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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

NICHOLAS J. ODEGAARD, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D12-1712

Opinion filed March 28, 2014.

Appeal from the Circuit Court for Hillsborough County; Susan Sexton, Judge.

Frances Martinez of Escobar & Associates, P.A., Tampa, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Katherine Coombs Cline, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Nicholas Odegaard appeals the denial of his amended motion for relief from his conviction for robbery with a weapon after an open plea, the resulting revocation of his community control, and his forty-five-year prison sentence. See Fla.

R. Crim. P. 3.850(a)(5). The postconviction court erred in finding that Mr. Odegaard's trial counsel did not perform deficiently. Consequently, we reverse, in part.

Background

In 2008, Mr. Odegaard pleaded guilty to theft-related offenses. At the plea hearing, the trial court informed him that he faced a maximum prison sentence of fifteen years. The trial court, however, imposed a youthful offender sentence of two years' community control, followed by four years of probation.

In 2009, Mr. Odegaard violated his community control by committing robbery with a weapon. See § 812.13(2)(b), Fla. Stat. (2008). This offense carried a maximum sentence of thirty years. § 775.082(3)(b), Fla. Stat. (2008). To resolve this new offense and the community control violation, the State offered Mr. Odegaard a plea deal of fifteen years in prison followed by five years of probation. The prosecutor stated he would upgrade the new charge to robbery with a firearm, an offense punishable by life with a ten-year mandatory minimum, if Mr. Odegaard did not accept the offer. See §§ 812.13(2)(a) (robbery with firearm); 775.082(3)(a)(3) (life sentence); 775.087(2)(a)(1) (ten-year minimum for firearm).

Mr. Odegaard's trial counsel advised him that the only way to receive less than fifteen years was to enter an open plea and ask the trial court to consider his young age. Counsel hoped for a bottom-of-the-guidelines sentence of seventy-six months. Mr. Odegaard pleaded open but did not fare well at the subsequent sentencing hearing in May 2009. The trial court accepted the plea and sentenced Mr. Odegaard to thirty years for the armed robbery and fifteen years for the underlying community control offenses, consecutive.

Mr. Odegaard filed an unsuccessful posttrial motion to reduce his sentence. See Fla. R. Crim. P. 3.800(c). We thereafter affirmed his convictions and sentences on appeal. Odegaard v. State, 44 So. 3d 589 (Fla. 2d DCA 2010) (table decision). Mr. Odegaard then filed his motion for postconviction relief. He claims that his trial counsel was ineffective for misadvising him to reject the State's offer and plead open and for failing to inform him that he faced up to forty-five years in prison. Mr. Odegaard asserts that had counsel correctly advised him, he would have accepted the fifteen-year offer.

The postconviction court held an evidentiary hearing on the motion. At the hearing, the court warned Mr. Odegaard that if he succeeded, he would start anew with a community control violation and a robbery charge pending. The State could upgrade the charge and refuse to offer any plea deal. Mr. Odegaard acknowledged the risk.

Trial counsel testified that he did not tell Mr. Odegaard to reject any offers from the State. Counsel stated that he told Mr. Odegaard that in entering an open plea he "would be asking for the bottom of the guidelines, or below." However, he also told Mr. Odegaard that "it was most likely going to be at least the bottom of the guidelines, if not more, based on his current situation. And that [sic] the judge could in fact give him more than the State Attorney was offering." The postconviction judge asked trial counsel whether he advised Mr. Odegaard that "judges do not usually go to the bottom of the guidelines when . . . you're already on probation, or community control, and this is a new charge and it's a robbery charge." Trial counsel did not recall giving such advice. Trial counsel also testified that his notes did not show—and he did not remember—that he informed Mr. Odegaard that the trial court could impose consecutive sentences.

Indeed, the trial court informed Mr. Odegaard at the plea hearing in April 2009 only that the maximum sentence for armed robbery was thirty years. No plea form was used for the community control violation case. The only plea form was for the robbery offense, which showed a maximum penalty of thirty years. Our record contains nothing in writing informing Mr. Odegaard of the forty-five-year maximum sentence he faced.

