FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-4016

BENJAMIN B. MORALES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Maureen Horkan, Judge.

December 18, 2020

LONG, J.

Benjamin Morales appeals the trial court's denial of his motion for postconviction relief. The motion raised several grounds for relief. This opinion addresses only Ground Two, which was heard at an evidentiary hearing, and Ground Seven, which was summarily denied. On Ground Two, we affirm for the reasons below. On Ground Seven, we reverse and remand for the trial court to hold an evidentiary hearing. We affirm the trial court's order in all other respects.

I.

Mr. Morales was sentenced to two terms of life in prison for two armed robberies he committed with Molli Feehley. Neither

victim had a solid identification of Mr. Morales, but Ms. Feehley testified against him and had, before trial, provided incriminating evidence and statements to police officers and other civilian witnesses. Other circumstantial evidence was presented. This Court affirmed on direct appeal.

Mr. Morales then filed a postconviction motion alleging that his trial counsel provided ineffective assistance. Ground Two of the motion claimed ineffective assistance of counsel for failing to properly prepare him to testify. Mr. Morales claimed that he did not testify at his trial because his trial counsel incorrectly advised him that the nature of his prior felony convictions would be admissible as impeachment evidence, rather than just the number of convictions.

The postconviction court held an evidentiary hearing on this claim. Mr. Morales' trial counsel testified that while she had no specific recollection of her conversation with Mr. Morales, she had notes reflecting they had discussed the possibility of him testifying more than once and that her regular practice is to correctly inform her clients of the law on this issue. She also testified to her extensive criminal defense experience. Mr. Morales testified consistently with his motion—that his trial counsel misinformed him.

The postconviction court denied the claim after a hearing. The court made a credibility determination in favor of Mr. Morales' trial counsel. It found that because counsel had "vast criminal and trial experience prior to [Mr. Morales'] trial, this Court believes counsel's testimony that she would have accurately advised [Mr. Morales] on this matter."

Ground Seven of Mr. Morales' motion claimed ineffective assistance of counsel for failing to investigate and call a witness. Mr. Morales alleged that Roxanne Collins was available at the time of trial, that he told his trial counsel about her, and that she would have provided him a complete alibi as she was with him at the time of the crime. Mr. Morales alleged that his trial counsel conducted no investigation into Ms. Collins.

The postconviction court denied this claim without a hearing. It found that the following colloquy between the trial judge and Mr. Morales at the close of the State's case conclusively refuted his claim:

> THE COURT: Let me ask counsel: Will there be any witnesses called by the defense?
>
> [COUNSEL]: No, Your Honor.
>
> THE COURT: Do you agree with that decision, Mr. Morales?
>
> [MR. MORALES]: Yes, sir.

This appeal followed.

II.

"When a postconviction movant seeks relief due to alleged ineffective assistance of counsel, she must establish 'counsel's performance was deficient,' and 'the deficient performance prejudiced the defense.'" *McCray v. State*, 266 So. 3d 250, 251 (Fla. 1st DCA 2019) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings as long as they are supported by competent, substantial evidence and reviewing the legal conclusions de novo." *Wickham v. State*, 124 So. 3d 841, 858 (Fla. 2013).

In addition to the mixed standard of review of law and fact, the Florida Supreme Court has articulated an additional standard for the summary denial of a 3.850 claim:

> 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.

Foster v. State, 810 So. 2d 910, 914 (Fla. 2002) (quoting *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999)).

A.

Two Florida District Courts of Appeal have reached different conclusions about whether, absent a specific recollection, a trial attorney's experience and general practice can serve as evidence in the postconviction court's credibility determination against a defendant's assertions to the contrary. This is a frequent issue encountered by postconviction courts because evidentiary hearings usually occur years after the trial court resolution. And trial attorneys often work on many cases before, during, and after that resolution. They cannot be expected to have perfect memories.

