NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

DERRION T. PATTERSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D19-2495

Opinion filed July 29, 2020.

Appeal from the Circuit Court for Polk County; Wayne M. Durden, Judge.

Derrion T. Patterson, pro se.

Ashley Moody, Attorney General, Tallahassee, and William Stone, Jr., Assistant Attorney General, Tampa, for Appellee.

MORRIS, Judge.

Derrion T. Patterson appeals the summary denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. Because we conclude that his claim that his counsel provided ineffective assistance by failing to advise him of a possible coerced consent defense and/or to file a motion to suppress was not refuted by the record, we reverse the portion of the order denying that claim. We affirm the remaining portion of the postconviction court's order.

BACKGROUND

Patterson originally pleaded no contest to burglary of a conveyance with assault or battery while armed with a firearm, robbery with a firearm, and aggravated assault with a firearm, and he was sentenced accordingly. He subsequently sought to withdraw his plea, arguing that he was not guilty of the crimes, but that motion was denied. He did not argue in that motion that his attorney failed to advise him of potential defenses. His direct appeal from his judgment and sentences was per curiam affirmed. See Patterson v. State, 252 So. 3d 170 (Fla. 2d DCA 2018).

In his current postconviction motion, Patterson raised two claims. In his first claim, he argued that the State breached the plea agreement by preventing, interfering with, or failing to cooperate with a condition precedent and the specific performance of the agreement. That claim was summarily denied by the postconviction court, and we find no error in that denial.

In Patterson's second claim, he argued that while he gave consent to a Polk County Sheriff's Office deputy to search the contents of his phone, it was coerced. Specifically, he alleged that he had been arrested on an unrelated charge and handcuffed, at which time his cell phone was seized. He further alleged that on the way to the sheriff's office, the deputy began scrolling through his unlocked cell phone without first obtaining consent or a warrant. Later, after arriving at the sheriff's office, Patterson was informed that he was under investigation for the crimes to which he ultimately entered his pleas. Patterson contended that it was only after he had been arrested on the unrelated charge, after he had observed the deputy looking through his phone, and after being told that he was being investigated for the other crimes that he was asked

for consent to search the phone. Thus, Patterson argued that he believed the deputy had authority to search his phone, thereby rendering Patterson's consent to the search to be mere acquiescence to that authority.

Upon searching the contents of the phone, the deputy discovered pictures of money and a black handgun that Patterson had sent to his girlfriend. Patterson asserted that he had never mentioned his girlfriend to the deputy prior to that point, nor had his girlfriend contacted the sheriff's office. As a result of discovering the girlfriend's contact information, the deputy made contact with her, ultimately obtaining statements from her that were utilized in the prosecution of Patterson. In fact, the deputy used some of the information provided by the girlfriend to obtain a search warrant for the phone.

Patterson argued that if his counsel had investigated the facts surrounding the various searches of the cell phone and filed a motion to suppress thereon, there was a reasonable probability that the motion would have been granted. Patterson also argued that his counsel was ineffective for failing to advise him of and/or investigate a potential defense. He contended that none of the exceptions to the warrant requirement applied in this case, and he argued that neither the inevitable discovery nor the independent investigation doctrines applied because of the alleged initial illegal search. Patterson argued that if his counsel had advised him of the potential defense and filed the motion to suppress, it would have been granted and he would have proceeded to trial.

The State was ordered to file a response to claim two. After it did so, the postconviction court entered its final order summarily denying claim two, stating:

> In claim 2[,] the Defendant argues that trial counsel was ineffective for failing [to] file a Motion to Suppress. The State responds that the record is devoid of any suggestion that [the questioning deputy] acted in an overbearing manner. Defendant was cooperative throughout the encounter and scrolled through his own phone while [the questioning deputy] sat beside him. The State further argues that the fruits of the search warrant would not have been suppressed on the grounds stated by the Defendant. Defendant has failed to establish deficient performance or prejudice.

Upon receiving this appeal and reviewing Patterson's arguments, we issued a Toler[1] order to the State, wherein we directed the State to address Brown v. State, 270 So. 3d 530, 532-33 (Fla. 1st DCA 2019), and to discuss Patterson's contention that his consent had been coerced. We also directed the State to address whether, absent Patterson's consent, the evidence at issue would have been otherwise discovered.

