Third District Court of Appeal
State of Florida

Opinion filed September 16, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-2423
Lower Tribunal No. 13-26118

Antonio Cobb,
Appellant,

vs.

The State of Florida,
Appellee.

An appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, Jose L. Fernandez, Judge.

Whidden Johnson, P.L., and Wade M. Whidden, and Karen A. Johnson (Tampa), for appellant.

Ashley Moody, Attorney General, and Sandra Lipman, Assistant Attorney General, for appellee.

Before SCALES, MILLER, and GORDO, JJ.

MILLER, J.

UPON PARTIAL CONFESSION OF ERROR

Appellant, Antonio Cobb, challenges the summary denial of his motion for postconviction relief alleging ineffective assistance of counsel. See Fla. R. Crim P. 3.850. Upon the State's proper and commendable partial concession of error, and in accord with well-established precedent, we affirm, in part, and reverse, in part.

Following a jury trial, Cobb was convicted of five counts of attempted first-degree murder, in violation of sections 777.04(1) and 782.04(1)(a)(1), Florida Statutes, and sentenced to life imprisonment. His conviction and sentence were affirmed on direct appeal. Cobb v. State, 246 So. 3d 1244 (Fla. 3d DCA 2018). After Cobb timely filed his postconviction relief motion below, in the absence of an evidentiary hearing, the trial court denied the same.

On appeal, Cobb raises numerous claims of error. Applying a de novo standard of review, we affirm his newly discovered evidence assertion without elaboration. See Tisdale v. State, 282 So. 3d 998, 1000 (Fla. 3d DCA 2019). However, his remaining three grounds for relief merit further discussion. Cobb contends he was entitled to an evidentiary hearing on the issue of whether his trial counsel was ineffective for: (1) misadvising him as to the ability of the State to convict him on all five counts of attempted murder, thereby precipitating his rejection of a favorable plea offer; (2) informing him that, in the event he testified, the State would be entitled to explore the nature and circumstances of his prior

convictions; and (3) failing to investigate and ensure the presence of a material witness, Shanequa Rigby. Because Cobb set forth facially sufficient claims in his motion, and those assertions are not conclusively refuted by the record below, an evidentiary hearing is required.[1] See Alcorn v. State, 121 So. 3d 419, 422 (Fla. 2013) ("[I]n order to show prejudice [where the defendant rejected a plea offer based on misadvice], the defendant must demonstrate a *reasonable probability*, . . . 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, . . . would have been less severe than under the judgment and sentence . . . imposed.") (emphasis added); Nelson v. State, 875 So. 2d 579, 583-84 (Fla. 2004) ("In a rule 3.850 motion, a defendant . . . would be required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have so testified prejudiced the case . . . [Further, the motion] must include an assertion that those witnesses would in fact have been

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[1] Further, we note that although courts are not precluded from rejecting an "undisputed . . . allegation that [a defendant] would have taken the plea offer but for being misadvised on the proper statutory maximum . . . , [n]o single piece of evidence will absolutely mandate or foreclose a finding of prejudice under any and every scenario." Alcorn v. State, 121 So. 3d 419, 431-32 (Fla. 2013). Accordingly, a trial court errs by summarily denying such a postconviction claim, filed under oath and supported with a transcript wherein a plea is referenced. See Massaro v. State, 127 So. 3d 690, 691 (Fla. 4th DCA 2013).

available to testify at trial."); McLin v. State, 827 So. 2d 948, 954 (Fla. 2002) ("[W]here no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record.") (citation omitted); Rollins v. State, 246 So. 3d 1284 (Fla. 2d DCA 2018) (reversing the summary denial of a motion for postconviction relief where the defendant alleged that counsel failed to give proper advice concerning the strength of the State's case and his claims were not conclusively refuted by the record); Simon v. State, 47 So. 3d 883, 886 (Fla. 3d DCA 2010) ("Counsel may make a tactical decision in advising the defendant, but a trial court's finding that such a decision was tactical, so as to defeat a defendant's post-conviction ineffective assistance claim, usually is inappropriate without an evidentiary hearing.") (citation omitted); Rodriguez v. State, 761 So. 2d 381, 383 (Fla. 2d DCA 2000) ("When [a] witness admits his or her convictions, a trial court errs by allowing the State to question the witness about the specific convictions.") (citation omitted).

Accordingly, we affirm, in part, reverse in part, and remand for further proceedings consistent with this opinion.

Affirmed in part; reversed in part.