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IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

KATARZYNA MA MAKSYMOWSKA, )

Appellant, )

v. )

STATE OF FLORIDA, )

Appellee. )

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Case No. 2D18-4697

Opinion filed October 30, 2020.

Appeal from the Circuit Court for  
Pinellas County; Chris Helinger, Judge.

Howard L. Dimmig, II, Public Defender  
and Megan Olson, Assistant Public  
Defender, Bartow, for Appellant.

Ashley Moody, Attorney General,  
Tallahassee and Chelsea N. Simms,  
Assistant Attorney General, Tampa, for  
Appellee.

CASE, JAMES R., Associate Senior Judge.

Katarzyna Maksymowska appeals from her convictions and sentences for possession of clonazepam, possession of oxycodone, and driving with a suspended license. Because we agree with Maksymowska that her trial counsel provided

ineffective assistance by failing to request a jury instruction on the prescription defense, we reverse and remand for a new trial.

Maksymowska was stopped by police as she was pulling out of a parking lot with her young son. When asked for identification, Maksymowska said she had none and gave police a false name. A consensual search of her car and purse revealed a driver's license with a different name than that given the officer. Initially, Maksymowska denied that the license was hers but then admitted that it belonged to her.

Maksymowska was arrested, and a further search of her purse revealed oxycodone and clonazepam inside of a metal container held together with a bungee cord.

Maksymowska told the officer that the pills belonged to her grandmother.

At trial, Maksymowska testified that she cared for her grandmother who lives with her and has dementia. She admitted that she had the oxycodone and clonazepam in her purse when she was stopped by police but explained that she carried them with her to prevent her grandmother from taking too many of the pills. Maksymowska maintained that she did not know it was illegal for her to hold her grandmother's medication, that she gave a false name to police because she knew her license was suspended, and that she was afraid.

The jury convicted Maksymowska as charged. Following the guilty verdict but before sentencing, trial counsel informed the court that he had failed to request a jury instruction on the prescription defense because he was unaware that holding a controlled substance as an agent for a person who had a prescription was an affirmative defense to the possession charges. He requested that the court postpone sentencing, but the court refused and sentenced Maksymowska to concurrent terms of 180 days in

jail on each possession charge. Thereafter, trial counsel filed a motion for judgment of acquittal notwithstanding the verdict and for new trial. The court denied the motion.

On appeal, Maksymowska argues that the face of the record shows that her counsel rendered ineffective assistance by not requesting a jury instruction on the prescription defense.

Ineffective assistance of counsel claims are generally not cognizable on direct appeal. Forget v. State, 782 So. 2d 410, 413 (Fla. 2d DCA 2001). However, such claims may be raised on direct appeal where counsel's failure is " 'apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue.' " Dupin v. State, 239 So. 3d 1286, 1287 (Fla. 2d DCA 2018) (quoting Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987)). Counsel is deemed ineffective when his "performance does not meet the standard of reasonable professional assistance and there is a reasonable probability that the outcome of the trial would have been different but for the unsatisfactory assistance." Forget, 782 So. 2d at 413 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

Here, Maksymowska was clearly entitled to a prescription defense instruction. "A prescription defense instruction is necessary where there is evidence that the defendant was holding a controlled substance as [the] agent of another individual to whom it was prescribed." Romanyuk v. State, 141 So. 3d 749, 751 n.1 (Fla. 2d DCA 2014) (citing McCoy v. State, 56 So. 3d 37, 39 (Fla. 1st DCA 2010)); see also Ramirez v. State, 125 So. 3d 171, 177 (Fla. 4th DCA 2013) (reversing the defendant's conviction for trafficking in hydrocodone and remanding for a new trial where the jury was not apprised of its ability to apply the prescription defense).

Maksymowska's sole defense was that she was holding the pills for her ailing grandmother. By neglecting to request an instruction that was central to Maksymowska's case, trial counsel deprived her of her only defense. Hence, it is clear on the face of the record that counsel's performance was deficient and that Maksymowska was prejudiced by his failure to request the prescription defense instruction. See McComb v. State, 174 So. 3d 1111, 1113 (Fla. 2d DCA 2015) (holding that counsel's failure to request an instruction on the defendant's defense constitutes ineffective assistance of counsel on the face of the record); Michel v. State, 989 So. 2d 679, 681-82 (Fla. 4th DCA 2008) (same).

Accordingly, we reverse Maksymowska's convictions for possession of clonazepam and oxycodone and remand for a new trial. We affirm Maksymowska's conviction for driving with a suspended license.

Affirmed in part; reversed in part; remanded.

KHOUZAM, C.J., and BLACK, J., Concur.