

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

STATE OF FLORIDA,

Appellant,

v.

GERARDO OLIVARES JESUS,

Appellee.

No. 2D21-1843

November 30, 2022

Appeal from the Circuit Court for Collier County; Ramiro Mañalich,
Judge.

Ashley Moody, Attorney General, Tallahassee and Chris Phillips,
Assistant Attorney General, Tampa; and William C. Shelhart,
Assistant Attorney General, Tampa (substituted as counsel of
record), for Appellant.

Wade M. Whidden and Karen A. Johnson of Whidden Johnson, P.L.,
Tampa, for Appellee.

PER CURIAM.

The State of Florida appeals from the postconviction court's
order finding that appellee Gerardo Olivares Jesus's trial counsel

was ineffective for failing to identify and advise the appellee of the existence of exculpatory evidence, vacating his judgment and sentence, and ordering a new trial. Because the postconviction court did not apply the correct standard in evaluating the appellee's claim, we reverse and remand for the court to reconsider the claim applying the correct standard.

The appellee was charged with one count of shooting into an occupied vehicle and one count of aggravated battery with a firearm. He entered a negotiated plea of no contest to the charge of shooting into an occupied vehicle, and the trial court adjudicated him guilty and sentenced him to fifteen years in the Department of Corrections. The State filed a nolle prosequi as to the charge of aggravated battery with a firearm.

The appellee filed a motion for postconviction relief alleging, among other claims, that his counsel was ineffective for failing to identify and advise him of the existence of a video that he alleged was exculpatory. The appellee alleged the video showed someone else firing the gun at the vehicle and that had he known the video was exculpatory, he would not have entered a plea. After an evidentiary hearing, the postconviction court granted the motion

and ordered a new trial. We agree with the State that in granting the motion the postconviction court did not apply the proper standard in evaluating whether the appellee was prejudiced by counsel's deficient performance.

A claim of ineffective assistance of counsel has two components. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The appellee bore the burden of establishing both components. *Id.* First, counsel's performance must be deficient, which means "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* Second, the appellee must establish prejudice. In the context of a plea, the Supreme Court has held that a defendant must demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

[I]n determining whether a reasonable probability exists that the defendant would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at trial.

Grosvenor v. State, 874 So. 2d 1176, 1181-82 (Fla. 2004). Here, the postconviction court focused only on its conclusion that counsel could have used the video at trial to show that another individual fired the weapon and that this defense could have succeeded at trial. Because *Grosvenor* requires that the postconviction court consider other factors in determining whether a reasonable probability exists that the appellee would have insisted on going to trial, we reverse and remand for the court to reconsider the appellee's claim applying the correct standard.

Reversed and remanded.

NORTHCUTT, KELLY, and LaROSE, JJ., Concur.

Opinion subject to revision prior to official publication.