DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

KIMBERLEE SZEWCZYK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-10

October 21, 2022

BY ORDER OF THE COURT:

Kimberlee Szewczyk's motion for rehearing, motion for rehearing en banc, and request for written opinion is granted in part and denied in part. The prior opinion dated April 8, 2022, is withdrawn, and the attached opinion is issued in its place. No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL
CLERK

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

KIMBERLEE SZEWCZYK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-10

October 21, 2022

Appeal from the Circuit Court for Charlotte County; Donald H. Mason, Judge.

Rachael E. Reese of O'Brien Hatfield Reese, P.A., Tampa, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and William C. Shelhart, Assistant Attorney General, Tampa for Appellee.

BLACK, Judge.

Kimberlee Szewczyk challenges the denial of her motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm but write to address Szewczyk's

argument that the postconviction court erred in denying her claim regarding trial counsel's failure to file a motion to suppress evidence found during a warrantless search of her home.

Szewczyk was charged with one count of conspiracy to traffic in oxycodone, eighteen counts of trafficking in oxycodone, and eighteen counts of obtaining a controlled substance by fraud. She was convicted as charged on all counts following a jury trial.

At the time Szewczyk was arrested on the drug charges, she was on probation for an unrelated conviction. The terms of her probation did *not* include warrantless searches of her home. However, Szewczyk's probation officer, accompanied by at least nine law enforcement officers, entered her residence and conducted a search without a warrant. Szewczyk's trial counsel did not move to suppress the evidence obtained during the warrantless search, and that evidence was introduced at the trial on the drug charges.

In her postconviction motion, Szewczyk argued that her trial counsel's failure to file a motion to suppress the evidence obtained during the warrantless search constituted ineffective assistance of counsel. She asserted that law enforcement had neither a warrant

nor reasonable suspicion of any criminal activity, rendering the search of her residence a violation of the Fourth Amendment.

After an evidentiary hearing addressing this claim, the postconviction court determined that Szewczyk's trial counsel had performed deficiently in failing to file a motion to suppress the evidence found during the warrantless search. In reaching that determination, the court considered the facts of Szewczyk's case, including a concession by law enforcement officers that they had no reasonable suspicion to believe Szewczyk was engaged in criminal activity, and precedent from the Florida Supreme Court, Florida District Courts of Appeal, and the United States Supreme Court on the issue of probationary versus investigatory searches.[1] However,

---

[1] The court cited *Grubbs v. State*, 373 So. 2d 905, 909-10 (Fla. 1979), for its holding that a warrantless search of a probationer's residence by law enforcement officers—rather than a probation supervisor—"is not permissible under the search and seizure provisions of the Florida or United States Constitutions . . . in the absence of one of the traditional exceptions to the warrant requirement." The court also cited *United States v. Knights*, 534 U.S. 112, 122 (2001), for its holding that a "warrantless search of [the probationer's home], supported by reasonable suspicion *and* authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment." (Emphasis added.) Although the court cited additional cases, *Grubbs* and *Knights* are the principal cases addressing warrantless searches of probationers' homes. We agree with the postconviction court that the facts of

the postconviction court denied Szewczyk's claim because it determined that she had failed to establish that she was prejudiced by counsel's deficient performance. *See Abdool v. State*, 220 So. 3d 1106, 1112 (Fla. 2017) (reiterating that both deficient performance and prejudice must be shown in order for a motion for postconviction relief alleging ineffective assistance of counsel to be granted and that "when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong" (quoting *Zakrzewski v. State*, 866 So. 2d 688, 692 (Fla. 2003))).

We agree that Szewczyk failed to establish that she was prejudiced by counsel's purportedly deficient performance.[2] The

---

each case must be considered in determining whether and how *Grubbs* and *Knights* apply, and we note that none of the cases relied upon by Szewczyk and the State address a warrantless search by law enforcement officers without reasonable suspicion and where the probation order does not include a provision authorizing warrantless searches.

[2] We decline to address the deficient performance determination by the postconviction court. *See Gonzalez v. State*, 249 So. 3d 1269, 1276 (Fla. 1st DCA 2018) ("Because the defendant must prove both deficient performance and prejudice, we address this case without deciding whether the [postconviction] court's findings as to any deficient performance by defense counsel are supported by competent, substantial evidence.").

postconviction court correctly determined that although one piece of evidence found during the warrantless search was heavily relied upon in the State's case against Szewczyk, the totality of the evidence against her precludes a reasonable probability that the outcome of the trial would have been different had the evidence in question been suppressed. *See Cannon v. State*, 310 So. 3d 1259, 1264 (Fla. 2020) (stating that the totality of the evidence is considered when determining whether prejudice has been shown in a claim of ineffective assistance of counsel). In addition to the three codefendants who testified that Szewczyk actively participated in obtaining fraudulent prescriptions and trafficking in oxycodone, Szewczyk testified that she and a codefendant had an agreement whereby she would receive oxycodone in exchange for finding a pharmacy that would fill a fraudulent prescription for the codefendant and that she had inserted a codefendant's name on a prescription that had already been written and signed. This testimony supports the convictions without consideration of the evidence obtained in the warrantless search. *Cf. id.* ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record

support." (quoting *Williamson v. State*, 123 So. 3d 1060, 1066 (Fla. 2013))).

The order denying Szewczyk's motion for postconviction relief is affirmed.

Affirmed.

ATKINSON, J., Concurs.
LUCAS, J., Concurs in result only.