DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

MATTHEW RUBRIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D22-2008

December 7, 2022

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

Deana K. Marshall of Law Office of Deana K. Marshall, P.A., Riverview, for Appellant.

PER CURIAM.

Matthew Rubright appeals from the order summarily denying his motion filed under Florida Rule of Criminal Procedure 3.850. We reverse and remand for further proceedings consistent with this opinion.

The postconviction record reflects that in case number 2017-CF-12368, the State charged Mr. Rubright with attempted robbery. At some point before August 8, 2018, which was the day of trial, the State offered Mr. Rubright a sentence of seventy-two months' imprisonment in exchange for his guilty plea.[1] Mr. Rubright's counsel told the court that Mr. Rubright had rejected that offer and that he wanted to enter an open plea and defer sentencing so he could obtain an evaluation for the purpose of seeking a downward departure sentence. The trial court conducted the plea colloquy and accepted Mr. Rubright's no-contest plea.

On October 26, 2018, the State filed a notice that Mr. Rubright qualified as a prison releasee reoffender (PRR). The prosecutor explained to the court:

> This is — and I let the Defense attorney — I don't know if she gave you the situation. Basically, in preparing for this hearing I noticed that the Defendant qualified as PRR. Obviously, that wasn't something that was part of our plea discussions. But it was an open plea, but the Defendant wasn't aware of it at the time.

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[1] The transcript of this plea hearing reflects that Mr. Rubright was also facing charges of driving while license suspended or revoked and possession of paraphernalia in case number 2017-CF-15379.

The court granted Mr. Rubright's subsequent motion to withdraw his no-contest plea.

On March 5, 2019, Mr. Rubright was again before the trial court for a change of plea hearing. The prosecutor informed the trial court that the State had offered Mr. Rubright a fifteen-year mandatory minimum PRR sentence in this case to be served concurrently with sentences in his three other pending cases[2] and that Mr. Rubright faced a maximum sentence of 120 years' imprisonment if convicted at trial of all his pending charges. Mr. Rubright chose to enter guilty pleas, and the trial court adjudicated Mr. Rubright guilty of each crime charged in the four cases and sentenced him as a PRR to fifteen years' imprisonment for the attempted robbery to run concurrently with terms of fifteen years'

[2] In addition to the charges Mr. Rubright faced in case number 2017-CF-15379, the State had charged Mr. Rubright in case 2018-CF-08888 with five counts of dealing in stolen property and one count of fraudulent use of a credit card and in case number 2018-CF-08889 with dealing in stolen property and grand theft.

and five years' imprisonment for the second-degree and third-degree felony convictions in the other cases.[3]

Mr. Rubright filed a rule 3.850 motion only in case number 2017-CF-12368. He alleged that his trial counsel was ineffective for not advising him that he qualified as a PRR and therefore faced a fifteen-year mandatory minimum sentence when the State offered to accept his plea in exchange for a seventy-two month sentence. He further alleged that had he known that he faced a fifteen-year mandatory minimum sentence, he would have accepted the offer, and he would have been sentenced to seventy-two months' imprisonment for this offense.[4]

The postconviction court determined that Mr. Rubright pleaded a facially sufficient claim of deficient performance that was not conclusively refuted by the record but stated that it could not order the State to again extend the offer for seventy-two months'

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[3] The trial court sentenced Mr. Rubright to time served for his possession of paraphernalia conviction in case number 2017-CF-15379.

[4] Mr. Rubright also alleged, pursuant to *Alcorn v. State*, 121 So. 3d 419, 422 (Fla. 2013), that the State would not have withdrawn the offer and that the trial court would have accepted it.

imprisonment because the State, not the trial court, has sole discretion to pursue a PRR sentence.[5] It ruled:

> The record reflects that after the State filed its notice of intent to seek PRR sentencing, the Court addressed the voluntariness of Defendant's open plea and allowed him to withdraw it. This was the sole remedy available. When Defendant pleaded guilty again on March 5, 2019, he was aware of the maximum penalty he faced and the State's unwillingness to waive the PRR designation. After considering Defendant's motion, the State's response, and the record, the Court finds Defendant's motion should be denied.

