NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

OSCAR O. REYNA, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D08-518

Opinion filed September 11, 2009.

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Hendry County; Bruce E. Kyle, Judge.

Oscar O. Reyna, pro se.

CASANUEVA, Chief Judge.

Oscar Reyna appeals an order denying his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. The postconviction court characterized his claims of ineffectiveness of trial counsel as (1) failing to provide an interpreter at a private meeting where plea offers were discussed, (2) misleading him regarding the length of the sentence he would actually serve in prison if he were to have

accepted the State's offer of twenty years, and (3) failing to inform him of the maximum sentence he could receive. We affirm the summary denial of Mr. Reyna's first and third claims without comment. However, because Mr. Reyna's second claim is a facially sufficient, legally cognizable claim that is not conclusively refuted by the record, we reverse and remand for an evidentiary hearing.

Analysis

Mr. Reyna's second claim stated:

> [H]e was led to believe that the plea offer was mandatory because the trial counsel kept advising him as to the maximum time he could have received in prison if found guilty on all the charges, and not the minimum time he could have received if he had taken the State's plea offer of (20) years with all available jail and prison time credits served.

He further explained that "had Defendant been correctly informed by trial counsel that he could have received all previous jail time credits and prison credits towards the (20) year plea deal, which would have made his sentence lesser, then he would have accepted the State's offer."

The postconviction court disposed of the claim as follows:

> Defendant's second argument is that counsel was ineffective for allegedly failing to inform the Defendant that he could receive all credit time served prior to sentencing with the State's plea offer of 20 years and suggesting that the State's 20 year offer was mandatory. This Court has carefully reviewed the transcript of the violation of probation hearing, which includes an extensive discussion between counsel and Defendant as to the State's plea offer. This Court cannot read into that discussion any suggestion on the part of counsel that the 20 year offer was "mandatory." Defendant does not suggest that counsel offered any affirmative misadvise [sic], as it relates to jail or prison credit; in other words, Defendant never alleges that counsel even told him that he would not receive jail or prison credit to which he would be legally entitled. The record conclusively

> demonstrates that counsel did inform Defendant of the State's offer, that he was facing a greater sentence, and informed Defendant that his counter offer of ten years was rejected. Accordingly, Defendant's second argument is without merit.

To file a successful claim of ineffective assistance of counsel, "a defendant must . . . assert facts that support his or her claim that counsel's performance was deficient and that the defendant was prejudiced by counsel's deficient performance." Nelson v. State, 875 So. 2d 579, 583 (Fla. 2004). Where the trial court has summarily denied the claim, we are required to accept the defendant's factual allegations to the extent that they are not refuted by the record. Rhodes v. State, 986 So. 2d 501, 513 (Fla. 2008). The ultimate merit of a defendant's claim is not at issue on appeal.

The essence of Mr. Reyna's second claim centers upon the State's plea offer of a twenty-year prison term to resolve all his pending cases. Basically, he claimed that had counsel advised him that the twenty-year prison term being offered by the State would have been offset by the time he had already spent in jail—in his words, "a lesser sentence"—the offer would have been accepted, and he would not now be serving a prison term of fifty-five years.

" '[F]or counsel to provide the reasonably effective assistance mandated by the Constitution, he need advise his client of . . . the direct consequences of a guilty plea.' " Bolware v. State, 995 So. 2d 268, 272 n.3 (Fla. 2008) (quoting State v. Ginebra, 511 So. 2d 960, 960 (Fla. 1987)). Whether counsel's alleged conduct was deficient in this case turns on the definition of "direct consequence." "[A] 'direct consequence must affect the range of punishment in a definite, immediate, and largely automatic way.' " Id.

at 273 (quoting State v. Partlow, 840 So. 2d 1040, 1043 (Fla. 2003) (emphasis omitted)). Credit for time served, or jail credit, is a direct consequence of a plea because it affects the range of punishment—in this case, the length of Mr. Reyna's incarceration—in a definite manner, immediately and automatically upon imposition of a sentence.

Further, Mr. Reyna adequately alleged prejudice, asserting that he would have accepted the plea and not gone to trial but for counsel's failure to explain the effects of jail credit. Cf. Lynch v. State, 2 So. 3d 47, 57 (Fla. 2008) (holding that following entry of a plea, a defendant who alleges counsel was ineffective " 'establishes Strickland's prejudice prong by demonstrating a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial' " (quoting Grosvenor v. State, 874 So. 2d 1176, 1181 (Fla. 2004))).