The Third District held that a trial attorney's standard practice and experience is not competent, substantial evidence sufficient to support a credibility determination and subsequent denial of relief. *Polite v. State*, 990 So. 2d 1242, 1244–45 (Fla. 3d DCA 2008). Polite sought postconviction relief based on ineffective assistance of counsel for misadvise regarding the maximum sentence he faced upon a revocation of probation. *Id.* at 1243. Polite testified at an evidentiary hearing in support of his claims. *Id.* Polite's trial counsel testified that "he did not specifically remember advising Polite of the statutory maximum sentences for the charges he faced, but that it was his standard practice to advise all his clients of such details." *Id.*

The postconviction judge denied relief based on the trial attorney's testimony, and the Third District reversed. *Id.* at 1244–45. Applying the oft-cited rule that "[w]hen a defendant provides sufficient evidence in support of his claim of ineffective assistance of counsel, the burden shifts to the State to present competent substantial evidence which contradicts the defendant's evidence," the Third District found that Polite's testimony supported his claim and that "[t]rial counsel did not provide any testimony to the contrary on this issue." *Id.* at 1244 (citing *Williams v. State*, 974 So. 2d 405, 407 (Fla. 2d DCA 2007)). The Third District concluded

that general practice testimony is not evidence of specific conduct and cannot support a postconviction court's denial of relief.[1] *Id.*

A year after *Polite*, the Fourth District declined to follow. In *Gusow v. State*, 6 So. 3d 699, 702, n. 4 (Fla. 4th DCA 2009), the court wrote that "where a defendant testifies about bad attorney advice . . . and the attorney does not remember the transaction with the defendant, but testifies to his standard practice which is to correctly advise defendants . . . the trial court is entitled to disbelieve the defendant's testimony." The Fourth District reaffirmed this holding two years later:

> A court hearing a postconviction motion is not required to accept a movant's self-serving testimony about a matter simply because trial counsel cannot specifically recall the transaction and testifies about a standard practice. The court should consider the totality of the circumstances and the credibility of the witnesses in making its determination.

Alcorn v. State, 82 So. 3d 875, 878 (Fla. 4th DCA 2011), *quashed on other grounds*, 121 So. 3d 419 (Fla. 2013). Before these cases, the Florida Supreme Court addressed a similar issue in a death penalty case. *See Monlyn v. State*, 894 So. 2d 832 (Fla. 2004). *Monlyn* addressed a claim that trial counsel failed to inform the defendant of his right to testify in the penalty phase. *Id.* at 838. Counsel could not remember specifically informing the defendant but testified that he had extensive criminal defense experience and his standard practice was to inform all his clients of their right to testify. The court found counsel's experience and standard practice was competent, substantial evidence supporting a finding

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[1] The Second District has supported this proposition as well. In *Campbell v. State*, 247 So. 3d 102, 106 (Fla. 2d DCA 2018), trial counsel died before the evidentiary hearing. The Second District held that if there is no articulable basis to disbelieve the defendant, "the issue is not one of witness credibility" and "the court cannot choose to disregard the defendant's testimony." *Id.* at 107 (quoting *Thomas v. State*, 117 So. 3d 1191, 1194 (Fla. 2d DCA 2013)).

that the defendant was appropriately advised.[2] *Id; see also Patrick v. State*, 45 Fla. L. Weekly S177 (Fla. June 4, 2020) (citing *Monlyn* favorably and concluding that "a specific recollection is not necessary to support a finding that the attorney was indeed employing a specific strategy").

This Court has not previously addressed the issue. We agree with the Fourth District and hold that the trial court may disbelieve the defendant's testimony and may consider a trial attorney's general practice as evidence when making a factual finding about specific conversations between the attorney and client.

B.

