 586, 587 (Fla. 2d DCA 2000). Here, the trial court asked appellant whether he understood that if the court revoked his probation his minimum penalty was 28.5 months and maximum penalty was 15 years. The appellant acknowledged that he understood the minimum and maximum penalties. Although appellant responded that no promises had been made to him to get him to admit to the probation violation, he was not questioned as to whether he was promised a sentence below the maximum. *See id.* ("However, Johnson's awareness of the maximum sentence he faced does not vitiate his claim that his attorney had assured him that his actual sentence would be much less than the maximum."). Appellant's mere acknowledgment that no promises were made is insufficient to refute his claim. *See Leroux*, 689 So. 2d at 237.

In *Leroux*, the trial court held a similar plea colloquy, wherein the defendant acknowledged the minimum and maximum sentences and stated that he was not promised anything in exchange for his plea. 689 So. 2d at 236. Leroux then filed a 3.850 motion asserting that his plea was involuntary because his counsel misinformed him as to the length of his sentence, erroneously telling him that he would be eligible for provisional gain time credits. *Id.* at 235. The supreme court held that the defendant's affirmative response that he was not made any promises did not conclusively refute his contentions. The court stated that, if it had been made clear to the defendant when he entered his plea that he

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[1] The Criminal Punishment Code applies to all non-capital felony offenses committed on or after October 1, 1998. *See* § 921.002, Fla. Stat.

could not rely on his counsel's calculation of the time that he would actually serve, then he would have no basis for his motion. *Id.* at 237.

Appellant also asserted that he would have sought a hearing on his violation of probation, rather than plead guilty, had he not been misinformed by his counsel. This assertion is sufficient to satisfy the prejudice prong of the *Strickland* test. *See Suomi v. State*, 947 So. 2d 697 (Fla. 4th DCA 2007) (citing *Cousino v. State*, 770 So. 2d 1258 (Fla. 4th DCA 2000)). Accordingly, we reverse the trial court's order summarily denying appellant's motion for post-conviction relief and remand for an evidentiary hearing or the attachment of portions of the record conclusively refuting appellant's claim that his counsel promised him a prison sentence of no more than the 66-month guidelines maximum.

As to appellant's remaining contention that his counsel advised him that the trial court would likely reinstate his probation or possibly impose a 365-day jail sentence, we consider these statements to be predictions of results, rather than promises of a certain outcome. Hence, the trial court did not err in summarily denying relief on this claim.

Reversed and Remanded.

KLEIN, TAYLOR and HAZOURI, JJ., concur.

* * *

Appeal of order denying rule 3.850 motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Stanton S. Kaplan, Judge; L.T. Case No. 02-7693 CF 10 A.

Dan Hallenberg of the Law Offices of Dan Hallenberg, P.A., Fort Lauderdale, for appellant.

No appearance required for appellee.

Not final until disposition of timely filed motion for rehearing/