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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

BARRY JOSEPH JOHNSON, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D12-127

Opinion filed September 4, 2013.

Appeal from the Circuit Court for
Hillsborough County; Susan Sexton, Judge.

Barry Joseph Johnson, pro se.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Donna S. Koch, Assistant
Attorney General, Tampa, for Appellee.

SILBERMAN, Judge.

Barry Joseph Johnson seeks review of several orders denying his motion and amended motion for postconviction relief which were filed pursuant to Florida Rule of Criminal Procedure 3.850. The postconviction court summarily denied claims two through eight, dismissed claim nine, and denied claim one after an evidentiary hearing. We affirm without discussion the denial of all the claims but claim seven. We reverse the denial of that claim and remand for further proceedings.

Johnson was charged with second-degree murder based on evidence that he shot a friend in the back as the friend was walking away from an argument with Johnson. At trial, Johnson testified that he and the victim had a heated argument on the date in question but that no shots were fired. Johnson claimed the victim left the scene and must have been shot by someone else thereafter.

A jury found Johnson guilty as charged, and the trial judge imposed the maximum sentence of life in prison with a minimum mandatory of twenty-five years based on the discharge of a firearm.[1] The judge explained his reasoning as follows:

> This, you know, is a troubling case. It's a tragic case because again we have a situation where two, you know, good families are destroyed. You know, you see these little children running around here and, you know, I think about the victim's child that's not going to have a father and that's the tragedy of this case.
>
> We don't know exactly what provoked or what caused this incident, but Mr. Johnson, I have no doubt in my mind that you shot and killed [the victim]. I have no doubt whatsoever in my mind. I was clearly convinced of that by the testimony of Mr. [Roy] Johnson and the other witnesses in this case and the circumstances of this case.
>
> You have – you did this with a child present. You have shown absolutely no remorse to this day. You continue to deny your involvement and basically say this didn't even happen. So I think it's a very serious offense. [The victim] is dead and you have to answer for that death.
>
> It is the judgment and sentence of the Court that I adjudicate you guilty as to Count One. I'm going to sentence you to life in the Florida State Prison with a statutory twenty-five year minimum mandatory sentence based on the use of the firearm as it was charged in the information.

[1] See § 775.087(2)(a)(3), Fla. Stat. (2004).

In claim seven of his postconviction motion, Johnson asserted that the trial judge's consideration of his failure to confess was erroneous. Johnson argued that trial counsel was ineffective for failing to object to these improper considerations. The postconviction court concluded that the trial judge did not rely on improper factors in sentencing Johnson and summarily denied this claim.

The first question we must decide on appeal is whether Johnson's claim is cognizable in a motion for postconviction relief. This court has determined that claims alleging ineffective assistance for failing to object to improper reasons given in support of an upward departure sentence are cognizable in motions for postconviction relief. See, e.g., Rodriguez v. State, 932 So. 2d 1287, 1289 (Fla. 2d DCA 2006); Pilkington v. State, 734 So. 2d 1153, 1153 (Fla. 2d DCA 1999), review denied, 744 So. 2d 456 (Fla. 1999). Although the present case does not involve an upward departure sentence, it does involve improper considerations by the trial judge in determining an appropriate sentence. We conclude that postconviction relief is available here as it was in Rodriguez and Pilkington.

On the merits, the transcript of the sentencing proceeding clearly establishes that the trial judge relied on improper factors in sentencing Johnson. A sentencing judge may not consider a defendant's claims of innocence or refusal to admit guilt when imposing sentence. Smith v. State, 62 So. 3d 698, 699 (Fla. 2d DCA 2011); Hannum v. State, 13 So. 3d 132, 135 (Fla. 2d DCA 2009); Bracero v. State, 10 So. 3d 664, 665 (Fla. 2d DCA 2009). It is similarly improper for a judge to consider whether the defendant testified truthfully in imposing sentence. Smith, 62 So. 3d at 700; Hannum, 13 So. 3d at 136. In this case, the trial judge did both in violation of Johnson's

due process rights. See Hannum, 13 So. 3d at 136. And counsel's failure to object to this error therefore renders his performance deficient.