This court recently addressed a similar ruling in *Kohutka v. State*, 343 So. 3d 660 (Fla. 2d DCA 2022). Mr. Kohutka alleged that he rejected a five-year plea offer after his trial counsel incorrectly advised him of the maximum sentence for his charge and that his counsel did not advise him that the State had filed notices of intent to seek an enhanced PRR and habitual violent felony offender

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[5] *See Foulks v. State*, 306 So. 3d 1178, 1182 (Fla. 3d DCA 2020) ("[T]he PRR statute vests the state attorney with sole discretion to seek imposition of a PRR sentence for an eligible offender or waive it."); *see also Johnson v. State*, 834 So. 2d 384, 385 (Fla. 2d DCA 2003) (explaining that the PRR act, currently codified in section 775.082(9), Florida Statutes (2022), "established minimum mandatory sentences and removed sentencing discretion from the judicial branch" (citing *State v. Cotton*, 769 So. 2d 345, 347–49 (Fla. 2000))).

sentence. *Id.* at 663. The postconviction court denied Mr. Kohutka's motion after an evidentiary hearing, ruling that the trial court's explanation of Mr. Kohutka's sentencing exposure on the day of trial and his decision that day to reject a less favorable offer prevented him from establishing prejudice. *Id.*

This court explained that the postconviction court erred by concluding that events occurring after Mr. Kohutka rejected the State's offer "overcame any prejudice that might have been caused by his counsel's deficiencies." *Id.* at 664. We reminded the postconviction court that "[i]n 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.' " *Id.* (alteration in original) (quoting *Wilson v. State*, 189 So. 3d 912, 913 (Fla. 2d DCA 2016)). This court also addressed the postconviction court's conclusion that Mr. Kohutka could not show prejudice because the only possible remedy would be to direct the State to again engage in plea negotiations.

> [T]he postconviction court was mistaken as a matter of law. The potential remedy available to Kohutka is not confined to simply renegotiating with the State. Rather, remedies for Sixth Amendment violations may vary according to the circumstances and "should be 'tailored to the injury suffered from the constitutional violation.' " *Alcorn v. State*, 121 So. 3d 419, 428 (Fla. 2013) (quoting *Lafler v. Cooper*, 566 U.S. 156, 170, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012)). "Thus, a remedy must 'neutralize the taint' of a constitutional violation, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." *Alcorn*, 121 So. 3d at 428 (quoting *Lafler*, 566 U.S. at 170, 132 S.Ct. 1376).
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> As the *Lafler* court established, there are at least two types of injury that can arise from such violations, and "the remedy should be tailored accordingly." *Alcorn*, 121 So. 3d at 428.

Id. at 664-65. This court reversed the postconviction court's order and remanded for further proceedings.

The postconviction court's incorrect prejudice analysis in this case similarly requires this court to reverse the order summarily denying Mr. Rubright's motion and to remand for further proceedings. In doing so, we note that the postconviction record reflects that Mr. Rubright entered negotiated pleas in four cases. "[T]his court has recognized on numerous occasions, that a defendant cannot enforce a plea agreement against the State after withdrawing a plea." *Small v. State*, 249 So. 3d 675, 676 (Fla. 2d

DCA 2018); *see also Taylor v. State*, 132 So. 3d 882, 885 (Fla. 2d DCA 2014) (explaining that if the defendant chose to withdraw his negotiated plea, he could not enforce the plea agreement against the State); *Ciambrone v. State*, 938 So. 2d 550, 553 (Fla. 2d DCA 2006) (remanding with directions to give the defendant an opportunity to withdraw her plea but noting that "if she does so, neither she nor the State will be bound by the plea agreement"); *Moreland v. Smith*, 664 So. 2d 1039, 1040 (Fla. 2d DCA 1995) ("When a criminal defendant seeks to withdraw a negotiated plea, or to attack it collaterally, if he is successful he loses the benefit of the bargain he has elected to attack."). Should Mr. Rubright ultimately prevail on his motion and withdraw his negotiated plea in case number 2017-CF-12368, the State would no longer be bound by the terms of the negotiated agreement in case numbers 2017-CF-15379, 2018-CF-08888, and 2018-CF-08889. The State could choose to withdraw from the agreement in those cases, and Mr. Rubright could face substantially longer terms of imprisonment.

We also note that Mr. Rubright was represented by counsel in the postconviction court, and the same attorney has filed documents in this appeal. On remand, the postconviction court

shall provide Mr. Rubright the opportunity to consult with his postconviction counsel to ensure he understands the possible consequences should the postconviction court ultimately find that his trial counsel provided ineffective assistance in case number 2017-CF-12368.