In its response, the State first argued that Patterson should not be allowed to go behind his plea since he told the court that he was satisfied with his counsel's representation at the plea hearing. The State also asserted that counsel cannot be ineffective for failing to raise an issue that is without legal merit or would not have altered the proceedings. Notably however, while the State conceded that there were "three separate searches" (the first without consent, the second with consent, and the third pursuant to the warrant), the State failed to address the legality of the first search at all. Instead, the State focused on the second search, arguing that Patterson's consent should not be considered coerced because there was nothing indicating that the second search had been performed pursuant to an invalid warrant or some other

[1]Toler v. State, 493 So. 2d 489 (Fla. 1st DCA 1986).

acquiescence to a claim of lawful authority. The State argued that neither Patterson's status as a juvenile nor his subjective belief about whether he could withhold consent should be interpreted to mean he was coerced. The State dismissed the fact that Patterson had been under arrest when the first two searches occurred, arguing that it should not change the outcome.

The State also contended that the evidence would have been inevitably discovered because the search warrant did not rest on the alleged illegal initial searches and because there was other adequate probable cause to obtain a search warrant.[2] In addressing Brown, the State summarily rejected its application to this case, noting that it involved a review of the plea colloquy and guilty plea form and that the State conceded error in that case. The State also pointed out that the First District did not address the inevitable discovery doctrine in Brown.

ANALYSIS

The problem with both the postconviction court's summary denial of claim two and the State's response to our Toler order is that they do not really address the crux of Patterson's claim: that his counsel was ineffective for failing to advise him of a possible coerced consent defense. While it is true that a postconviction motion cannot be used to go behind the representations a defendant made at a plea hearing, "[a] trial attorney's failure to investigate a factual defense or a defense relying on the

[2]Specifically, the State pointed to tips that law enforcement received indicating that Patterson was the perpetrator, the fact that Patterson's guardian told law enforcement that Patterson had been wearing a tactical vest similar to the perpetrator on the day of the crimes, Patterson's conflicting post arrest statements, information received from Patterson's girlfriend, and Patterson's admission that he had his cell phone on him on the night of the crimes.

suppression of evidence, which results in the entry of an ill-advised plea . . . has long been held to constitute a facially sufficient attack upon the conviction." Brown, 270 So. 3d at 532-33 (alteration in original) (quoting Fry v. State, 217 So. 3d 1139, 1140 (Fla. 1st DCA 2017)). "A claim of ineffective assistance of counsel for failure to advise a defendant of a potential defense can state a valid claim if the defendant was unaware of the defense and can establish that a reasonable probability exists that [he] would not have entered the plea if properly advised." Id. (quoting Fry, 217 So. 3d at 1141). "Therefore, it is error to summarily deny a claim of ineffective assistance of counsel based on counsel's failure to investigate a potential defense or file a motion to suppress evidence where the record attachments do not conclusively show that the defendant was made aware of the potential defense or suppression issue prior to entering the plea." Id.; see also Myers v. State, 247 So. 3d 78, 80 (Fla. 2d DCA 2018); Fernandez v. State, 135 So. 3d 446, 447-48 (Fla. 2d DCA 2014); Zanchez v. State, 84 So. 3d 466, 468 (Fla. 2d DCA 2012).

Here, the postconviction court focused on the lack of evidence that the questioning deputy had acted in an overbearing manner. But that finding does not address the fact that Patterson had already been arrested on an unrelated charge and had already observed the deputy looking on his phone.

In V.P.S. v. State, 816 So. 2d 801, 801-03 (Fla. 4th DCA 2002), officers went to a house where V.P.S., a juvenile, resided. The officers had an arrest warrant for another individual, and when V.P.S. opened the door, the officers told V.P.S. about the warrant and asked about the named individual. Id. at 802. Although V.P.S. denied that the named individual was in the apartment, he gave consent to the officers when

they asked if they could search the apartment. Id. During the search, officers found drug paraphernalia which V.P.S. admitted belonged to him. Id.

On appeal from his delinquency disposition, the Fourth District addressed the question of whether V.P.S.'s consent was voluntary, explaining that "[c]onsent is involuntary when it is based upon a mere acquiescence to lawful authority." Id. at 803. The court further explained that where law enforcement claims lawful authority to search based on a warrant, "[t]he situation is instinct with coercion—albeit lawful coercion." Id. (quoting Bumper v. N. Carolina, 391 U.S. 543, 550 (1968)). The Fourth District concluded that V.P.S.'s consent was a mere acquiescence to authority because the officers had shown him the arrest warrant, leading him to believe that they had the right to search the premises. Id. The court noted that it did "not think a lay person, particularly a juvenile, should be expected to understand the limits of an arrest warrant." Id.