The postconviction court denied the motion, finding that trial counsel's performance was not deficient. Implicit in the order on appeal is a conclusion that trial counsel did not advise Mr. Odegaard to reject any offer. The postconviction court also found that Mr. Odegaard "was warned of the maximum penalties he faced in each case": he "was warned that he faced 15 years during the August 14, 2008, plea colloquy" and "was informed of the 30 year maximum at his April 13, 2009, plea date." We can only conclude that the postconviction court found that trial counsel was not deficient in failing to advise about consecutive sentences because Mr. Odegaard knew of the potential sentences well before his May 2009 sentencing.

Analysis

Strickland v. Washington, 466 U.S. 668, 687 (1984), is the bedrock upon which we construct any analysis of an ineffectiveness of counsel claim. Strickland demands that a defendant demonstrate first that counsel's performance was deficient and second that the deficient performance prejudiced the defense. Id. at 687. "[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness" based on professional norms. Id. at 688; accord Schwab v. State, 814 So. 2d 402, 408 (Fla. 2002). Next, "[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." Strickland, 466 U.S. at 694; accord Schwab, 814 So. 2d at 408. A postconviction court's finding that trial counsel's performance was not deficient is a determination that no ineffective assistance of counsel occurred, and the postconviction court may deny the motion without reaching Strickland's prejudice prong. See Strickland, 466 U.S. at 697. That is the case here, certainly, with regard to the claim that trial counsel advised Mr. Odegaard to reject any State offer. Although making no express finding, the postconviction court obviously found trial counsel credible when he denied telling Mr. Odegaard to reject a fifteen-year plea offer. The postconviction court properly denied relief on this claim. Our task is not ended, however. We must now assess whether trial counsel was ineffective in failing to advise Mr. Odegaard that he faced up to forty-five years in prison.

Florida Rule of Criminal Procedure 3.171(c)(2)(B) admonishes "[d]efense counsel [to] 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." (Emphasis added.) By entering an open plea to the robbery charge and facing a revocation of community control, Mr. Odegaard confronted up to forty-five years in prison if the trial court imposed consecutive sentences. Unquestionably, a plea cannot be knowing and voluntary if the defendant does not understand all direct consequences of the plea, including those that affect the range of punishment. See Murphy v. State, 868 So. 2d 585, 586 (Fla. 2d DCA 2004) (citing State v. Partlow, 840 So. 2d 1040, 1042 (Fla. 2003); Watrous v. State, 793 So. 2d 6, 8-9 (Fla. 2d DCA 2001)).

Trial counsel testified that his notes did not reflect that he warned Mr. Odegaard of a possible forty-five-year sentence, and he did not remember giving him

such a warning. The trial court said nothing about a possible consecutive sentence. Mr. Odegaard testified that he was unaware of such a prospect; the postconviction court gave no indication that Mr. Odegaard was not credible on this point. That Mr. Odegaard was warned of the fifteen-year maximum on the underlying cases in 2008 and was warned a year later in 2009 of the thirty-year maximum for robbery with a weapon does not constitute competent substantial evidence that he understood at the 2009 plea hearing that he faced forty-five years in prison. Based on our record, we must conclude that Mr. Odegaard has satisfied the deficient performance prong of Strickland. We therefore reverse the postconviction court's order and remand for the postconviction court to consider whether Mr. Odegaard suffered prejudice as a result of trial counsel's deficient performance in failing to advise him of the potential for consecutive sentences.