Reversed and remanded.

KELLY and ROTHSTEIN-YOUAKIM, JJ., Concur.
LUCAS, J., Concurs with separate opinion.

LUCAS, Judge, Concurring separately.

I completely agree that Mr. Rubright's attorney's advice to reject the State's seventy-two-month plea offer in order to pursue an open plea constituted deficient performance of such a degree that it violated Mr. Rubright's Sixth Amendment right to effective counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Constrained by the holdings of the Supreme Court of the United States and the Florida Supreme Court, I must also concur with our court's decision to remand this case for an evidentiary hearing to address the prejudice Mr. Rubright suffered.[6] *See Lafler v. Cooper*,

[6] That is, assuming Mr. Rubright truly wishes to unwind the plea agreement he reached in three other criminal cases that were resolved at the same time as the case sub judice.

566 U.S. 156 (2012); *Missouri v. Frye*, 566 U.S. 134 (2012); *Alcorn v. State*, 121 So. 3d 419 (Fla. 2013). As the Supreme Court stated in *Lafler*:

> [I]f a mandatory sentence confines a judge's sentencing discretion after trial . . . the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed. In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here.

566 U.S. at 171.

The vagaries of what exactly a postconviction court is supposed to *do* in these kinds of cases—how it should exercise its "discretion" to redress what is deemed a constitutional deprivation of a favorable plea offer—remain much the same as they were a decade ago when *Lafler* and *Frye* were decided. In *Alcorn*, the Florida Supreme Court added a factor for courts to consider—that is, whether the prosecution would have withdrawn the offer and the trial court would have accepted it—but that was simply another

point of measurement, not a guiding principle of discretion. Little has changed since then.[7]

So I sympathize with the postconviction court and the lawyers in this case who, on remand, must now navigate a course through an area of law appellate courts seem incapable of mapping out. It's not at all clear how judges are supposed to balance the limits of their lawful authority, the mandates of sentencing statutes, the inherent "give-and-take" nature of plea bargaining, and the constitutional directives of *Lafler* and *Frye*. They are expected to engage in hindsight in a process that is ordinarily prospective in its

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[7] Indeed, the best we could manage in *Kohutka v. State*, 343 So. 3d 660, 665 & n.4 (Fla. 2d DCA 2022), was to direct the postconviction court to "devise a proper remedy as discussed in the line of cases starting with *Lafler* and *Alcorn*," and to suggest that the court "may need to take further evidence on the nature of the State's offer." To complicate the matter further, Florida courts have repeatedly held that a criminal defendant has no "right" to a plea offer, *see Hurt v. State*, 82 So. 3d 1090, 1093 (Fla. 4th DCA 2012), and the State is under no obligation to extend one in a criminal prosecution, *see Larson v. State*, 247 So. 3d 26, 34 (Fla. 2d DCA 2018) ("If Larson elects on remand to withdraw his plea he will be facing a significantly longer prison term than that which he is currently serving, and the State is under no obligation to offer another plea agreement."); *Odegaard v. State*, 137 So. 3d 505, 508 (Fla. 2d DCA 2014) ("[T]he State is not required to reoffer its original plea on remand." (citing *Rudolf v. State*, 851 So. 2d 839, 841-42 (Fla. 2d DCA 2003); *Eristma v. State*, 766 So. 2d 1095, 1097 (Fla. 2d DCA 2000))).

vantage. And all we, as courts of review, can say is for judges to exercise their discretion to remove the "taint" of a lawyer's inadequate counsel.

I am inclined to agree with Justice Scalia's observations, which seem prescient:

> While the inadequacy of counsel's performance in this case is clear enough, whether it was prejudicial (in the sense that the Court's new version of *Strickland* requires) is not. The Court's description of how that question is to be answered on remand is alone enough to show how unwise it is to constitutionalize the plea-bargaining process. Prejudice is to be determined, the Court tells us, by a process of retrospective crystal-ball gazing posing as legal analysis.

Frye, 566 U.S. at 153-54 (Scalia, J., dissenting). Hopefully on remand, the postconviction court can find a good, clear crystal ball with which to work.

Opinion subject to revision prior to official publication.