Third District Court of Appeal

State of Florida

Opinion filed September 4, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-0091
Lower Tribunal No. 13-7027B

Orlando Hernandez,
Petitioner,

vs.

The State of Florida,
Respondent.

A Case of Original Jurisdiction -- Habeas Corpus

Wasson & Associates, Chartered, and Roy D. Wasson, for petitioner.

Ashley Moody, Attorney General, and Linda Katz, Assistant Attorney General, for respondent.

Before LOGUE, LINDSEY, and MILLER, JJ.

MILLER, J.

UPON PARTIAL CONFESSION OF ERROR

Petitioner, Orlando Hernandez, seeks habeas corpus relief alleging ineffective assistance of appellate counsel pursuant to Florida Rule of Appellate Procedure 9.141(d).[1] Upon the State's proper and commendable partial concession of error, and in accord with our precedent in Rua-Torbizco v. State, 255 So. 3d 462 (Fla. 3d DCA 2018)[2] and Lopez v. Junior, 259 So. 3d 202 (Fla. 3d DCA 2018), we remand for resentencing pursuant to Williams v. State, 186 So. 3d 989 (Fla. 2016).

Following a jury trial, Hernandez was convicted of attempted first-degree murder, aggravated battery, and aggravated assault. The jury expressly found Hernandez possessed and discharged a firearm during the commission of the attempted first-degree murder, and possessed a firearm while committing both the aggravated battery and aggravated assault.

The lower tribunal sentenced Hernandez to forty-years imprisonment with a twenty-year minimum mandatory for the attempted murder conviction, ten years, as a minimum mandatory, for the aggravated battery conviction, and three years, as a minimum mandatory, for the aggravated assault conviction. Adhering to the belief it was bound by our decision in Morgan v. State, 137 So. 3d 1075 (Fla. 3d DCA 2014), the court imposed all minimum mandatory sentences consecutively,

[1] "A petition for writ of habeas corpus is the proper vehicle for a claim of ineffective assistance of appellate counsel." Hampton v. State, 178 So. 3d 921, 922 (Fla. 5th DCA 2015) (citing Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000)).

[2] Rua-Torbizco was Hernandez's co-defendant in the commission of the underlying crimes.

culminating in a total minimum mandatory sentence of thirty-three years. See Lopez, 259 So. 3d at 203-04 ("[I]n Morgan . . .[we] held that the trial court, under these circumstances, [was] without discretion to impose concurrent minimum mandatory sentences, and instead [was required to] impose those sentences consecutively.").

On direct appeal, Hernandez's appellate counsel raised two issues: (1) whether the State's willful withholding of exculpatory evidence constituted a violation of Brady v. Maryland,[3] and (2) whether the trial court erred in denying a motion for new trial given the State's failure to heed its discovery obligations. The appeal was per curiam affirmed. See Hernandez v. State, 229 So. 3d 1236 (Fla. 3d DCA 2016).[4]

Through the instant petition, Hernandez asserts his appellate counsel was ineffective for failing to further raise the issue that imposition of consecutive minimum mandatory sentences was discretionary, rather than mandatory, contrary to our holding in Morgan.[5] In reviewing Hernandez's petition, "we must determine

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[3] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[4] As Hernandez's judgment and sentence became final when the mandate issued on January 13, 2017, the instant petition filed on Monday, January 14, 2019 was timely filed within the two year prescribed time under the Florida Rules of Appellate Procedure. See Fla. R. App. P. 9.141(d)(5) ("A petition alleging ineffective assistance of appellate counsel on direct review shall not be filed more than [two] years after the judgment and sentence become final on direct review . . .").

[5] Hernandez additionally contends that appellate counsel was ineffective for failing to appeal the denial of his motion to suppress his out-of-court identification. We

whether counsel's performance was deficient and, if so, whether '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.'" Pierce v. State, 121 So. 3d 1091, 1093 (Fla. 5th DCA 2013) (quoting Lopez v. State, 68 So. 3d 332, 333 (Fla. 5th DCA 2011)).