As did the postconviction court, we admonish Mr. Odegaard of the potentially harsh consequences he faces if he succeeds. Even where trial counsel's misadvice results in a defendant's rejection of a favorable plea offer, the State is not required to reoffer its original plea on remand. See Rudolf v. State, 851 So. 2d 839, 84-42 (Fla. 2d DCA 2003); Eristma v. State, 766 So. 2d 1095, 1097 (Fla. 2d DCA 2000). And because Mr. Odegaard violated his youthful offender community control with a new substantive offense, he again may be sentenced to up to the maximum sentence for the original offenses. See § 958.14, Fla. Stat. (2008). However, he is entitled to retain his youthful offender designation for those offenses upon any resentencing. See Yegge v. State, 88 So. 3d 1058, 1059-60 (Fla. 2d DCA 2012) (stating although youthful offender may receive maximum sentences for original offenses after substantively violating youthful offender probation, continued youthful offender designation carries benefits such as availability of programs, facilities, and if offender qualifies, early release

eligibility (citing Lee v. State, 67 So. 3d 1199, 1202 (Fla. 2d DCA 2011))). The record before us does not reflect youthful offender designation at the 2009 sentencing. If Mr. Odegaard elects not to withdraw his plea, he can file a motion to correct this error. See Fla. R. Crim. P. 3.800(a). In any resentencing that may occur as a result of proceedings on remand, the trial court must maintain Mr. Odegaard's youthful offender designation for the original 2008 offense.

Affirmed in part, reversed in part, and remanded.

DAVIS, C.J., and CASANUEVA, J., Concur.
LaROSE, J., Concurs with opinion.

LaROSE, Judge, Concurring.

I concur fully in the court's decision to reverse the postconviction court's order. I write to express my view that, on remand, the postconviction court must consider carefully the impact of the United States Supreme Court's decisions in Lafler v. Cooper, 132 S. Ct. 1376 (2012), and Missouri v. Frye, 132 S. Ct. 1399 (2012), and the Supreme Court of Florida's decision in Alcorn v. State, 121 So. 3d 419 (Fla. 2013), on the Strickland prejudice prong. A bit of history will be helpful.

In Cottle v. State, 733 So. 2d 963, 966-67 (Fla. 1999), our supreme court "recognized that counsel's acts or omissions bearing on a defendant's decision to reject a plea offer and proceed to trial could establish the basis for a legally sufficient ineffective assistance claim under Strickland." Alcorn, 121 So. 3d at 426. Cottle "adopted a modified Strickland analysis to be applied where the basis for an accused's ineffective assistance claim hinged on counsel's failure to properly advise him or her about the State's plea offer, resulting in the accused's rejection of that offer." Alcorn, 121 So. 3d at 426. Cottle's three-part test for establishing a prima facie ineffectiveness claim was whether "(1) counsel failed to communicate a plea offer or misinformed defendant concerning the penalty faced; (2) defendant would have accepted the plea offer but for the inadequate notice; and (3) acceptance of the State's plea offer would have resulted in a lesser sentence." Cottle, 733 So. 2d at 967. The Cottle court rejected any requirement that the trial court would have accepted the plea had it been conveyed to and accepted by the defendant because "any finding on that issue would necessarily have to be predicated upon speculation." Id. at 969.

Subsequently, in Morgan v. State, 991 So. 2d 835, 839-40 (Fla. 2008), the supreme court adopted Cottle's three-part modified Strickland test for ineffective-

assistance-of-counsel claims arising from the plea stage and confirmed that such claims could be based on the counsel's advice to reject a plea offer. See also Alcorn, 121 So. 3d at 426.

We applied the Cottle test to such a claim in Beasley v. State, 964 So. 2d 213 (Fla. 2d DCA 2007), the facts of which mirror those here. The trial court sentenced Mr. Beasley to thirty years in prison after he rejected the State's fifteen-year plea offer. Id. at 215. In his postconviction motion, he asserted that trial counsel was ineffective for advising him to reject the State's fifteen-year plea offer and failing to inform him that he could receive an enhanced habitual felony offender (HFO) sentence of thirty years. Id. Mr. Beasley's trial counsel admitted that she counseled him to reject the plea offer. Id. However, she did not recall her advice about the HFO notice and she had no notes. Id. The postconviction court denied Mr. Beasley's claim because it chose not to believe his testimony that he had not learned about HFO sentencing when he was in prison, even though his testimony was unrefuted. Id. at 216.

