

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

GEORGE EDWARD JACKSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-3827

October 28, 2022

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Pinellas County; William H. Burgess, III, Judge.

ATKINSON, Judge.

George E. Jackson appeals the order summarily denying his motion for postconviction relief in which he alleged four ineffective assistance of counsel claims. We affirm the part of the postconviction court's order denying Jackson's first, second, and fourth claims without further discussion. However, we reverse the

part of the postconviction court's order summarily denying Jackson's third claim as facially insufficient.

In 2018, Jackson entered an open plea of guilty to each of the felonies charged in cases 17-000437-CF, 17-01166-CF, 17-07563-CF, 18-12052-CF, and 18-12053-CF. The trial court sentenced Jackson to five years of imprisonment for each felony offense, all sentences to be served concurrently. The trial court imposed costs of prosecution and investigative costs for the offenses charged in cases 17-000437-CF, 17-01166-CF, and 17-07563-CF. Although Jackson filed a consolidated direct appeal of his convictions and sentences in each of the cases, the appeal was voluntarily dismissed. *See Jackson v. State*, 265 So. 3d 602 (Fla. 2d DCA 2019).

In 2019, Jackson filed a motion for postconviction relief, alleging four claims of ineffective assistance of counsel. The postconviction court struck his initial motion as facially insufficient but allowed Jackson to file an amended motion. Jackson timely filed an amended postconviction motion.

In claim three of his amended motion for postconviction relief, Jackson alleged that his trial counsel rendered ineffective

assistance by failing to object to the imposition of costs of prosecution and investigative costs. He alleged that the record indicated that the State did not request an award of costs of prosecution, the investigative agencies did not request investigative costs, and the State failed to provide any documentation to support the amounts of investigative costs awarded. He alleged that if trial counsel had objected, the trial court would not have imposed these costs and thus, the outcome of the proceeding would have been different. The postconviction court denied claim three as facially insufficient because it concluded that Jackson failed to sufficiently allege prejudice. The postconviction court found that Jackson had failed to sufficiently allege prejudice because he did not allege that, but for trial counsel's alleged unprofessional errors, he would not have pleaded guilty and would have insisted on going to trial instead. *See Grosvenor v. State*, 874 So. 2d 1176, 1181 (Fla. 2004).

"The postconviction court's summary denial of a claim of ineffective assistance of counsel is reviewed de novo." *Brown v. State*, 335 So. 3d 820, 821 (Fla. 2d DCA 2022) (citing *Romaine v. State*, 283 So. 3d 425, 427 (Fla. 2d DCA 2019)). "The summary denial will be affirmed if the claim is facially insufficient or

'conclusively refuted by the record, the relevant portions of which must be attached to the postconviction court's order.' " *Id.* (quoting *Romaine*, 283 So. 3d at 427–28).

Generally, to prevail on a claim for ineffective assistance of counsel, the defendant must satisfy the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). "First, the defendant must show that counsel's performance was deficient," and "[s]econd, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In cases involving guilty pleas, the Florida Supreme Court has held that "for the second prong, . . . a defendant must demonstrate 'a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial.'" *Long v. State*, 183 So. 3d 342, 345 (Fla. 2016) (quoting *Grosvenor*, 874 So. 2d at 1181). However, this modified standard has no logical application outside of the context of the entry of a plea. *Cf. Grosvenor*, 874 So. 2d at 1181 (applying the

modified standard for establishing prejudice in a case in which the defendant alleged counsel was "ineffective for failing to advise of an available defense" prior to her entry of a guilty plea); *Hill v. Lockhart*, 474 U.S. 52, 55 (1985) (misadvice regarding parole eligibility prior to entry of plea); *Brazeail v. State*, 821 So. 2d 364, 365 (Fla. 1st DCA 2002) (misadvice regarding eligibility for early release prior to entry of plea).

The deficient performance alleged in Jackson's motion—counsel's failure to object to the imposition of costs during the sentencing hearing—occurred *after* and was unrelated to Jackson's entry of his guilty plea. *Cf. Phillips v. State*, 225 So. 3d 269, 271 (Fla. 4th DCA 2017) (applying the *Strickland* standard for the prejudice prong to determine whether the defendant had established prejudice as a result of trial counsel's failure to object to imposing a sentence that exceeded the agreed-upon sentence). As such, the modified standard for determining prejudice articulated in *Grosvenor* and *Long* is not applicable to claim three of Jackson's amended postconviction motion.

"Counsel's failure to challenge the imposition of costs can serve as a basis for postconviction relief." *Hornstra v. State*, 218 So.

3d 979, 980 (Fla. 5th DCA 2017). Section 938.27(1), Florida Statutes (2018), provides in relevant part that "[i]n all criminal . . . cases, convicted persons are liable for payment of the costs of prosecution, including investigative costs incurred by law enforcement agencies . . . if requested by such agencies." Although the State must provide documentation to support imposition of costs in excess of \$100, additional documentation is not necessary for the trial court to impose the minimum \$100 amount for costs of prosecution. *See* § 938.27(8). However, it is error for the trial court to impose costs of prosecution in the absence of an express request for these costs by the State Attorney's Office. *D.L.J. v. State*, 331 So. 3d 227, 228 (Fla. 2d DCA 2021). With respect to investigative costs, the relevant investigative agencies must request an award of investigative costs and the state attorney must present competent substantial evidence to support the amount requested. *See* § 938.27(1), (4), (7); *see also Negron v. State*, 266 So. 3d 1266, 1267 (Fla. 5th DCA 2019).

Here, Jackson sufficiently alleged in his amended motion that he was prejudiced as a result of his trial counsel's alleged deficient performance. First, he sufficiently alleged that but for his trial

counsel's failure to object to the imposition of unrequested costs of prosecution, these costs would not have been imposed and therefore the result of the sentencing hearing would have been different. *Cf. D.L.J.*, 331 So. 3d at 228. Second, he sufficiently alleged that but for his trial counsel's failure to object to the imposition of unrequested investigative costs and to the state attorney's failure to provide competent substantial evidence in support of the amounts of investigative costs awarded, the trial court would not have imposed those costs and therefore the result of the sentencing hearing would have been different. *Cf. Strickland*, 466 U.S. at 694.

"When reviewing the summary denial of a motion for postconviction relief, this court . . . 'must accept the movant's factual allegations as true to the extent they are not refuted by the record.' " *Williams v. State*, 310 So. 3d 975, 976 (Fla. 2d DCA 2020) (quoting *Martin v. State*, 205 So. 3d 811, 812 (Fla. 2d DCA 2016)).

The postconviction court did not attach portions of the record that conclusively refute Jackson's allegations that trial counsel failed to object to the imposition of costs of prosecution and investigative costs when the State failed to request them and failed

to present competent substantial evidence of the amount of investigative costs. Therefore, we affirm the postconviction court's order in part, reverse in part, and remand for the postconviction court to either attach portions of the record that refute claim three of Jackson's amended postconviction motion or hold an evidentiary hearing on claim three. *See Woodbury v. State*, 302 So. 3d 492, 494–95 (Fla. 2d DCA 2020).

Affirmed in part, reversed in part, and remanded.

MORRIS, C.J., and KHOUZAM, J., Concur.

Opinion subject to revision prior to official publication.