District Court Of Appeal Of Florida
Second District

DERRICK LAMOND UPSHUR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

No. 2D22-2520

March 17, 2023

Petition Alleging Ineffective Assistance of Appellate Counsel. Hillsborough County; Barbara Twine Thomas, Judge.

Derrick Lamond Upshur, pro se.

Ashley Moody, Attorney General, Tallahassee, and Alicia M. Winterkorn, Assistant Attorney General, Tampa, for Respondent.

PER CURIAM.

In his timely petition alleging ineffective assistance of appellate counsel filed under Florida Rule of Appellate Procedure 9.141(d), Derrick Lamond Upshur asserts that his appellate counsel was ineffective for failing to argue that his fifteen-year sentence for DUI manslaughter lacks the probationary component required by section 316.193(5), Florida Statutes (2016). We agree and grant the petition.

A jury found Mr. Upshur guilty of DUI manslaughter, among other offenses,[1] and the trial court sentenced Mr. Upshur to fifteen years' imprisonment with a four-year minimum mandatory term. Mr. Upshur appealed his judgment and sentences, and this court affirmed without written opinion. *Upshur v. State*, No. 2D20-543, 2021 WL 2622050 (Fla. 2d DCA June 25, 2021).

In support of his claim of ineffective assistance of appellate counsel, Mr. Upshur refers this court to the Fourth District's decision in *Powers v. State*, 316 So. 3d 352 (Fla. 4th DCA 2021), which issued while his direct appeal was pending before this court and held that when a defendant is convicted of an offense listed in section 316.193, the total sentence cannot exceed fifteen years—including the appropriate probationary period. Mr. Upshur contends that if his appellate counsel had requested supplemental briefing to challenge his sentence, there is a reasonable probability that this court would have reversed his sentence and remanded for the trial court to impose a sentence within the statutory maximum of fifteen years that includes the term of probation required by section 316.193(5).

To establish a claim of ineffective assistance of appellate counsel, a petitioner must show that appellate counsel performed deficiently and that "the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." *Downs v. Moore*, 801 So. 2d 906, 909–10 (Fla. 2001) (quoting *Wilson v. Wainwright*, 474 So. 2d 1162, 1163

[1] The jury also found him guilty of vehicular homicide, two counts of reckless driving with property damage or personal injury, and two counts of driving under the influence with property damage or personal injury. The trial court dismissed the conviction for vehicular homicide and imposed sentences of time served for the remaining convictions.

(Fla. 1985)). Regarding the deficiency prong, appellate counsel is not ineffective for failing to anticipate changes in the law, and "[t]he ineffectiveness of appellate counsel cannot be based upon the failure of counsel to assert a theory of law which was not at the time of the appeal fully articulated or established in the law." *Alvord v. State*, 396 So. 2d 184, 191 (Fla. 1981). However, appellate counsel can be ineffective for failing to raise issues of merit based on law decided during the pendency of a direct appeal. *See York v. State*, 891 So. 2d 569, 571 (Fla. 2d DCA 2004) ("Although [the pending cases] were not available to appellate counsel prior to the completion of her initial *Anders* brief . . . , she should have been aware of them and could have filed a motion to file a supplemental brief.").

In *Powers*, Mr. Powers—like Mr. Upshur—was convicted of DUI manslaughter, and the trial court sentenced him to fifteen years' imprisonment with a four-year minimum mandatory term. *Powers*, 316 So. 3d at 354. Mr. Powers' appellate counsel challenged this sentence in a motion filed under Florida Rule of Criminal Procedure 3.800(b)(2), and then on direct appeal, arguing that it lacked the probationary component required by section 316.193(5). *Id.* The Fourth District agreed. Although section 316.193(3)(a)-(c)3.a states that the offense is "[a] felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084," section 316.193(5) states that when a defendant is convicted of an offense listed in section 316.193, "[t]he court *shall* place all offenders convicted of violating that statute on monthly reporting probation and *shall* require completion of a substance abuse course." *Powers*, 316 So. 3d at 355 (quoting § 316.193(5), Fla. Stat. (2011)). The Fourth District reasoned that the probationary component in section 316.193(5) is mandatory, and "[w]hen a defendant is sentenced to a term

in prison followed by probation, the combined times must not exceed the statutory maximum." *Id.* (quoting *Jackson v. State*, 276 So. 3d 972, 973 (Fla. 5th DCA 2019)). It remanded the case for a de novo resentencing with directions that "[t]he total sentence may not exceed fifteen years, and *shall* include a probationary period that, at a minimum, is of sufficient length to permit [a]ppellant to complete a substance abuse course pursuant to section 316.193(5)." *Id.* at 356.

