DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2013

BRENDA FIELDS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

No. 4D13-2276

[October 30, 2013]

PER CURIAM.

Brenda Fields filed a petition for writ of habeas corpus in this court seeking a new appeal of her conviction of trafficking in oxycodone, arguing ineffective assistance of her appellate lawyer in her earlier, direct appeal. This court per curiam affirmed without opinion in *Fields v. State*, 86 So. 3d 1135 (Fla. 4th DCA 2012). In the petition filed here, she identified three arguments that appellate counsel failed to raise in her direct appeal, and then concluded that if those points had been raised on appeal, the outcome "would probably have been different." As the dissent points out, petitioner did not allege any supporting facts or references to the record at all. She did not file an appendix. We find this petition legally insufficient and dismiss it.

Florida Rule of Appellate Procedure 9.141(d)(4)(F) expressly requires a petitioner alleging ineffective assistance of appellate counsel to recite in a statement of facts "the specific acts sworn to by the petitioner or petitioner's counsel that constitute the alleged ineffective assistance of counsel." We interpret this rule as requiring more than a listing of legal arguments counsel should have raised on appeal followed by some case citations, as was presented in this petition.

This court has rejected a legally insufficient petition alleging ineffective assistance of appellate counsel without leave to amend in *Lightsey v. State*, 964 So. 2d 255 (Fla. 4th DCA 2007). The petitioner there failed to show that any deficiency of his appellate counsel undermined confidence in the outcome of the appeal. The petitioner had stated in conclusory language that if appellate counsel had raised an

issue he identified, it would have affected the outcome and "the case possibly would've been dismissed." *Id.* at 256. We found that language legally insufficient, citing case law including *Brown v. State*, 894 So. 2d 137 (Fla. 2004) (holding that a petition alleging ineffective assistance of appellate counsel was facially insufficient for failure to show how the outcome of the case would have been different). *See also Johnson v. State*, 3 So. 3d 426 (Fla. 4th DCA 2009) (denying petition alleging ineffective assistance of appellate counsel as legally insufficient).

The dissent suggests that this court should extend the supreme court's decision in *Spera v. State*, 971 So. 2d 754 (Fla. 2007), requiring the trial court to allow a defendant at least one opportunity to cure a facially insufficient motion for postconviction relief filed under Florida Rule of Criminal Procedure 3.850, to petitions for ineffective assistance of appellate counsel filed under Florida Rule of Appellate Procedure 9.141(d). We resist the suggestion, pointing out first that this would require an amendment to the existing appellate rule, a matter for the supreme court to ultimately undertake. Indeed, *Spera* was codified by rule 3.850(f), allowing movants sixty days to amend a timely but deficient motion, as the dissent acknowledges.

Further, even in *Spera*, the supreme court quoted from its earlier decision in *Bryant v. State*, 901 So. 2d 810 (Fla. 2005), that "we do not intend to authorize 'shell motions'—those that contain sparse facts and argument and are filed merely to comply with the deadlines, with the intent of filing an amended, more substantive, motion at a later date." *Id.* at 819. Here, petitioner may not necessarily have filed this petition merely to avoid the passage of a deadline, but her petition lacks even the "sparse facts" referred to in *Bryant*.

In *Oquendo v. State*, 2 So. 3d 1001 (Fla. 4th DCA 2008), this court said that *Spera* did not give postconviction movants an opportunity to amend conclusory claims. *See also Mancino v. State*, 10 So. 3d 1203, 1204 (Fla. 4th DCA 2009). We can see no rationale for allowing petitioners alleging ineffective assistance of appellate counsel a greater opportunity to amend shell or conclusory claims, particularly where the supreme court has not suggested that *Spera* should be extended to these petitions.

Even if this court could extend *Spera* to petitions alleging ineffective assistance of appellate counsel, this could open the door to demands for leave to amend by petitioners seeking mandamus, prohibition, certiorari, and other remedies after their initial petitions filed in appellate courts were deemed legally insufficient. Such procedure is not contemplated by

the rules of appellate procedure or any other authorities.

Dismissed.

LEVINE and CONNER, JJ., concur.

WARNER, J., dissents with opinion.

