DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

HOOVER EMILSON ARROYAVE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-3497

November 9, 2022

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Pinellas County; Philip J. Federico, Judge.

J. Jervis Wise of Brunvand Wise, P.A., Clearwater, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Cerese Crawford Taylor, Assistant Attorney General, Tampa, for Appellee.

SMITH, Judge.

Hoover Emilson Arroyave challenges the order summarily denying his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. Because claim six of Mr.

Arroyave's postconviction motion is not conclusively refuted by the record, we reverse the order as to that claim and remand for further proceedings. We affirm the order in all other respects.

In 2017, Mr. Arroyave was convicted of two counts of attempted second-degree murder. The trial court sentenced him to concurrent minimum mandatory sentences of twenty years' prison on count one and twenty-five years' prison on count two. The minimum mandatory terms were based on section 775.087, Florida Statutes (2014), because a firearm was used in the offenses. This court affirmed Mr. Arroyave's judgment and sentences. *See Arroyave v. State,* 280 So. 3d 29 (Fla. 2d DCA 2019) (table decision). Mr. Arroyave subsequently filed his timely motion for postconviction relief, raising several claims of ineffective assistance of trial counsel.

To plead a facially sufficient claim of ineffective assistance of counsel, a defendant must plead sufficient facts to establish that his counsel's performance was deficient and that he was prejudiced by such deficiency. *See Martin v. State*, 205 So. 3d 811, 812 (Fla. 2d DCA 2016) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

In claim six of his motion, Mr. Arroyave alleged that his counsel was ineffective for failing to inform him that he would be subject to a twenty-five-year minimum mandatory term should he be convicted of attempted second-degree murder at trial. Mr. Arroyave contended that this lack of information led him to reject a favorable plea offer of fifteen years' prison with a minimum mandatory term of ten years. Mr. Arroyave alleged that had he known the severity of the minimum mandatory sentence he faced, he would have accepted the State's fifteen-year offer.

The postconviction court determined that this claim was conclusively refuted by the record because the record demonstrated that Mr. Arroyave should have known he faced a minimum mandatory term and that he did not react to imposition of the twenty-five-year minimum mandatory term at sentencing. To the extent that the postconviction court reasoned that Mr. Arroyave must have been aware that *some* minimum mandatory term would apply, given that the State's plea offer included a minimum mandatory term of ten years, this fact does not demonstrate that Mr. Arroyave was made aware that a conviction at trial would result in a minimum mandatory term of twenty-five years' prison. Nor

could Mr. Arroyave be expected, as the postconviction court further suggested, to refer to the statutes cited in the charging information to ascertain for himself the applicable minimum mandatory terms. *See Plancarte v. State*, 975 So. 2d 487, 487 (Fla. 2d DCA 2007) ("We reject the postconviction court's conclusion that Plancarte was as a matter of law chargeable—solely by virtue of notice of the charge brought against him—with knowledge of the maximum penalty to which he was exposed and therefore would be unable to show that he was prejudiced by counsel's alleged ineffectiveness."). It was ultimately *counsel's* responsibility to inform Mr. Arroyave of the potential penalties he faced. *See Walker v. State*, 642 So. 2d 56, 57 (Fla. 2d DCA 1994) ("Defense counsel must inform a defendant of . . . any mandatory minimum penalties. . . . [H]is attorney's failure to advise Walker of the minimum mandatory penalties constitutes ineffective assistance of counsel." (citation omitted) (citing *Norris v. State*, 343 So. 2d 964 (Fla. 1st DCA 1977))); *see also* Fla. R. Crim. P. 3.171(c)(2)(B) ("Defense counsel shall advise defendant of . . . all pertinent matters bearing on the choice of which plea to enter and the particulars attendant upon each plea and the likely results thereof, as well as any possible alternatives that may be open to the

defendant."). The attached postconviction record does not demonstrate that counsel so informed Mr. Arroyave.

As for the postconviction court's conclusion that counsel informed Mr. Arroyave that he faced a twenty-five-year minimum mandatory term because Mr. Arroyave "registered no reaction to the imposition of the 25-year minimum mandatory term at sentencing," Mr. Arroyave's lack of reaction does not refute his claim that counsel did not inform him that he faced the twenty-five-year minimum mandatory term before he rejected the State's offer. "In the context of ineffective assistance resulting in the rejection of a plea offer, '[p]rejudice . . . is determined based upon a consideration of the circumstances as viewed *at the time of the offer* and what would have been done *with proper and adequate advice*.' " *Armstrong v. State*, 148 So. 3d 124, 126 (Fla. 2d DCA 2014) (quoting *Alcorn v. State*, 121 So. 3d 419, 432 (Fla. 2013)). Therefore, even if Mr. Arroyave became aware of the relevant minimum mandatory terms at some point after he rejected the State's plea offer but before sentencing, this "could not cure counsel's alleged failure to provide him with all of the information necessary to make an informed decision concerning the offer."

Wilson v. State, 189 So. 3d 912, 913 (Fla. 2d DCA 2016) (citing *Armstrong v. State*, 148 So. 3d 124, 126 (Fla. 2d DCA 2014)).

Accordingly, because the present record does not conclusively refute Mr. Arroyave's claim that trial counsel failed to advise him of the relevant minimum mandatory terms, resulting in the rejection of a favorable plea offer, we reverse the postconviction court's order insofar as it denies claim six and remand for the postconviction court to either attach those portions of the record that conclusively refute Mr. Arroyave's claim or conduct an evidentiary hearing. We affirm in all other respects.

Affirmed in part, reversed in part, and remanded.

LaROSE and SLEET, JJ., Concur.

Opinion subject to revision prior to official publication.