A hearing on an ineffective assistance claim is warranted "where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrate a deficiency in the performance that prejudiced the defendant." Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998). The postconviction court made several findings noting the absence of discussion regarding jail credit, but those do not refute Mr. Reyna's claim as stated. In fact, nothing within the limited record before this court demonstrates that counsel, before the rejection of the State's plea offer, informed Mr. Reyna that jail credit would offset the length of incarceration offered by the State. Without any record evidence to conclusively refute Mr. Reyna's claim, the postconviction court should have granted Mr. Reyna an evidentiary hearing. See Kirkland v. State, 1 So. 3d 1224, 1227 (Fla. 2d DCA 2009) (" '[R]elief may be summarily

denied only where the record conclusively refutes [a facially sufficient] claim.' " (quoting Doward v. State, 802 So. 2d 518, 519 (Fla. 5th DCA 2001))).

Accordingly, we reverse the summary denial of Mr. Reyna's second claim and remand for an evidentiary hearing.

Affirmed in part; reversed in part; remanded.

KHOUZAM, J., Concurs specially with opinion.
VILLANTI, J., Concurs in part and dissents in part with opinion.

KHOUZAM, Judge, Specially concurring.

I agree with the majority that Reyna has alleged a legally cognizable claim and is entitled to an evidentiary hearing. As the majority points out, Reyna alleged that he would have taken the State's plea offer of twenty years had counsel advised him that he would receive credit for time served, which would have lessened his sentence. This allegation of ineffective assistance of counsel was not conclusively refuted by the record and therefore the postconviction court should have granted Reyna an evidentiary hearing.

The dissent incorrectly asserts that the majority opinion adds a new requirement for a lawyer to "predict the actual length of a given defendant's sentence." Rather, our decision is consistent with existing law that a lawyer must advise his client of the direct consequences of his plea. See Bolware, 995 So. 2d at 272 n.3; Ginebra, 511 So. 2d at 960. This includes informing the client that, if applicable, the client may be entitled to credit for time served, which would impact the actual time to be served for a given sentence. Ultimately, the question to be resolved here is whether counsel was ineffective for not properly advising Reyna and whether Reyna was prejudiced by ineffective assistance. As held in the majority opinion, the record simply does not refute Reyna's claim.

Finally, the dissent contends that Reyna would not be entitled to any credit for time served on his new charges and, therefore, any advice regarding credit would have been wrong. That contention misses the key concern addressed in this appeal. The record provided to this court simply does not establish that Reyna would not have been entitled to credit for time served upon arrest and incarceration for the violation of probation, regardless of any credit for time served applicable to the new charges. Because the record does not refute Reyna's claim, I concur with the majority opinion.

VILLANTI, Judge, Concurring in part and dissenting in part.

I agree with the majority that Reyna is not entitled to relief on claims one and three of his motion for postconviction relief. However, because I find the allegations of claim two of Reyna's motion both legally and facially insufficient, I would affirm the trial court's order denying Reyna relief on that ground as well.

While the record before this court is somewhat limited, it does reflect that on September 10, 2003, Reyna entered no contest pleas to two counts of burglary of a dwelling, three counts of burglary of a structure, and four counts of third-degree grand theft in seven separate cases. The trial court sentenced him to two years in prison followed by two years' probation on each count, with all the sentences to run concurrently.

Subsequently, on March 29, 2005, while Reyna was serving his probationary term, he was arrested and charged with numerous counts of loitering and prowling. On September 13, 2005, at Reyna's violation of probation (VOP) hearing, his counsel announced for the record that the State extended a plea offer to Reyna of twenty years in prison, which offer would resolve all of the VOP cases as well as the new charges filed against Reyna as a result of his most recent arrest. Counsel also announced that he had discussed the plea offer with Reyna and that Reyna had rejected it. After a VOP hearing, the trial court found that Reyna had violated his probation, and it sentenced him to the statutory maximum for each of the VOP offenses with the sentences to run consecutively. This resulted in a fifty-five-year prison sentence, which this court affirmed on direct appeal. See Reyna v. State, 941 So. 2d 379 (Fla. 2d DCA 2006) (table decision). The new charges against Reyna stemming

from his March 29 arrest remained pending.

