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

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v. Case No. 5D19-2409

EDWARD ELMA,

Appellee/Cross-Appellant.

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Opinion filed August 21, 2020

Appeal from the Circuit Court
for Orange County,
John E. Jordan, Judge.

Ashley Moody, Attorney General, Tallahassee, and Rebecca Rock McGuigan and Roberts J. Bradford, Jr., Assistant Attorneys General, Daytona Beach, for Appellee/Cross-Appellant.

Matthew R. McLain, of McLain Law, P.A., Longwood, for Appellee/Cross-Appellant.

EVANDER, C.J.

In this postconviction case, the State appealed an order granting, in part, Edward Elma's motion for ineffective assistance of counsel. However, after Elma was permitted

to file a belated cross-appeal, the State voluntarily dismissed its appeal, leaving only Elma's cross-appeal to be resolved. This court has jurisdiction.[1]

In his cross-appeal, Elma argues that the postconviction court failed to grant him the appropriate remedy after it found that he was deprived of an opportunity to accept a favorable plea offer because his trial attorney misadvised him of the maximum possible sentence and misadvised him that the minimum mandatory component of the State's offer had to be served day-for-day and was not subject to gain-time credit. We agree.

Elma was charged by amended information with the following counts: (1) trafficking in 28 grams or more of cocaine (three-year minimum mandatory); (2) possession of a firearm by a convicted felon; (3) possession of cannabis with intent to sell or deliver; and (4) possession of drug paraphernalia. Before trial, the State made a plea offer, whereby Elma would plead to a single felony—trafficking in 28 grams or more of cocaine. The remainder of Elma's charges would be dropped or reduced to misdemeanors. The agreed-upon sentence would be 38.7 months in prison, which would include the minimum mandatory three-year prison term. Elma rejected the plea offer and proceeded to trial.

At trial, Elma was convicted, as charged, on Counts 1, 2, and 4. On Count 3, Elma was convicted of the lesser included offense of possession of cannabis under 20 grams. Elma was sentenced to six years in prison with a three-year minimum mandatory term on Count 1. He also received concurrent sentences of three years on Count 2 and one year on each of Counts 3 and 4. This Court per curiam affirmed Elma's convictions on direct appeal. *Elma v. State*, 226 So. 3d 849 (Fla. 5th DCA 2017) (table).

[1] *See* Fla. R. App. P. 9.140(b)(1)(d), (b)4.

Elma subsequently filed Florida Rule of Criminal Procedure 3.850 motions alleging ineffective assistance of counsel. There were three grounds that were considered at the evidentiary hearing. In ground one, he alleged that during plea negotiations, his counsel failed to advise him that he had the potential to receive a life sentence as a habitual felony offender. In ground two, Elma alleged that trial counsel misadvised him during plea negotiations that the three-year minimum mandatory component of the State's offer had to be served day-for-day with no possibility of gain-time credit. In ground three, Elma alleged that trial counsel had failed to pursue a motion to suppress, notwithstanding that the motion had already been filed.

The postconviction court granted Elma's motion, in part, as to grounds one and two, and denied, in part, as to ground three. Citing to the Florida Supreme Court's decision in *Alcorn v. State*, 121 So. 3d 419, 422 (Fla. 2013), the court found that Elma had met his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to establish both deficient performance of counsel and prejudice.[2] These findings are not challenged on appeal. As to ground three, the court found that Elma had failed to meet his burden to show prejudice.

The postconviction court rejected Elma's argument that pursuant to *Lafler v. Cooper*, 566 U.S. 156 (2012), the appropriate remedy was to order the State to reoffer a disposition of 38.7 months in prison subject to a three-year minimum mandatory term.

[2] In *Alcorn*, the court held that in order to show prejudice, the defendant must demonstrate a reasonable probability 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.