On appeal, we reversed, holding that competent substantial evidence did not support the postconviction court's factual findings that Mr. Beasley had knowledge of the consequences of rejecting the plea offer. Id. at 217. Our determination of prejudice, using the Cottle test, focused not on trial counsel's advice to reject the plea, but on trial counsel's failure to advise him of the consequences of rejecting the plea—that the maximum sentence could be doubled. See Beasley, 964 So. 2d at 216.

In 2012, the Supreme Court decided Lafler and Frye. Lafler held that a federal habeas petitioner was prejudiced by his trial counsel's deficient performance in

advising him to reject a plea offer because he could not be convicted at trial.[1] 132 S. Ct. at 1384, 1391. In so holding, the Supreme Court applied an apparently enhanced prejudice analysis requiring the petitioner to demonstrate that "the prosecution would not have withdrawn [the plea offer] in light of intervening circumstances [and] that the court would have accepted its terms." Id. at 1385. The Supreme Court affirmed the Sixth Circuit's holding that Lafler had demonstrated prejudice.[2] Id. at 1391.

In Frye, the Supreme Court held that trial counsel performed deficiently by failing to inform Mr. Frye of a written plea offer before it expired. 132 S. Ct. at 1409. However, the Supreme Court reversed the state appeals court's holding that Mr. Frye had established prejudice and remanded because, even though Mr. Frye could show he would have accepted the plea offer, the appeals court failed to require Mr. Frye to show "a reasonable probability [that] neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented." Id. at 1410. The Court observed that there was "strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final" because of an intervening event: Mr. Frye was arrested for a new offense of driving without a license. Id. at 1411.

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[1]The State, in Lafler, conceded that trial counsel's performance was deficient. 132 S. Ct. at 1383.

[2]The Supreme Court observed that the Sixth Circuit and other federal appellate courts employed such an enhanced prejudice analysis. Lafler, 132 S. Ct. at 1385. That conclusion may sweep too broadly. None of the cited cases used an enhanced prejudice standard. Cooper v. Lafler, 376 Fed. Appx. 563, 569-70 (6th Cir. 2010), used the longstanding rule that a petitioner who rejected a plea offer must show a " '*reasonable probability* that, but for his counsel's erroneous advice . . . he would have accepted the [S]tate's plea offer.' " (quoting Magana v. Hofbauer, 263 F.3d 542, 551 (6th Cir. 2001)), overruled by Lafler v. Cooper, 132 S. Ct. 1376 (2012). The Sixth Circuit held that Lafler's uncontradicted testimony—that had his counsel correctly advised him, he would have accepted the State's offer—demonstrated that Lafler was prejudiced by his counsel's deficient performance. Id. at *8-9.

Admittedly, Lafler and Frye involve counsel's failure to convey a plea offer or affirmative advice to reject an offer. Nevertheless, Lafler and Frye seemingly require, as a general proposition, that the defendant show that he would have accepted the plea and that neither the State nor the trial court would have thwarted implementation of the defendant's expectation. Lafler and Frye shift the prejudice landscape for ineffective assistance of counsel claims based on rejected plea offers. Alcorn, 121 So. 3d at 429.

Building on Lafler and Frye, our supreme court, in Alcorn, constructed what appears to be a more onerous schema to establish Strickland prejudice in Florida:

> [T]he defendant must demonstrate a reasonable probability, defined as a probability sufficient to undermine confidence in the outcome, that
> (1) he or she would have accepted the offer had counsel advised the defendant correctly,
> (2) the prosecutor would not have withdrawn the offer,
> (3) the court would have accepted the offer, and
> (4) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Alcorn, 121 So. 3d at 422. Points (1) and (4) cling to points (2) and (3) of the long-standing Cottle test. But, anchored to Lafler and Frye, Alcorn apparently imposes an expanded inquiry, requiring the defendant to show that the prosecutor would not have withdrawn the offer and the trial court would have approved the plea deal.

