Third District Court of Appeal

State of Florida

Opinion filed July 8, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1673
Lower Tribunal No. 16-201-A-M

Shawn Lawrence Ryerson,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Monroe County, Ruth L. Becker and Mark Wilson, Judges.

Carlos J. Martinez, Public Defender, and Deborah Prager, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Kseniya Smychkouskaya Assistant Attorney General, for appellee.

Before FERNANDEZ, LINDSEY, and GORDO, JJ.

FERNANDEZ, J.

Shawn Ryerson appeals his conviction and sentence for felony driving under the influence of alcohol (DUI). Ryerson claims that two letters that he sent to the trial judge admitting guilt and seeking leniency were inadmissible as plea negotiations. We agree; however, Ryerson failed to preserve this issue for appeal. "[E]vidence of an offer or a plea of guilty . . . later withdrawn . . . is not admissible in any civil action or criminal proceeding against the person who made the plea or offer." Fla. R. Crim. P 3.172(i); see § 90.420, Fla. Stat. (2018); see also Calabro v. State, 995 So. 2d 307, 313 (Fla. 2008). To determine whether evidence is a plea negotiation, and therefore inadmissible, courts first examine the plain meaning of the statute and rule. See Calabro, 995 So. 2d at 314. However, if that does not resolve the issue, courts analyze the issue under the totality of the circumstances test set out in Robertson. Id. The totality of the circumstances test focuses on two factors: (1) whether the defendant had a subjective expectation of engaging in plea negotiations, and (2) whether that expectation was reasonable under the circumstances. Id. (citing U.S. v. Robertson, 582 F.2d 1365, 1366 (Fla. 5th DCA 1978). Applying these factors we conclude that the letters were inadmissible; however, because the issue was not preserved for appeal, we are unable to consider it and provide relief.

Ryerson argues that the trial court's error in admitting the letters rises to the level of fundamental error. We disagree. An error is fundamental if it "reaches

down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Rutherford v. Moore, 774 So. 2d 637, 646 (Fla. 2000). Alternatively, Ryerson argues that we should reverse based on ineffective assistance of counsel, urging us to conclude that such ineffectiveness appears on the face of the record. Again, we disagree. For ineffective assistance of counsel claims to be successful, (1) the claimant must identify particular acts or omissions of the lawyer that are outside the broad range of reasonably competent performance, and (2) the deficiency must have affected the fairness and reliability of the proceeding to the extent that confidence in the outcome is undermined. Peterson v. State, 221 So. 3d 571, 583 (Fla. 2017) (quoting Schoenwetter, 46 So. 3d 535, 546 (Fla. 2010)). To establish that the deficiency prejudiced the result, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. 668, 694 (1984). These factors are not established in the record before us.

We find that the trial court's error in admitting Ryerson's letters is unpreserved, and further find that the error is not fundamental. We further conclude that the claim of ineffective assistance of counsel does not appear on the face of the record. We thus affirm without prejudice to Ryerson's right to raise a claim of ineffective assistance of counsel in a proper post-conviction motion.

Affirmed.