Traditionally, "[w]hen sitting as the fact-finder in a criminal case, the court is free to disbelieve the State's witness even if that witness's testimony is unrefuted and even if that witness is the sole witness at the hearing or trial." *Z.E. v. State*, 241 So. 3d 979, 980 (Fla. 2d DCA 2018); *see also Maurer v. State*, 668 So. 2d 1077, 1079 (Fla. 5th DCA 1996); *State v. Paul*, 638 So. 2d 537, 539 (Fla. 5th DCA 1994). "A trial court has the same ability [as the jury] to determine the believability of a witness. The mere fact that the testimony appears 'uncontradicted' does not necessarily make it believable . . . ." *Lewis v. State*, 979 So. 2d 1197, 1200 (Fla. 4th DCA 2008).

When sitting as the fact-finder in a postconviction evidentiary hearing, the trial judge is similarly free to disbelieve a witness's testimony. Convicted defendants have much to gain by their testimony in these proceedings. It would be unreasonable to require trial courts to accept a defendant's wildest allegations as true, simply because there is no direct testimony or evidence to the contrary. The postconviction court is well positioned to evaluate the claims, weigh them against other evidence in the case, and reach a reasoned conclusion about their credibility. We should avoid constructing artificial boundaries for this important fact-

[2] The cases cited in *Monlyn* show the Florida Supreme Court considered the trial court's finding a credibility determination.

finding. This is a classic example of a credibility determination that should be left to the trial judge.

"[E]vidence which is incredible or unreliable is not competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Wiggins*, 151 So. 3d 457, 476 (Fla. 1st DCA 2014) (Van Nortwick, J., dissenting). A postconviction court may find a defendant's testimony incredible or unreliable and, when otherwise unsupported, hold it does not constitute competent, substantial evidence to support the defendant's claims. Additionally, a postconviction court can determine that testimony from trial counsel about their legal experience and regular practices is credible and reliable, constituting competent, substantial evidence to rebut or cast doubt upon the credibility of a defendant's testimony.

Here, the postconviction court's finding is supported by the evidence. Mr. Morales testified that his trial counsel misadvised him about what the jury would hear of his prior felony convictions had he testified. But trial counsel testified that she had notes showing Mr. Morales did not want to testify, and she testified to her "vast criminal and trial experience prior to [Mr. Morales'] trial" and that "she would have accurately advised [him] on this matter" despite her lack of specific recollection. The trial court credited counsel's testimony over Mr. Morales'. That finding is supported by competent, substantial evidence. We therefore affirm the postconviction court's denial of Ground Two.

III.

In Ground Seven, Mr. Morales claimed his trial counsel was ineffective for failing to investigate and call as a witness Roxanne Collins. His motion claims Ms. Collins would have provided him an alibi. The postconviction court denied relief without an evidentiary hearing based on the above-recited colloquy where Mr. Morales agreed with his trial counsel's decision to call no witnesses.

> An ineffective assistance claim for failure to call a witness to testify at trial must be distinguished from an ineffective assistance claim for failure to reasonably

> investigate and locate witnesses. Unlike the strategic decision to call a witness to testify at trial, the failure to reasonably investigate and locate witnesses can often serve as a colorable claim of ineffective assistance of counsel.

Mendoza v. State, 81 So. 3d 579, 581 (Fla. 3d DCA 2012). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 690–91).

Mr. Morales argues, and we agree, that this distinction is meaningful here because while Mr. Morales consented on the record to not calling any witnesses, he claims he did so because he knew his counsel did not perform an investigation of Ms. Collins. Even if his claim of failure to call Ms. Collins as a witness at trial was refuted by the colloquy on the record, his claim of failure to investigate is not. The colloquy was the sole basis for the postconviction court's summary denial. "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." *Peede*, 748 So. 2d at 257.

We reverse and remand on this ground for the postconviction court to address Mr. Morales' claim of ineffective assistance of counsel for failing to investigate and call Ms. Collins. On remand the postconviction court should attach the portions of the record which conclusively refute this claim or hold an evidentiary hearing.

Affirmed in part, reversed in part, and remanded.

LEWIS and NORDBY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Nah-Deh Simmons, Jacksonville, for Appellant.

Ashley Moody, Attorney General, and Sharon S. Traxler, Assistant Attorney General, Tallahassee, for Appellee.