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

UNTERRIO BERNARDO JULIAN,

Petitioner,

v. Case No. 5D20-1022

STATE OF FLORIDA,

Respondent.

_____/

Opinion filed August 28, 2020

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

Unterrio Bernardo Julian, Daytona Beach, Pro se.

Ashley Moody, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Respondent.

HARRIS, J.

Petitioner, Unterrio Bernardo Julian, petitions for postconviction relief under Florida Rule of Appellate Procedure 9.141(d), raising several claims of ineffective assistance of his appellate counsel. We find merit in only one of Petitioner's claims and grant his petition for the reasons set forth below.

Petitioner and his twin brother, Angelo, were charged together with second-degree murder with a firearm, reclassified as a life felony under section 775.087(1), Florida Statutes (2016), and with robbery with a firearm. However, because no one was able to

identify whether either Petitioner or Angelo pulled the trigger, the brothers were prosecuted under the principal theory. The charging document named Petitioner and Angelo as co-defendants in each count, and the allegations in each count repeatedly used the "and/or" conjunction to identify both co-defendants.

Following a jury trial, each co-defendant was found guilty. The verdict forms in Petitioner's case, which listed only his name, gave several options to the jury. The options included: on Count One, finding Petitioner guilty of Second Degree Murder with a firearm or Second Degree Murder; and on Count Two, finding Petitioner guilty of Robbery with a Firearm, Robbery with a Weapon, or Robbery. The jury selected the "as charged" option on both counts. For second-degree murder with a firearm, the court sentenced Petitioner to forty years in prison. For robbery with a firearm, the court imposed a concurrent sentence of twenty-five years in prison.

In Petitioner's direct appeal, counsel raised one issue—the trial court's denial of Petitioner's motion for judgment of acquittal. Petitioner argued that the evidence against him was purely circumstantial and inconsistent with his theory that he was not one of the perpetrators. This Court *per curiam* affirmed. Petitioner timely filed the instant petition in April 2020, raising four grounds for relief. We find that one claim has merit.

To grant postconviction relief based on ineffective assistance of appellate counsel, this Court must first determine:

> [W]hether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Dill v. State, 79 So. 3d 849, 851 (Fla. 5th DCA 2012) (quoting Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000)). The failure to raise a potentially meritorious issue can constitute deficient performance. E.g., King v. State, 15 So. 3d 27, 28 (Fla. 1st DCA 2009) (granting new appeal due to appellate counsel's failure to raise two potentially meritorious issues). This standard parallels the standard for ineffectiveness of trial counsel under Strickland v. Washington, 466 U.S. 668 (1984).

In his petition, Petitioner alleges that his appellate counsel failed to raise a valid claim of fundamental error. In his brief, Petitioner acknowledges that second-degree murder is a first-degree felony and that it can be reclassified to a life felony under section 775.087(1)(a), Florida Statutes (2016). However, this reclassification requires an express jury finding that the defendant actually carried, displayed, used, threatened to use, or attempted to threaten to use, a weapon or firearm. § 775.087(1)(a), Fla. Stat. Petitioner correctly points out that the jury verdict forms in his case reflect no such finding. We agree with Petitioner that because the jury never found that he had the gun, reclassification of his crime from a first-degree to a life felony was impermissible. Petitioner now takes the position that if his appellate counsel had argued this in the direct appeal, this Court would have reached a different result. This Court has noted that normally under section 775.087(1)(a), reclassification (or "enhancement") of a first-degree felony to a life felony "is impermissible unless a defendant actually possesses a weapon during the commission of the crime." Parker v. State, 906 So. 2d 1273 (Fla. 5th DCA 2005) (granting petition for belated appeal expressly because appellate counsel failed to raise this issue).

The State relies on Tucker v. State, 726 So. 2d 768, 772 (Fla. 1999), where the Florida Supreme Court considered a similar claim. In that case, the jury determined that

Tucker committed the crimes while using a firearm and incorporated this finding of fact into the jury's verdict: "guilty of attempted first degree murder with a firearm." Id. The court upheld the enhancement of Tucker's sentence because "there was specific language in the verdict referencing a firearm." Id. (citing State v. Hargrove, 694 So. 2d 729, 731 (Fla. 1997)). However, the certified question answered by the Tucker court limited its holding to cases involving only one defendant.

In Thompson v. State, 862 So. 2d 955 (Fla. 2d DCA 2004), the second district addressed a similar argument, but unlike Tucker, Thompson involved a co-defendant. In relevant part, the court held that:

> a verdict form that simply recites that the defendant is guilty as charged does not support reclassification of the crime under section 775.087(1) because there is no specific jury finding that the defendant used a firearm. See Toro v. State, 691 So. 2d 576, 577 (Fla. 2d DCA 1997). Moreover, an "as charged" verdict will not support the imposition of a minimum mandatory sentence under section 775.087(2) when the verdict fails to reflect that the defendant was in actual, as opposed to constructive, possession of a firearm. Henry v. State, 834 So. 2d 406, 407 (Fla. 2d DCA 2003).

Thompson, 862 So. 2d at 958. Additionally, in State v. Rodriguez, 602 So. 2d 1270, 1272 (Fla. 1992), the Florida Supreme Court held "that, when a defendant is charged with a felony involving the 'use' of a weapon, his or her sentence cannot be enhanced under section 775.087(1) without evidence establishing that the defendant had personal possession of the weapon during the commission of the felony." Our Court has construed that holding to mean that "the reclassification provision in section 775.087(1) could not be applied using the principal theory." Roberts v. State, 923 So. 2d 578, 580 (Fla. 5th DCA 2006). Other Florida courts have mostly agreed. See State v. R.C.S., 837 So. 2d 517, 518 n.2 (Fla. 3d DCA 2003) (construing holding similarly); see also Clark v. State, 230

So. 3d 499, 501 (Fla. 2d DCA 2017) (suggesting that Tucker might be inapplicable if a co-defendant had been involved).

In this case, Petitioner and Angelo were prosecuted under the principal theory. However, the jury verdict forms failed to specify which of the co-defendants specifically possessed, used, or otherwise engaged with a firearm during the charged crimes. Therefore, we hold that Petitioner's conviction was improperly reclassified. See Rodriguez, 602 So. 2d at 1272; Clark, 230 So. 3d at 501; Roberts, 923 So. 2d at 580; R.C.S., 837 So. 2d at 518 n.2. Even though the jury form clearly reflected a conclusion that the murder was committed with a firearm, it did not reflect a conclusion as to which co-defendant was actually the shooter. Thus, the reclassification of Petitioner's crimes in this case was error and the failure to raise it was deficient performance undermining confidence in the outcome of the appeal. See, e.g., Dill, 79 So. 3d at 851.

We grant Petitioner's petition, vacate his sentence on the second-degree murder charge, and remand to the trial court to re-sentence Petitioner on that count without the reclassification of the crime.

PETITION GRANTED. SENTENCE PARTIALLY VACATED, REMANDED WITH INSTRUCTIONS.

LAMBERT and GROSSHANS, JJ., concur.