On March 5, 2007, Reyna filed a timely motion for postconviction relief pursuant to rule 3.850 in the VOP cases. In claim two of his motion, Reyna contended that his trial counsel was ineffective in his explanation, or lack thereof, concerning the time Reyna would actually spend in prison if he chose to accept the State's twenty-year plea offer. Reyna's allegations pertinent to claim two read as follows:

> 13). On March 29th, 2005, the Defendant was arrested and charged with (Loitering and Prowling) in which [sic] resulted in a violation of his current probation status for his prior offenses. On September 13th, 2005, at Defendant's final (VOP) hearing, the Defendant's trial counsel (Mr. Rodriguez) noted for the record that the State had offered the Defendant a "plea deal" of (20) years in the Department of Corrections which would take care of the new cases that the Defendant was charged with, the VOP (violation of probation), and any new cases that where [sic] in fact open at the time of sentencing[.]
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> . . . .
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> 15). Accordingly, the trial counsel stated to the Court that he in fact visited the Defendant three times in order to express to the Defendant what the State was offering in the matter of plea deal. Here, the trial counsel stated that he told the Defendant he was facing more than the (20) years if the State proved all the cases against him[.]
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> 16). However, the Defendant argues that **he was led to believe** that the plea offer was mandatory because the trial counsel kept advising him as to the maximum time he could have received in prison if found guilty on all the charges, and not the minimum time he could have received if he had taken the State's plea offer of (20) years with all available jail and prison time credits served. See *Fla. R. Crim. Proc.* 3.171(c)(2)(B) ("mandating that counsel advise defendant of all pertinent matters bearing on the choice of which plea to enter and the particulars attended [sic] upon each plea and the likely results thereof, as well as and [sic] possible alternatives that may be open to defendant")[.]
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> 17). The Defendant further argues that when the trial counsel came to see him in a [sic] "attorney visit" at the Hendry County Jail, that he did not bring an interpreter to translate for him concerning the State's plea offer. The

Defendant testified that he does not speak or read good English, and the **trial counsel was only confusing him, and never properly explained** that the Defendant could have received a lesser sentence with all jail time credit, prison time credit, and/or eligible prison gain time credit. See *State v. Leroux*, 689 So. 2d 235, 236 (Fla. 1996) "Misadvice as to gain time or the sentence actual length is a cognizable claim of ineffective assistance of counsel." See also *Morales v. State*, 731 So. 2d 91 (Fla. 4DCA 1999) "Counsel's failure to direct an interpreter to assist defendant during discussions concerning the plea offer held sufficient to warrant evidentiary hearing." Id. at 91, keynote [1].

18). Let the record reflect that Defendant was willing to take a plea offer of (10) years in prison but, the State rejected this counter offer[.] However, had Defendant been correctly informed by trial counsel that he could have received all previous jail time credits and prison credits toward the (20) year plea deal, which would have made his sentence lesser, then he would have accepted the State's offer. See also *Reed v. State*, 903 So. 2d 344 (Fla. 1DCA 2006); citing *Steel v. State*, 684 So. 2d 290 (Fla. 4DCA 1996) "A claim that misinformation supplied by counsel induced a defendant to reject a favorable plea offer can constitute actionable ineffective assistance of counsel."

19). Defendant asserts that at the time of the revocation hearing he was unaware that he had accumulated close to (2) years of previous jail time and prison time served, that could have been awarded to him, pursuant to the plea deal. Also, he was **not informed** that he could have received 85% off of the remaining (18) years, in which [sic] he would only have left to serve (15) years prison, instead of the maximum (20) year sentence, **as misinformed to him by his trial counsel**. See *Green v. State*, 547 So. 2d 925 (Fla. S.Ct. 1989) "Generally, on any case with an offense date after October 1st, 1989, when a defendant's probation is revoked, he would receive credit against that sentence for "jail time served" and for actual day for day "prison time served. . ." Id. at 927[.]

20). Accordingly, Defendant contends that he has made a prima facie case for relief and a direct result of trial counsels [sic] **omission** regarding the length of plea offer and/or eligibility for all jail time, prison time and gain time credit toward the State's plea, prejudiced him in receiving a fair trial and denied him effective assistance of trial counsel.

(Internal record citations omitted; footnote omitted; bold emphasis added.)

In his reply to the State's response to his motion, Reyna also alleged that "he **was misled** to believe that the (20) year plea was a 'mandatory' sentence **due to counsel's omission**, and had his counsel properly conveyed the plea he would have accepted it." (Bold emphasis added.) However, later in that same motion, Reyna alleged that he was never "properly or fully advised about the jail time prison time reduction." (Emphasis added.)