Because Alcorn issued after briefing was complete in this case, we ordered supplemental briefing to allow the parties an opportunity to weigh in on its impact. They agree that Alcorn applies to determine whether Mr. Odegaard demonstrated prejudice.

Alcorn did not change the existing three elements of the existing Florida test, first set forth in Cottle, for claims of ineffective assistance of counsel for acts or omissions bearing on a defendant's decision to reject a plea offer. See Alcorn, 121

So. 3d at 426. Alcorn words the first two as whether "(1) counsel failed to convey a plea offer or misinformed the defendant concerning the possible sentence he faced; (2) the defendant would have accepted the plea but for counsel's failures." Id. As stated earlier, Cottle worded them as whether "(1) counsel failed to communicate a plea offer or misinformed defendant concerning the penalty faced; [and] (2) defendant would have accepted the plea offer but for the inadequate notice." 733 So. 2d at 967. Beasley worded them as whether "(1) counsel failed to communicate a plea offer or *misinformed the defendant concerning the penalties* [and] (2) the defendant would have accepted the plea offer but for the inadequate communication." Beasley, 964 So. 2d at 216.

Each variation uses the term "misinformed" regarding trial counsel's deficient performance in advising the defendant of the possible sentence. Trial counsel did not affirmatively tell Mr. Odegaard that his sentences could not be imposed consecutively; he failed to inform Mr. Odegaard that he faced a possible forty-five-year sentence. The test, both pre- and post-Alcorn, applies the words "inadequate"[3] and "failures" to both failing to communicate a plea offer and to "misinforming" the defendant concerning the possible sentence. To me, the word "misinform" applies to omissions as well as to affirmative misadvice.

What appears to be a more exacting prejudice analysis under Lafler, Frye, and Alcorn causes critics to pounce on the speculative nature of the requirements that the defendant demonstrate that, absent counsel's misadvice, he would have taken the plea offer, the State would not have withdrawn the offer, and the trial court would have accepted it. Dissenting in Frye, Justice Scalia pointedly observed that the test consists

[3]"Inadequate" means "[i]nsufficient; disproportionate; lacking in effectiveness or in conformity to a prescribed standard or measure." Black's Law Dictionary 758 (6th ed. 1990) (emphasis added).

of "retrospective crystal-ball gazing" rather than legal analysis. Frye, 132 S. Ct. at 1413 (Scalia, J., dissenting). Aaron K. Friess, in *Soothsaying with a Foggy Crystal Ball: A Critique of the U.S. Supreme Court's Remedy for Ineffective Assistance of Counsel when a Criminal Defendant Rejects a Plea Bargain [Lafler v. Cooper, 132 S. Ct. 1376 (2012)]*, criticizes Lafler's prejudice test for "depend[ing] largely on speculative hindsight . . . , improperly rel[ying] on post-hoc inquiries into the relative likelihood of events that, by necessity, never occurred . . . [and] wherein the court . . . must try to analyze how the prosecution and judge would have exercised their discretion had this plea come before them."[4] 52 Washburn L.J. 147, 164-65 (2012) (internal citations omitted). "[H]inging a defendant's constitutional rights on speculative hindsight inquiries constitutes an uncomfortable step in Sixth Amendment jurisprudence." Id. at 167.