The dissent disagrees with this conclusion and suggests that trial counsel may have failed to object as a tactic or because he was caught up in the emotion of the proceedings. We are unable to envision any tactical reason that trial counsel would have had for standing mute when the trial judge imposed the harshest sentence available based on improper sentencing factors. And, of course, suggesting that counsel failed to object "by inadvertence in this moment of emotion" does not excuse the omission. See Mazard v. State, 649 So. 2d 255, 257 (Fla. 3d DCA 1994) (noting that the Strickland[2] standard concerns decisions trial counsel made by "inadvertence or mistake" as opposed to trial strategy and defense tactics). The failure to object is similarly not excused by the fact that Johnson testified at trial rather than invoking his Fifth Amendment rights. The trial judge's improper considerations have a constitutional dimension as violations of Johnson's due process rights. See Smith, 62 So. 3d at 700; Hannum, 13 So. 3d at 136.

As for prejudice, Johnson was required to establish that " 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " Rodriguez v. State, 39 So. 3d 275, 285 (Fla. 2010) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). Although the minimum sentence was twenty-five years in prison, the trial judge imposed a life sentence after emphasizing Johnson's refusal to admit guilt and assertions of innocence

[2]Strickland v. Washington, 466 U.S. 668 (1984).

both at trial and at sentencing. These improper considerations by the trial judge undermine our confidence in the outcome of the sentencing proceeding.

The dissent speculates that, had counsel objected at sentencing, the trial judge would have simply withdrawn his reliance on these improper factors and reimposed the life sentence. But such speculation as to what might have happened does little to restore our confidence in the outcome of the sentencing proceeding. Furthermore, the fact that a court subsequently offers additional reasons to justify a sentence that was originally based on improper factors does not necessarily cure the error. See, e.g., Hannum, 13 So. 3d at 136 (reversing and remanding on direct appeal for a resentencing before a different judge based on the court's improper consideration of certain factors even though the court subsequently offered additional reasons to justify the sentence). Indeed, when sentencing courts are reversed on direct appeal for consideration of improper factors, they generally are not given an opportunity to offer additional reasons to justify their sentence on remand. See, e.g., Smith, 62 So. 3d at 700; Hannum, 13 So. 3d at 136; Bracero, 10 So. 3d at 666.

We recognize, as the dissent points out, that Johnson did not raise this issue on direct appeal. But the fact that a claim of trial court error was or could have been raised on direct appeal does not bar a claim of ineffective assistance that arises from the same facts. Bruno v. State, 807 So. 2d 55, 63 (Fla. 2001). In fact, "an affirmance on direct appeal should rarely, if ever, be treated as a procedural bar to a claim for ineffective assistance of counsel on a postconviction motion." Johnson v. State, 3 So. 3d 412, 414 (Fla. 3d DCA 2009). It is worth noting that Johnson would have been entitled to resentencing before a different judge if appellate counsel had

raised the sentencing issue on direct appeal as fundamental error. See Smith, 62 So. 3d at 700; Hannum, 13 So. 3d at 136; Bracero, 10 So. 3d at 665-66.

We also observe that Johnson would have been entitled to resentencing before a different judge had he filed a petition claiming ineffective assistance of appellate counsel based on counsel's omission. See Whitmore v. State, 27 So. 3d 168, 172 (Fla. 4th DCA 2010). But there is no authority requiring Johnson to seek relief by filing a petition claiming ineffective assistance of appellate counsel or barring postconviction relief based on his failure to file such a petition.

Accordingly, we conclude that trial counsel's failure to object to the trial judge's consideration of improper factors at sentencing constituted deficient performance. Because there is no possible tactical reason for counsel's failure to object, an evidentiary hearing would be redundant. Accordingly, we reverse the denial of claim seven and remand for a new sentencing hearing before a different judge. Cf. Evans v. State, 979 So. 2d 383, 386 (Fla. 5th DCA 2008) (reversing summary denial of postconviction claim asserting ineffective assistance of counsel for failing to object to vindictive sentencing and remanding for resentencing before a different trial judge).

Affirmed in part, reversed in part, and remanded.

DAVIS, C.J., Concurs.
ALTENBERND, J., Dissents with opinion.

ALTENBERND, Judge, Dissenting.