"The effectiveness of counsel must be measured by the law in effect at the time the brief was filed." Sanders v. Singletary, 707 So. 2d 364, 365 (Fla 1st DCA 1998) (citation omitted); see Thompson v. Wade, 603 So. 2d 28 (Fla 1st DCA 1992) (finding appellate counsel was not ineffective as, at the time the initial brief was filed, the law in effect precluded counsel from raising the issue on appeal); Smith v. Crosby, 872 So. 2d 279, 281 (Fla. 4th DCA 2004) ("Appellate counsel's performance must be measured in terms of the law in effect at the time of the appeal, and not in hindsight.") (citing Knight v. State, 394 So. 2d 997, 1003 (Fla. 1981); Sanders, 707 So. 2d 364; Thompson, 603 So. 2d 28). Here, after Hernandez filed his notice of direct appeal, but before his initial brief was filed, the Florida Supreme Court

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reject this claim without further elaboration, as counsel cannot be faulted for failing to raise a meritless claim. See Boyd v. State, 200 So. 3d 685, 706 (Fla. 2015) ("[A]ppellate counsel cannot be deemed ineffective for not pursuing a meritless claim.") (citation omitted); Rutherford, 774 So. 2d at 644 ("The failure to raise meritless claims does not render appellate counsel's performance ineffective.") (citations omitted).

abrogated any compulsory requirement to impose consecutive minimum mandatory sentences, under these circumstances.[6] As explicated in Rua-Torbizco,

> In Morgan, we held "that section 775.087(2)(d) unambiguously requires that any mandatory minimum term required by section 775.087(2) – whether the defendant fires a gun, or only carries or displays it – shall be imposed consecutively to any other term imposed for any other felony." Id. (quotation omitted). The Fourth District Court of Appeal in Williams v. State, 125 So. 3d 879 (Fla. 4th DCA 2013) (en banc), decision quashed, 186 So. 3d 989 (Fla. 2016), also held that "consecutive mandatory minimum sentences are required by section 775.087(2)(d)." 125 So. 3d at 883. The Fourth District certified the following question of great public importance:
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> > Does section 775.087(2)(d)'s statement that "The court shall impose any term of imprisonment provided for in this subsection consecutively to any other term of imprisonment imposed for any other felony offense" require consecutive sentences when the sentences arise from one criminal episode?
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> Id. at 884. The Florida Supreme Court accepted jurisdiction to hear the case on July 16, 2013.
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> . . .
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> On March 3, 2016, the Florida Supreme Court answered "no" to the Fourth District's question, and held as follows:
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> > Generally, consecutive sentencing of mandatory minimum imprisonment terms for multiple firearm offenses is impermissible if the offenses arose from the same criminal episode and a firearm was merely possessed but not discharged.

[6] The Florida Supreme Court issued the Williams decision on March 3, 2016, while the initial brief on direct appeal was submitted to this Court on March 28, 2016.

> It follows, therefore, that a trial court must impose the mandatory minimum sentences concurrently under such circumstances.
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> If, however, multiple firearm offenses are committed contemporaneously, during which time multiple victims are shot at, then consecutive sentencing is permissible but not mandatory. In other words, a trial judge has discretion to order the mandatory minimum sentences to run consecutively, but may impose the sentences concurrently.

255 So. 3d at 463-64.

Accordingly, "[t]he [S]tate concedes that appellate counsel was deficient and prejudiced [Hernandez] by failing to raise the mandatory consecutive sentences on direct appeal. Had the issue been raised[, Hernandez's] case would have been placed in the Morgan/Williams pipeline, and ultimately his sentence would have been reversed and remanded for a new sentencing hearing." Rua-Torbizco, 255 So. 3d at 464 (citation omitted). Thus, we remand for resentencing.

Petition granted.