The majority reads these allegations to say that Reyna's trial counsel wholly failed to inform Reyna of his alleged eligibility for credits for prior jail and prison time served. The majority asserts that trial counsel's alleged failure to inform Reyna of these available credits resulted in Reyna not being advised of "the direct consequences of a guilty plea." I disagree. The State's twenty-year plea offer was intended to resolve Reyna's VOP charges as well as the new charges pending against him. While Reyna might have been entitled to credit for prior jail and prison time on his VOP charges, he was not entitled to such credit against the new charges. See, e.g., Blake v. State, 807 So. 2d 772, 773 (Fla. 2d DCA 2002) (noting that "a defendant 'is only entitled to credit against each sentence for the time spent in jail for the charge which led to that sentence' " (quoting Keene v. State, 500 So. 2d 592, 594 (Fla. 2d DCA 1986))). Thus, had counsel told Reyna that his prior jail and prison time would have been set off against the State's twenty-year plea offer, such advice would have been incorrect. Accordingly, because the advice Reyna claims he was not given was itself incorrect, I cannot agree that Reyna has alleged a legally sufficient claim for ineffective assistance of counsel.

Moreover, even if Reyna had been entitled to a set-off of his prior jail and

prison time against the twenty-year sentence offered, I do not believe that trial counsel's failure to advise Reyna of this would constitute ineffective assistance of counsel. This court has never held that trial counsel has an obligation to explain the calculation of jail or prison credit to a defendant when counseling that defendant concerning a plea offer from the State. Given the complexities of the current sentencing laws, the discretion afforded trial courts concerning the award of credit, and the ever-changing gain time rules of the Department of Corrections, any attempt by trial counsel to accurately predict the actual length of a given defendant's sentence would be ill-advised and a guessing game at best. This is all the more true because, if trial counsel attempts such a task and is incorrect, even through no fault of his or her own, that misadvice will support an ineffective assistance of counsel claim. See, e.g., State v. Leroux, 689 So. 2d 235, 236 (Fla. 1996) (noting that "counsel's erroneous advice regarding the length of sentence or eligibility for gain time or early release can be the basis for postconviction relief"); Borders v. State, 936 So. 2d 737, 737 (Fla. 2d DCA 2006) (finding that the defendant stated a facially sufficient claim of ineffective assistance of counsel after counsel advised the defendant that he would be entitled to full credit for all prior time served but the court refused to award such full credit). Thus, I cannot agree with the majority's apparently new requirement that trial counsel attempt to calculate the prison term a defendant will actually serve when conveying a plea offer from the State.

Finally, while I disagree with the majority that the failure to advise a defendant of possible jail time and prison time credits can support a claim for ineffective assistance of counsel, I recognize that "if counsel chooses to offer such advice, then the advice given must be accurate." Deck v. State, 985 So. 2d 1234, 1236 (Fla. 2d DCA

2008). Thus, if defense counsel attempted to explain jail and prison credits to Reyna and did so inaccurately, I agree that such misadvice could support a claim for ineffective assistance of counsel.

Here, however, I find Reyna's allegations to be ambiguous, thus rendering his motion facially insufficient. As noted above, Reyna alleged that he was "misled" by "counsel's omission" into believing that the twenty-year sentence offered by the State was mandatory. He also alleged that trial counsel did not "properly explain" that Reyna could be entitled to jail credit and prison credit and that he might be eligible for gain time. I frankly cannot determine from these allegations whether Reyna is contending that trial counsel explained the issue of jail and prison credit but provided improper information or whether Reyna is contending that counsel wholly failed to advise him on this issue, which Reyna asserts was not "proper." The majority presumes the latter, and the postconviction court presumes the former. Interestingly, although diametrically opposed, both the postconviction court's view and the majority's view are plausible interpretations of Reyna's claim. As these differing conclusions prove, Reyna's claim is, at best, ambiguous. This ambiguity renders Reyna's claim, as currently pleaded, facially insufficient. Hence I would not reverse for an evidentiary hearing since Reyna is not entitled to a hearing on facially insufficient claims. See Morgan v. State, 991 So. 2d 835, 841 (Fla. 2008) (noting that a defendant is not entitled to an evidentiary hearing on facially insufficient claims). Instead, I would affirm the postconviction court's denial of relief on this claim, and I dissent from the portion of the majority's opinion holding otherwise.