Mr. Upshur's appellate counsel filed his initial brief on September 1, 2020, and the State filed an answer brief on February 1, 2021. *Powers* issued on April 4, 2021, and this court affirmed Mr. Upshur's judgment and sentences about two-and-a-half months later on June 25, 2021. Even though appellate counsel was not expected to raise a novel argument, appellate counsel was expected to be aware of developments in the law relevant to Mr. Upshur's appeal and to request supplemental briefing when it could benefit Mr. Upshur. The failure to do so constitutes deficient performance. *See Banek v. State*, 75 So. 3d 762, 764 (Fla. 2d DCA 2011) (holding appellate counsel was ineffective in failing to seek supplemental briefing where the initial direct appeal brief and the State's answer brief were filed prior to the issuance of *Montgomery v. State*, 70 So. 3d 603 (Fla. 1st DCA 2009), but this court's per curiam affirmance did not issue until three months after *Montgomery* issued).

Mr. Upshur was prejudiced by his appellate counsel's failure to request supplemental briefing after *Powers* issued. At the time of Mr. Upshur's appeal, the argument raised in *Powers* was before this court in *Archer v. State*, 332 So. 3d 24 (Fla. 2d DCA 2021). Mr. Archer was also convicted of DUI manslaughter and sentenced to fifteen years in prison with a four-year minimum mandatory term. *Id.* at 25. While his direct

appeal was pending, Mr. Archer filed a rule 3.800(b)(2) motion asserting that the trial court erred in sentencing him to a term of fifteen years' prison without the period of probation required by section 316.193(5). *Id.* The trial court denied Mr. Archer's motion, reasoning that because section 316.193(3) provides that a person convicted of DUI manslaughter shall be punished as provided in sections 775.082, 775.083, or 775.084 and does not reference section 316.193(5), "punishment is not governed by section 316.193's DUI sentencing requirements." *Id.* This court disagreed.

> We are tasked, as the *Powers* court was, with considering on de novo review whether section 316.193(5) unambiguously conveys a clear meaning such that it must be given that meaning. *See* 316 So. 3d at 355 (quoting *McNeil v. State*, 215 So. 3d 55, 58 (Fla. 2017)). We find the *Powers* opinion persuasive and agree with its conclusion and analysis. Section 316.193(5) is unambiguous and requires that "in fashioning a sentence for a person convicted under section 316.193 (as here), the court shall place this person on 'monthly reporting probation' and *shall* require this person to complete a substance abuse course." *Powers*, 316 So. 3d at 355 (quoting § 316.193(5), Fla. Stat. (2011)).
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> Like the court in *Powers*, we also conclude that there is no conflict between the general sentencing statute—section 775.082, Florida Statutes (2018), in this case—and section 316.193 because section 775.082 provides for a maximum prison term of fifteen years not a mandatory prison term of fifteen years. Further, even if section 316.193(5) was ambiguous such that statutory construction principles were to be applied, the more specific statute is section 316.193(5) and the two provisions can otherwise be read in harmony. *See Powers*, 316 So. 3d at 355–56 (discussing principles of statutory construction and recognizing that in *McGhee v. State*, 847 So. 2d 498, 504 (Fla. 4th DCA 2003), the court had "necessarily rejected the argument that section 316.193(3)'s sentencing parameters are solely provided by section

> 775.082" because "[s]ubsection (5) requires probation and DUI school on *any* violation of section 316.193").

Id. at 25–26. This court reversed Mr. Archer's sentence and remanded for a de novo sentencing hearing with directions to impose a sentence between the lowest permissible sentence authorized by the Criminal Punishment Code and the statutory maximum of fifteen years that includes "a probation period of sufficient length to allow Archer to complete the substance abuse course requirement of section 316.193(5)." *Id.* at 26.[2]

Archer supports Mr. Upshur's claim that had appellate counsel sought supplemental briefing, this court would have reversed Mr. Upshur's fifteen-year prison sentence and would have remanded with directions to impose a sentence between 123 months, Mr. Upshur's lowest permissible sentence, and fifteen years, the statutory maximum, which would include any period of probation sufficient to complete the substance abuse course required by section 316.193(5). Accordingly, the petition alleging ineffective assistance of appellate counsel is granted, the sentence imposed upon Mr. Upshur is vacated, and the matter is remanded to the trial court for resentencing. Because a new appeal is unnecessary to determine that Mr. Upshur's sentence lacks the mandatory probationary component, we direct the trial court to conduct

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[2] In *Powers*, the Fourth District certified the following question to the supreme court: "DOES SECTION 316.193(5)'S REQUIREMENTS OF 'MONTHLY REPORTING PROBATION' AND COMPLETION OF A SUBSTANCE ABUSE COURSE VITIATE A TRIAL COURT'S DISCRETION TO IMPOSE THE MAXIMUM FIFTEEN-YEAR PRISON SENTENCE PROVIDED IN SECTION 775.082, FLORIDA STATUTES?" 316 So. 3d at 356. It certified the question again in *Bell v. State*, 329 So. 3d 157, 159 (Fla. 4th DCA 2021), and this court certified the same question in *Archer,* 332 So. 3d at 26.

a de novo sentencing hearing following which the court must impose a sentence that includes a period of probation of sufficient length to allow him to complete the substance abuse course requirement of section 316.193(5).

Petition granted; sentence vacated.

NORTHCUTT, KELLY, and SMITH, JJ., Concur.

Opinion subject to revision prior to official publication.