In this case, there is nothing indicating that the questioning deputy told Patterson that his arrest on the unrelated charge allowed the deputy to search Patterson's phone for evidence related to the burglary, robbery, and aggravated assault charges. However, the search warrant application attached to the State's response to the show cause order reveals that after Patterson's arrest, the deputy "explained to [Patterson] that [the deputy] was conducting a felony investigation and that [Patterson] would be charged for providing a false statement if he lied." Thus, taking the facts as alleged by Patterson as true,[3] at the time of consent, he had already been arrested on

[3]"In reviewing a trial court's summary denial of a postconviction claim, the factual allegations must be accepted as true to the extent they are not refuted by the

an unrelated charge, he had been informed that he was under investigation for other crimes, and he had observed the questioning deputy previously looking through his phone. Further, it is undisputed that Patterson was a juvenile at the time of his arrest and consent. These circumstances suggest that Patterson's consent was a mere acquiescence to lawful authority, cf. V.P.S., 816 So. 2d at 803, and there is a question as to why defense counsel did not seek to suppress the contents of the phone on that basis.

The State relies on State v. Parrish, 731 So. 2d 101, 103 (Fla. 2d DCA 1999), for the proposition that coerced consent must be demonstrated by some "coercive, oppressive, or dominating" show of authority by officers. But that reliance is misplaced as that case involved a defendant who was stopped for a traffic violation and asked for his consent to allow officers to search his vehicle. Further, the defendant in that case did not testify that he did not consent "or that he believed he had no choice but to consent." Id. at 103-04.

This case did not involve a traffic stop and simple request for consent. Rather, it involved an arrest for an unrelated crime, a defendant being told he was under investigation for other crimes, and a sheriff's deputy looking through the defendant's cell phone prior to asking for consent. Thus Parrish—a case that clearly did not involve any of the circumstances present in this case—is not dispositive of this appeal.

We are also not convinced by the State's argument that the evidence would have been inevitably discovered. The postconviction court appeared to simply

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record." Brown, 270 So. 3d at 532 (citing Valentine v. State, 98 So. 3d 44, 54 (Fla. 2012)).

adopt the State's argument that the fruits of the search would not have been suppressed, but the court provided no further explanation. And while it is true that there were other facts known to law enforcement that could have at least provided a partial basis for the search warrant, it is clear from the search warrant application that the questioning deputy relied heavily on the cell phone photos and messages to lead him to Patterson's girlfriend. Indeed, the last full paragraph of the application provides:

> Your Affiant knows that Patterson was sending photographs of money possibly taken during the robbery to his girlfriend and discussing the robbery with her on the phone to be searched. Through my training and experience I know that suspects in these type crimes often take photographs of stolen property and stolen money and also speak to others about the crimes through phone, text, applications, and social media using their phones. Phones also sometimes record and track suspect's locations through GPS services in either applications or from the phones themselves.

The warrant application also included two other paragraphs detailing how the deputy located Patterson's girlfriend and obtained a sworn statement from her regarding the text messages and photos. Thus had the deputy not seen the text messages and photos during the first search (allegedly performed prior to asking for consent), there would be nothing linking Patterson's girlfriend to the crimes. Because law enforcement relied at least in part on evidence obtained during an alleged illegal initial search, we cannot confidently say that the warrant was not fruit of the poisonous tree and that the evidence would have been inevitably discovered.

The postconviction court's denial of claim two does not address the factual issue of why Patterson's counsel failed to file a motion to suppress based on the argument that Patterson's consent to search the phone was coerced. Perhaps his

counsel believed that the motion would be meritless based on the inevitable discovery doctrine or perhaps Patterson never told his counsel that he only consented because he had already been arrested and had watched the deputy previously look through his phone. But those are factual questions that should be addressed at an evidentiary hearing. Cf. Ford v. State, 825 So. 2d 358, 361 (Fla. 2002) ("[T]o determine the reason why trial counsel did not call the witnesses, it was necessary to grant petitioner an opportunity to present evidence.").

Accordingly, because nothing in the record conclusively refutes Patterson's claim that his counsel was ineffective for failing to investigate the defense of coerced consent and/or to file a motion to suppress on that basis, we conclude that the postconviction court erred by summarily denying claim two. Therefore we reverse and remand for further proceedings on that claim. If the postconviction court again summarily denies the claim, it must attach those portions of the record that conclusively refute it. See Fla. R. Crim. P. 3.850(f).

Affirmed in part, reversed in part, and remanded.

NORTHCUTT and SILBERMAN, JJ., Concur.