I am more sanguine. Strickland's prejudice test retains its vitality even under Frye, Lafler, and Alcorn. The key to the core inquiry is whether counsel's deficient conduct created "a reasonable probability that . . . the result of the proceeding would have been different." Strickland, 466 U.S. at 695; accord Porter v. McCollum, 558 U.S. 30, 41 (2009). "A reasonable probability is a probability sufficient to undermine confidence in [that] outcome." Strickland, 466 U.S. at 669; accord Porter, 558 U.S. at 44; Alcorn, 121 So. 3d at 430. Accordingly, the postconviction court need not plumb the ether to determine whether the defendant would have accepted the plea had trial counsel advised him of all pertinent matters. The postconviction court need not find even that the defendant more likely than not would have accepted the plea. Rather,

[4]Requiring trial judges to testify in such cases as to whether they would have accepted the pleas would commit scarce judicial resources to speculation about decisions the judges were never called upon to make.

the probability that the defendant would have taken the plea need be only sufficient to undermine confidence that he would have rejected the plea regardless.

Frye provides a framework for applying this confidence standard to the added prejudice test inquiries:

> It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain. The determination that there is or is not a reasonable probability that the outcome of the proceeding would have been different absent counsel's errors can be conducted within that framework.

Frye, 132 S. Ct. at 1410.

Even though Alcorn issued after the postconviction court denied Mr. Odegaard's motion, the Alcorn prejudice inquiry applies because his appeal was pending when Alcorn issued. See Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992). Florida's "pipeline" rule,[5] that appellate courts should decide cases in accord with the

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[5]"Pipeline" cases generally talk about allowing the defendant the "benefit" of the new law. See, e.g., Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (stating that applying new rules to cases pending on direct review prevents inequity by allowing similarly situated defendants to benefit); Smith v. State, 598 So. 2d 1063, 1065 (Fla. 1992) (discussing requirement for defendant to "benefit of a change in the law" in a similar case pending on direct review); Castano v. State, 119 So. 3d 1208, 1209 (Fla. 2012) (Pariente, J., concurring) ("Fundamental fairness demands that Castano receive the benefit of Padilla [v. Kentucky, 559 U.S. 356 (2010)]."); Boardman v. State, 69 So. 3d 367, 369 (Fla. 2d DCA 2011) (holding defendant was not entitled to benefit of Blakely because his sentences became final before it was issued); Perez v. State, 120 So. 3d 49, 52 (Fla. 4th DCA 2013) ("Padilla could not be applied retroactively to the benefit of Perez."); Santana v. Fla. Dep't of Fin. Servs., 61 So. 3d 1262, 1263 (Fla. 3d DCA 2011) (holding Santana was "entitled to the benefit of . . . a change in the law as applied specifically to him"). In contrast here, the new law in Alcorn benefits the State because it arguably adds elements that the defendant must establish to prevail.

law in effect at the time of the appeal rather than the law in effect at the time of the order on appeal, has typically been applied to "new law on issues that would be raised during direct appeal—not postconviction." Castano v. State, 119 So. 3d 1208, 1210 (Fla. 2012) (Pariente, J., concurring). However, recent cases suggest an expansion of the "pipeline" analysis to new law that applies to postconviction claims where the resolution of the postconviction claim was still pending when the new case was decided. Id. Castano applied new law from Padilla v. Kentucky, 559 U.S. 356 (2010), that would apply to a postconviction claim, to the appeal of a denial of a postconviction motion using a "pipeline" analysis. Castano, 119 So. 3d at 1208. Barthel v. State, 882 So. 2d 1054, 1055 (Fla. 2d DCA 2004), applied new law from Nelson v. State, 875 So. 2d 579 (Fla. 2004), regarding ineffective-assistance-of-counsel claims, to the appeal of a denial of a postconviction motion. But see Perez v. State, 120 So. 3d 49, 51 (Fla. 4th DCA 2013) (following Chaidez v. United States, 133 S. Ct. 1103, 1113 (2013), a post-Castano case holding that under federal retroactivity analysis in Teague v. Lane, 489 U.S. 288 (1989), "defendants whose convictions became final prior to Padilla . . . cannot benefit from its holding").

The postconviction court made no finding of prejudice. As the court holds, Mr. Odegaard demonstrated deficient performance by trial counsel. On remand, in my view, the postconviction court must now assess the impact of Lafler, Frye, and Alcorn on Strickland's prejudice prong.