IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

STATE OF FLORIDA,

Appellant,

v.

Case No. 5D20-1320
LT Case No. 05-1998-CF-029288-A

JASON DAVID DOWNS,

Appellee.

_____/

Opinion filed November 12, 2021

Appeal from the Circuit Court
for Brevard County,
Charles G. Crawford, Judge.

Ashley Moody, Attorney General,
Tallahassee, and Rebecca Rock
McGuigan, Assistant Attorney General,
Daytona Beach, for Appellant.

Jason Scott Downs, Rockledge, pro se.

SLEET, D.H., Associate Judge.

The State of Florida challenges the order granting Jason Downs' Second or Successive Motion for Postconviction Relief. On appeal, the State argues that the postconviction court erred in granting relief because the

motion was untimely and was successive. Because the postconviction court's order contained no findings of fact or legal conclusions, and our review requires deference to the postconviction court's factual findings, we reverse and remand for the postconviction court to make findings of fact and draw legal conclusions regarding Downs' claims.

On April 19, 2001, Downs was convicted of lewd or lascivious act in the presence of a child under sixteen (count one) and forcing or enticing a child to commit a lewd or lascivious act (count two). The trial court withheld adjudication on both counts and sentenced him to a downward departure sentence of six months' community control with no GPS monitoring followed by an additional 4.5 years of probation. Downs filed a timely direct appeal to the Fifth District, which per curium affirmed the judgment and sentence. *Downs v. State*, 823 So. 2d 789 (Fla. 5th DCA 2002). Downs later filed a motion for postconviction relief, alleging four grounds of ineffective assistance of counsel. The postconviction court summarily denied all four claims, and on appeal, the Fifth District reversed for an evidentiary hearing as to two of the grounds. *Downs v. State*, 227 So. 3d 694 (Fla. 5th DCA 2017). On remand, following an evidentiary hearing, the postconviction court again denied both grounds. Downs timely appealed, and the Fifth District affirmed. *Downs v. State*, 291 So. 3d 612, 614 (Fla. 5th DCA 2020).

On February 28, 2020, Downs filed his Second or Successive Motion for Postconviction Relief, alleging ineffective assistance of trial counsel based on the newly discovered affidavit from Judge Bruce Jacobus, Downs' original trial judge in 2001. The affidavit represented that Judge Jacobus overheard a plea offer in open court on the day of trial which Downs' trial counsel did not convey to Downs and that when Judge Jacobus spoke with jurors after the trial, they were offended by the conduct of Downs' trial counsel.

The postconviction court directed the State to respond to Downs' motion. In its response, the State argued that the motion should be denied because it was conclusively refuted by the record, it was facially insufficient because Downs did not raise any new or different grounds, and there was no newly discovered evidence. The postconviction court did not conduct an evidentiary hearing but summarily granted the motion. In the order, the court did not include any factual findings or legal conclusions.[1] Rather, the court stated only that "[t]he Defendant did not receive a fair trial and is entitled to

[1] The record demonstrates that the issue of trial counsel's failure to relay the plea offer was specifically addressed at the evidentiary hearing for Downs' first postconviction motion and that Downs testified he was aware of the plea offer and discussed it with trial counsel. It is unclear whether Judge Jacobus' affidavit refers to the same offer or another offer because the postconviction court failed to make any factual findings.

relief." The court vacated Downs' judgment and sentence, noting that if the State should seek to refile charges, "the Defendant shall be entitled to the plea offer originally offered in this cause."

On appeal, the State argues that Downs' motion is an untimely successive motion. Specifically, the State argues that there is no newly discovered evidence and points to the fact that there were discussions on the record concerning the plea and advice related to the plea that date back to the sentencing hearing. The State argues that Judge Jacobus' affidavit stating that he heard the offer, heard defense counsel reject it, and saw that defense counsel did not inform Downs or Downs' parents is irrelevant because the original postconviction court already found that there was a plea offer, that defense counsel recommended Downs take it, and that Downs rejected it.

