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

JAHQUELL DAVIS,

Petitioner,

v. Case No. 5D20-810

STATE OF FLORIDA,

Respondent.
_____/

Opinion filed October 30, 2020

Petition Alleging Ineffectiveness of Appellate Counsel,
A Case of Original Jurisdiction.

Jahquell Davis, Chipley, pro se.

Ashley Moody, Attorney General, Tallahassee, and Rebecca Rock McGuigan, Assistant Attorney General, Daytona Beach, for Respondent.

ORFINGER, J.

In this petition filed under Florida Rule of Appellate Procedure 9.141(d), Jahquell Davis makes four claims of ineffective assistance of appellate counsel. We grant relief as to grounds 1 and 2 of the petition. We reject his other claims without comment.[1]

Davis was charged with attempted first-degree murder with a firearm. However, the State proceeded at trial on the theory of attempted felony murder. Likewise, the trial

[1] Davis was charged by information with attempted first-degree murder with a firearm, robbery with a firearm, and conspiracy to commit robbery with a firearm. Only his conviction for attempted first-degree murder is at issue in this proceeding.

court instructed the jury on attempted felony murder and not attempted first-degree murder. Davis's trial counsel did not object to the change in the State's theory or the erroneous jury instruction. The jury found Davis guilty "as charged"—attempted first-degree murder–with a special finding that he discharged a firearm during the commission of the crime causing great bodily harm. Davis was then sentenced to 40 years in prison for attempted first-degree murder with lesser terms for the remaining offenses. He appealed and appellate counsel raised only a speedy trial issue. We affirmed the judgment and sentence, but certified a question to the Florida Supreme Court. Davis v. State, 253 So. 3d 1234 (Fla. 5th DCA 2018). The Florida Supreme Court approved this Court's decision. Davis v. State, 286 So. 3d 170 (Fla. 2019).

In grounds 1 and 2 of his petition, Davis contends that appellate counsel should have claimed error in the trial court's jury instructions on attempted felony murder and his conviction of that uncharged crime. He points out, and the State concedes, that these are separate crimes and must be charged separately. The Florida Supreme Court has held that "[b]ecause the statutory crime of attempted felony murder is a crime separate from attempted premeditated murder with different elements and different punishments, the State must charge the crime of attempted felony murder in order to be entitled to a jury instruction on that crime and proceed under that theory." Weatherspoon v. State, 214 So. 3d 578, 580, 589 (Fla. 2017).

Davis is correct that while he was charged with attempted first-degree murder, the State proceeded to trial on the theory of attempted felony murder and the trial court erroneously instructed the jury on that crime. Because Davis's trial counsel did not object to the State's change in theory or the jury instructions, appellate counsel could be deemed

ineffective for failing to challenge these issues in the direct appeal only if they constituted fundamental error. See Routenberg v. State, 45 Fla. L. Weekly D241 (Fla. 2d DCA Jan. 31, 2020).

When the jury is instructed on an alternate theory of the charged crime, but that alternate theory was not charged in the information, it is fundamental error if it is clear that the jury returned a verdict on that uncharged theory. Jaimes v. State, 51 So. 3d 445, 449 (Fla. 2010). Here, it is clear that the jury returned a verdict on the theory of attempted felony murder because that was the only theory on which the jury was instructed. Such an error is fundamental. Richards v. State, 237 So. 3d 426, 432 (Fla. 2d DCA 2018).

Appellate counsel's failure to raise the jury instructions error in Davis's direct appeal was ineffective assistance of counsel. See Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985) (explaining that to prevail on claim of ineffective assistance of appellate counsel, petitioner must show "1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professional acceptable performance and 2) the deficiency of that performance compromised the appellate process to such degree as to undermine confidence in the fairness and correctness of the appellate result").

Because a new appeal on the attempted first-degree murder charge would be redundant in this case, we reverse Davis's judgment and sentence for attempted first-degree murder and remand for a new trial. See Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1986) (vacating petitioner's convictions and sentences and remanding for new trial and holding that, where petitioner demonstrated appellate counsel's ineffectiveness in

failing to raise claim of reversible error, granting petitioner new appeal would be redundant).

PETITION GRANTED.

COHEN and EISNAUGLE, JJ., concur.