FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-2707

CURTIS DUKES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Gadsden County.
Barbara K. Hobbs, Judge.

August 9, 2021

WINOKUR, J.

Curtis Dukes appeals from an order summarily denying two of the three grounds of his motion for postconviction relief. The trial court concluded that the motion attempted to couch claims that should have been or had been raised on direct appeal as claims for ineffective assistance of counsel. It did not attach to the denial order any portion of the record conclusively showing that Dukes is not entitled to relief. We reverse the denial of the two summarily-denied grounds.

Claims of ineffective assistance of counsel generally must be considered in postconviction proceedings rather than on direct appeal. *See Huckaba v. State*, 260 So. 3d 377, 383 (Fla. 1st DCA

2018). To prove ineffective assistance of counsel, "a defendant must show that (1) counsel's performance was so deficient that he or she did not provide the representation guaranteed by the Sixth Amendment, and that (2) counsel's deficient performance prejudiced the defense." *Mason v. State*, 153 So. 3d 335, 336 (Fla. 1st DCA 2014). Showing deficient performance or prejudice often requires similar arguments to those that would be made on direct appeal; for example, to show that counsel had been ineffective for failing to object to the admission of evidence, a defendant would have to prove that the evidence was inadmissible. The crucial distinction is that in an ineffective-assistance claim, the defendant is challenging his counsel's action or inaction rather than a decision of the trial court.

Of course, a defendant may try to disguise an attack on the decision of the trial court as an ineffective-assistance claim. We have identified two instances where the Supreme Court has held that a claim is improperly raised as an ineffective-assistance claim instead of a direct-appeal claim. First, an ineffective-assistance claim relying on a legal point already considered and rejected on the merits by an appellate court is procedurally barred. *See Pietri v. State*, 885 So. 2d 245, 256 (Fla. 2004); *see also Porter v. Crosby*, 840 So. 2d 981, 984 (Fla. 2003) ("[C]laims raised in a habeas petition which petitioner has raised in prior proceedings and which have been previously decided on the merits in those proceedings are procedurally barred in the habeas petition."); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990) ("Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal."). Second, an attempt to establish a point of law or interpret—not apply—a constitutional right couched in a postconviction motion is not truly an ineffective-assistance claim and is unauthorized under Florida Rule of Criminal Procedure 3.850. *See, e.g.*, *Israel v. State*, 985 So. 2d 510, 522 (Fla. 2008) (holding that a constitutional challenge couched as an ineffective-assistance claim was procedurally barred). Such arguments could or should be raised on direct appeal; moreover, counsel cannot be deficient for failing to follow law that has not been established.

Neither of the summarily-denied claims here involved an issue that had been considered and rejected on the merits in his

direct appeal.[*] Nor did Dukes attempt to establish a point of law in his claims; he merely argued that counsel should have made various evidentiary objections. Accordingly, he is entitled to an evidentiary hearing or, if the record conclusively refutes his claims, an order of summary denial with the relevant portions of the record attached. We REVERSE and REMAND for proceedings consistent with this opinion.

ROWE, C.J., and LEWIS, J., concur.

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

Curtis Dukes, pro se, Appellant.

Ashley Moody, Attorney General, and Jennifer J. Moore, Assistant Attorney General, Tallahassee, for Appellee.

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[*] In one of the summarily-denied claims, the trial court ruled that the issue "should have been addressed in [Dukes'] direct appeal," whereas in the second summarily-denied claim, the trial court ruled that the issue "should have [been] *and was* addressed in [Dukes'] direct appeal" (emphasis supplied). It may be that the basis of this claim was rejected on the merits in Dukes' direct appeal, so that Dukes cannot raise it now as an ineffective-assistance claim. But since the trial court failed to attach any record to the order that conclusively resolves this claim, we cannot affirm on that ground. *See* Fla. R. Crim. P. 3.850(f)(4); Fla. R. App. P. 9.141(b)(2)(D).