A claim of ineffective assistance of counsel is governed by *Strickland v. Washington*, 466 U.S. 668 (1984). "To state a legally sufficient claim of ineffective assistance of counsel, [the defendant] is required to show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced his defense." *Martin v. State*, 205 So. 3d 811, 812 (Fla. 2d DCA 2016) (citing *Strickland*, 466 U.S. at 694). "An attorney's performance is deficient when it falls below an objective standard of reasonableness under

prevailing professional norms." *Bolduc v. State*, 279 So. 3d 768, 770 (Fla. 2d DCA 2019) (quoting *Bell v. State*, 965 So. 2d 48, 56 (Fla. 2007)). A defendant demonstrates prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 694). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689.

"[T]his Court's standard of review is two-pronged: (1) this Court must defer to the [postconviction] court's findings on factual issues so long as competent, substantial evidence supports them; but (2) must review de novo ultimate conclusions on the deficiency and prejudice prongs." *Everett v. State*, 54 So. 3d 464, 472 (Fla. 2010) (first alteration in original) (emphasis omitted) (quoting *Reed v. State*, 875 So. 2d 415, 421-22 (Fla. 2004)).

Here, the postconviction court did not make any factual findings in the written order, and there are no oral findings to turn to because the court did not conduct an evidentiary hearing. The court did not even explicitly conclude that it found that there was ineffective assistance of counsel. Rather, the court simply stated that "[t]he Defendant did not receive a fair trial and is entitled to relief." It appears that the court was influenced by

Judge Jacobus' affidavit, in which he stated that he believed the conduct of Downs' trial counsel "prevented him from getting a fair trial."

Our review of the order granting postconviction relief requires deference to the court's factual findings. *See State v. Bush*, 292 So. 3d 18, 21 (Fla. 5th DCA 2020); *see also State v. Patterson*, 966 So. 2d 471, 477 (Fla. 2d DCA 2007) (finding that the principle of affording deference to the postconviction court's factual findings in reviewing a denial of a motion for postconviction relief is "applicable equally where—as in this case—the trial court grants a motion for postconviction relief alleging ineffective assistance of counsel"). Importantly, "an appellate court is not empowered to make findings of fact." *Farneth v. State*, 945 So. 2d 614, 617 (Fla. 2d DCA 2006). Because the postconviction court did not make factual findings, this court cannot independently review the sufficiency of the court's conclusion. "[W]hen a lower court makes insufficient findings of fact, we remand for the lower court to make necessary findings because we are precluded from making factual findings in the first instance." *State v. Jenkins*, 120 So. 3d 649, 650 (Fla. 5th DCA 2013); *see, e.g.*, *Hunter v. State*, 87 So. 3d 1273, 1275 (Fla. 1st DCA 2012) (reversing and remanding the denial of a motion for postconviction relief where the court did not make sufficient factual findings); *Kornegay v. State*, 826 So. 2d 1081, 1081 (Fla. 1st DCA 2002)

(reversing and remanding the order denying the postconviction motion where the "court cannot independently review the sufficiency of the court's conclusion under the prejudice prong" due to a lack of factual findings); *Dillbeck v. State*, 882 So. 2d 969, 973 (Fla. 2004) (remanding for the lower court to make findings and conclusions of law where the Florida Supreme Court could not determine from the order what the findings and conclusions were as to the claims); *Featured Props., LLC v. BLKY, LLC*, 65 So. 3d 135, 137 (Fla. 1st DCA 2011) ("[W]here . . . orders do not contain sufficient findings of fact . . ., appellate courts typically deem them incapable of meaningful review and they remand with directions to the issuing courts to make the necessary findings" (quoting *In re Doe*, 932 So. 2d 278, 283 (Fla. 2d DCA 2005))).

Accordingly, we reverse and remand for the postconviction court to make sufficient findings and conclusions in accordance with the two-pronged analysis of whether counsel provided ineffective assistance under *Strickland*.

REVERSED AND REMANDED.

ATKINSON, J.A., and STARGEL, J.K., ASSOCIATE JUDGES, Concur.