The court observed that in *Alcorn*, the Florida Supreme Court did not reach the issue of the appropriate remedy for defendants who reject plea offers due to ineffective assistance of counsel, *Alcorn*, 121 So. 3d at 426, 429 n.4, and, thus, concluded that this Court's earlier decision in *Lewis v. State*, 751 So. 2d 715, 718 (Fla. 5th DCA 2000), holding that remand for a new trial was the appropriate remedy, was left undisturbed.[3] The postconviction court further concluded that *Lafler* did not provide lower courts with a "complete list of appropriate remedies" and, accordingly, it was not required to order the State to reoffer the previously rejected plea offer. The court then vacated Elma's convictions, ordered the case be set on the trial docket, encouraged the State to engage in "good faith resumption of plea negotiations," and warned Elma that his potential exposure was life in prison if convicted upon retrial. We respectfully disagree with the postconviction court's analysis.

In *Lafler*, the respondent was charged with four criminal offenses, including assault with intent to murder. 566 U.S. at 161. The state offered to dismiss two of the charges and to recommend a sentence of 51 to 85 months if the respondent pled guilty to the other two offenses. *Id.* Based on his attorney's incorrect advice that the state would be unable to establish his intent to murder because the victim had been shot below the waist, the respondent rejected the plea offer. *Id.* At trial, the respondent was convicted of all

[3] In *Lewis*, we concluded that the defendant was prejudiced by his counsel's deficient performance where counsel had failed to convey the state's plea offer and had failed to make him aware of the consequences of habitualization. We remanded for the trial court to conduct a trial on the original charge, while also encouraging "good faith resumption of plea negotiations." *Lewis*, 751 So. 2d at 718. In *Alcorn*, the Florida Supreme Court disapproved of the prejudice analysis set forth in *Lewis*. *Alcorn*, 121 So. 3d 423, 431–32.

four offenses and received a mandatory minimum sentence of 185 to 360 months in prison. *Id.*

After holding that the respondent had been prejudiced by his counsel's deficient performance, the Court addressed the question of what constitutes an appropriate remedy where a defendant establishes that he rejected a plea offer based on ineffective assistance of counsel and, after trial, received a more severe sentence than he would have received if the state's plea offer had been accepted. *Id.* at 170.

The Court emphasized that the remedy should "neutralize the taint" of the constitutional violation, while at the same time "not grant a windfall to the defendant, or needlessly squander the resources the State properly invested in the criminal prosecution." *Id*. at 170. While recognizing that it would be difficult "to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer," the Court indicated a remedy should be found "that does not require the prosecution to incur the expense of conducting a new trial." *Id*. at 172. The Court specifically discussed the situation (as existed in *Lafler* and exists in the instant case) where an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial. *Id.* at 171. It ultimately determined that the correct remedy was to order the state to reoffer the plea deal. *Id.* at 174. If the respondent accepted the offer, the trial court could determine, in the exercise of its discretion, whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed. *Id*.

In light of the *Lafler* decision, we conclude that the postconviction court erred in its reliance on *Lewis*. The *Lewis* remedy, applied in this case, would be contrary to the holdings in *Lafler*. Permitting a new trial in this case would not only "needlessly squander the considerable resources the State properly invested in the criminal prosecution," it would do little to "neutralize the taint of the constitutional violation." Indeed, it is likely that the postconviction court's remedy places Elma in a worse position than he was prior to the constitutional violation. Before being released on bond after the postconviction evidentiary hearing, Elma had already served 39.5 months of his prior sentence. Under the trial court's order, his potential exposure would range, in essence, from the 39.5 months already served up to life in prison. Yet, prior to receiving ineffective assistance of counsel, Elma was already in receipt of a plea offer for 38.7 months in prison while his potential outcome ranged from acquittal to life in prison.

We affirm that portion of the postconviction court's order finding ineffective assistance of counsel and prejudice, but reverse the court's order as to the remedy granted. We remand for further consideration consistent with this opinion and *Lafler*.

AFFIRMED, in part; REVERSED, in part; and REMANDED with instructions.

HARRIS and SASSO, JJ., concur.