There may not be any harm in giving Mr. Johnson relief in this proceeding. Nevertheless, I cannot agree that Mr. Johnson is entitled to a new sentencing hearing

before a different judge as relief on a postconviction motion that alleged his lawyer was ineffective for failing to object to the sentencing judge's partial reliance on Mr. Johnson's lack of remorse during the imposition of this sentence. As the cases cited by the majority demonstrate, Mr. Johnson was entitled to raise this issue on direct appeal as fundamental error,[3] but he did not do so. See Johnson v. State, 951 So. 2d 842 (Fla. 2d DCA 2007) (table decision). He filed a petition claiming that his appellate lawyer was ineffective but did not raise this ground in that motion. Johnson v. State, 980 So. 2d 1075 (Fla. 2d DCA 2008) (table decision). Had his trial lawyer actually objected to the judge's statement at sentencing, I am inclined to believe that the experienced sentencing judge would simply have withdrawn his reliance on that ground and sentenced Mr. Johnson to life in prison based on the evidence at trial and the presentations at the full sentencing. I cannot agree that counsel was ineffective for failing to object to a comment that could be challenged on appeal without an objection.

Mr. Johnson was in his early twenties at the time of this offense. He lived in a semirural area of eastern Hillsborough County. The families in the area were friendly with one another. Within this community, there was a group of young men who socialized with one another. Mr. Johnson was part of that group.

Mr. Johnson apparently loaned $150 to the victim, Mark Franklin. In the weeks preceding this offense, he argued with Mr. Franklin. On the day of the offense, the argument apparently escalated. Mr. Johnson shot Mr. Franklin six times with a .22 caliber handgun. Some bullets entered Mr. Franklin's arms and shoulder, but one bullet entered his back and lodged in his lungs. The shooting took place with other people in

[3]See Smith v. State, 62 So. 3d 698 (Fla. 2d DCA 2011); Hannum v. State, 13 So. 3d 132 (Fla. 2d DCA 2009); Bracero v. State, 10 So. 3d 664 (Fla. 2d DCA 2009).

the vicinity, including an infant. Mr. Franklin then entered a car, apparently to escape. He sat in the driver's seat, and another man was already sitting in the passenger seat. Mr. Franklin drove the car onto the interstate. Eventually, the blood in his lungs caused Mr. Franklin to die. The car he was driving crashed, and the passenger died as well.

Following the shooting, Mr. Johnson called the aunt of the victim and confessed. Cell phone records confirm the call occurred. Because Mr. Franklin had been in the automobile accident, law enforcement had not immediately appreciated that he had been shot. Thus, the murder investigation commenced as a result of the report the aunt made to law enforcement. That investigation included the gathering of spent .22 caliber casings at the scene of the shooting.

Mr. Johnson's theory at trial was that the aunt was lying about the content of his telephone call and that somehow someone else had shot Mr. Franklin in the back after he left the neighborhood in the car. Mr. Johnson testified in this trial. He admitted that the men had had a disagreement over the money. He admitted that he had hit the victim with a shovel during an earlier argument over this money, but he denied the shooting. The jury convicted him of second-degree murder involving a firearm. The State had also charged Mr. Johnson for the death of the passenger. That charge had been severed, and it ultimately was dismissed.

Mr. Johnson's family attended the sentencing hearing. His mother spoke on his behalf, as did the mother of one of his three children. The victim's mother and his aunt also attended the hearing. The statement of the victim's mother was read in open court. The sentencing judge listened to the impact this senseless crime had had upon not only the two men who died but also on the neighborhood as a whole. Six bullets

were fired because of a $150 debt, leaving families without support, children without fathers, and parents and grandparents only to wonder.

It was in this context and before these people that the judge made the comments described in the majority's opinion. Whether Mr. Johnson's experienced attorney did not object as a tactic or by inadvertence in this moment of emotion is hard to say.

The majority cites no prior case that has granted relief in a similar context. I cannot agree that Mr. Johnson's attorney was ineffective on the face of this record, nor am I convinced that Mr. Johnson has established prejudice in a postconviction proceeding in which no evidentiary hearing was held.

Finally, this is not a case in which the trial court relied on the defendant's invocation of his Fifth Amendment rights. Both the judge and the jury had concluded that Mr. Johnson lied under oath during this trial. At the sentencing hearing where the neighborhood needed closure, Mr. Johnson gave them nothing. I agree with Judge Kelly that the law of Florida that makes it fundamental error for a trial judge to comment aloud about a defendant's visible lack of remorse in this context ought to be revisited by the supreme court. See Brown v. State, 27 So. 3d 181, 183-85 (Fla. 2d DCA 2010) (Kelly, J., concurring).