WARNER, J., dissenting.

Petitioner filed a petition for habeas corpus alleging ineffective assistance of counsel. She argues ineffective assistance in her appellate counsel's failure to argue trial court error in: (1) allowing prior bad acts to be heard by the jury; (2) denying her motion for mistrial after the detective and confidential informant testified, in violation of an order *in limine* and possibly other trial court orders barring evidence of prior bad acts; and (3) not finding entrapment as a matter of law. She alleges that, had counsel argued these issues, the outcome of the appeal would probably have been different, citing case law applicable to the three issues she raises.

The petition offers no supporting facts or references to the record. No appendix has been filed. We have held that conclusory allegations are insufficient to support a petition for ineffective assistance of counsel. *See Lightsey v. State*, 964 So. 2d 255, 256 (Fla. 4th DCA 2007). *Lightsey* simply followed supreme court precedent. *See Patton v. State*, 878 So. 2d 368, 380 (Fla. 2004) (a summary or conclusory allegation is insufficient to allow the appellate court to examine the specific allegations against the record); *see also Brown v. State*, 894 So. 2d 137, 160-61 (Fla. 2004) (petition for ineffective assistance of counsel facially insufficient for failure to show how outcome of case would have been different).

Our supreme court has determined that where motions for postconviction relief pursuant to rule 3.850 are legally insufficient, a trial court must allow a defendant at least one opportunity to cure a facially deficient motion. *Spera v. State*, 971 So. 2d 754 (Fla. 2007). *Spera* holds:

> [W]hen a defendant's initial rule 3.850 motion for postconviction relief is determined to be legally insufficient for failure to meet either the rule's or other pleading requirements, the trial court abuses its discretion when it fails to allow the defendant at least one opportunity to amend the motion. As we did in *Bryant* [*v. State*, 901 So. 2d

> 810 (Fla. 2005)], we hold that the proper procedure is to strike the motion with leave to amend within a reasonable period. We do not envision that window of opportunity would exceed thirty days and may be less. The striking of further amendments is subject to an abuse of discretion standard that depends on the circumstances of each case. As we did in *Bryant*, we stress here, too, that "we do not intend to authorize 'shell motions'—those that contain sparse facts and argument and are filed merely to comply with the deadlines, with the intent of filing an amended, more substantive, motion at a later date." *Bryant*, 901 So. 2d at 819.
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> We also stress that our decision is limited to motions deemed facially insufficient to support relief—that is, claims that fail to contain required allegations. When trial courts deny relief because the record conclusively refutes the allegations, they need not permit the amendment of pleadings.

Id. at 761-62; *see also* Fla. R. Crim. P. 3.850(f) (codifying *Spera* by allowing defendants 60 days to amend a timely but facially insufficient motion).

The supreme court has not applied the rule of *Spera* to petitions for ineffective assistance, although it would appear to me that the same reasoning which authorized the amendment in *Spera* would compel appellate courts to provide unrepresented defendants at least one chance to correct facial deficiencies in a petition alleging ineffective assistance of appellate counsel. If one looks at Florida Rule of Appellate Procedure 9.141(d)(4) regarding the contents required in such a petition, an unschooled person would hardly know of the level of detail that appellate courts require to make a petition sufficient. The rule does not require the petitioner to include the record facts which support the specific acts of ineffective assistance alleged, *see, e.g.*, *Patton*, 878 So. 2d at 380, nor does it require the petitioner to state how the results of the appeal would be different had the ineffective assistance not occurred, *see, e.g.*, *Brown*, 894 So. 2d at 160-61, both of which are essential to the legal sufficiency of the petition.

The petition in this case contained all of the information required in the rule. Yet it was deficient for failure to contain sufficient information to examine the summary allegations against the record or to show how the outcome would have been different in this case.

Although the supreme court has not as yet required it, I would apply *Spera* and dismiss this petition but grant petitioner leave to amend her petition within thirty days.

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Petition for writ of *habeas corpus* to the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; Robert A. Hawley, Judge; L.T. Case No. 2008CF1900B.

Brenda Fields, Ocala, pro se.

No appearance for respondent.

Not final until disposition of timely filed motion for rehearing.