Third District Court of Appeal

State of Florida

Opinion filed July 1, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D20-0770
Lower Tribunal No. 15-16272

Jean Gerome,
Petitioner,

vs.

The State of Florida,
Respondent.

A Case of Original Jurisdiction – Habeas Corpus.

Rier Jordan, P.A., and Jonathan E. Jordan, for petitioner.

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

Before SALTER, LINDSEY, and MILLER, JJ.

MILLER, J.

Petitioner, Jean Gerome, seeks relief in habeas corpus, contending his appellate counsel was ineffective in filing an Anders[1] brief on direct appeal. In his petition, Gerome contends his attorney was ineffective in failing to argue the trial court erred in allowing the State to amend the charging document in the midst of jury selection. As the asserted deficiency neither fell measurably outside the range of professionally acceptable performance, nor compromised "the appellate process to such a degree as to undermine confidence in the correctness of the result," we deny the petition. Richards v. State, 809 So. 2d 38, 39 (Fla. 5th DCA 2002) (citation omitted).

PROCEDURAL HISTORY

In late 2016, Gerome was charged by information with one count of sexual battery, in violation of sections 794.011(5)(b) and 777.011, Florida Statutes, based upon his involvement as a principal in the crime. The case proceeded to trial, and, shortly after the venire was summoned, the State moved to amend the operative charging document. The prosecutor sought to plead an alternative method by which the crime was committed. The defense objected. The lower court conducted an inquiry, and, after ascertaining the proposed amendment was amply supported by disclosures in pretrial discovery, granted the motion.

[1] Anders v. California, 386 U. S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

At the conclusion of the trial, Gerome was convicted, as charged, and sentenced to a substantial term of incarceration followed by reporting probation. Thereafter, he timely filed a direct appeal.

In that appeal, his appellate counsel initially filed a single-issue brief, raising a claim of error in conjunction with the State's exercise of a peremptory strike. The attorney subsequently withdrew her written submission and filed an Anders memorandum, asserting possible error in the admission of an out of court statement and denial of a motion for new trial. Upon our invitation, Gerome filed a statement of points, urging error in the failure to inform the jury of the availability of a read-back and denial of the motion for judgment of acquittal. We affirmed the judgment and sentence in an unelaborated per curiam decision. Gerome v. State, 274 So. 3d 1090 (Fla. 3d DCA 2019). Gerome then filed the instant petition.[2]

LEGAL ANALYSIS

"Criminal defendants are guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." Public

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[2] The fact a petitioner could have, but did not present an issue in his pro se brief on direct appeal does not preclude a subsequent claim of ineffective assistance of appellate counsel, nor does the fact that the court could have identified the error in the course of its independent Anders review.

Towbridge v. State, 45 So. 3d 484, 486 (Fla. 1st DCA 2010) (citing Riley v. State, 25 So. 3d 1, 2 n. 1 (Fla. 1st DCA 2008)).

Defender v. State, 115 So. 3d 261, 266-67 (Fla. 2013) (citing Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); Art. I, § 16, Fla. Const.). "[T]he underlying purpose of the Sixth Amendment requirement of effective assistance is 'to insure a fair trial.'" Lissa Griffin, The Right to Effective Assistance of Appellate Counsel, 97 W. Va. L. Rev. 1, 10 (1994)

"The standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), standard for claims of trial counsel ineffectiveness." Valle v. Moore, 837 So. 2d 905, 907 (Fla. 2002) (citing Jones v. Moore, 794 So. 2d 579, 586 (Fla. 2001)). Hence,

> [f]irst, the petitioner must show that the alleged omissions are of such magnitude as to constitute serious error or a substantial deficiency falling measurably outside the range of professionally acceptable performance. See Connor v. State, 979 So. 2d 852, 869 (Fla. 2007). Second, the petitioner must show that the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Id.

Skinner v. State, 137 So. 3d 1164, 1166 (Fla. 3d DCA 2014).

It is well-entrenched under Florida law that "appellate counsel cannot be deemed ineffective for failing to raise nonmeritorious claims on appeal." Valle, 837 So. 2d at 908 (citation omitted). "In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous

issue." Id. (citations omitted); see Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987 (1983) (finding a defendant does not have "a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client"); Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990) ("[I]t is well established that counsel need not raise every nonfrivolous issue revealed by the record.") (citation omitted).

It is axiomatic that "the state may substantively amend an information during trial, even over the objection of the defendant, unless there is a showing of prejudice to the substantial rights of the defendant." State v. Anderson, 537 So. 2d 1373, 1375 (Fla. 1989) (citing Lackos v. State, 339 So. 2d 217 (Fla. 1976)). Hence, an "amendment is permissible when it merely clarifies some detail of the existing charge and could not reasonably have caused the defendant any prejudice." Green v. State, 728 So. 2d 779, 781 (Fla. 4th DCA 1999); see also Toussaint v. State, 755 So. 2d 170, 172 (Fla. 4th DCA 2000) ("Since the age . . . was the only allegation changed in the amended information, it cannot be said that the amended complaint changed the 'essential elements of the charged offense.'") (citation omitted).

Prejudice occurs where the amendment "constitutes the charging of a different crime" or "change[s] the 'essential elements of the charged offense.'" Toussaint, 755 So. 2d at 172 (Fla. 4th DCA 2000) (citation omitted); see also Wright v. State,

41 So. 3d 924, 926 (Fla. 1st DCA 2010) ("[A]n amendment that substantively alters the elements of the crime charged is per se prejudicial.") (citation omitted).

Here, both the original and amended charging documents alleged that Gerome aided and abetted another in the commission of sexual battery. Although the amendment purported to add an alternative means by which the victim was violated, it did not alter the elements of the crime or the existing charge.

Further, at the time the amendment was effectuated, the jury had not yet been impaneled and sworn. Accordingly, as the parties had furnished neither evidence nor argument, the integrity of their presentations remained wholly uncompromised.

Finally, the State disclosed the alternative theory from the inception of the case, through written discovery that included a report encapsulating forensic medical examination findings. Indeed, the deposition testimony of the victim served as the catalyst for amendment.

Considering these factual circumstances, we conclude there was insufficient authority to support the position the amendment was improperly condoned. Accordingly, counsel was not ineffective as "appellate counsel should not raise every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed." Davila v. Davis, 137 S. Ct. 2058, 2067, 198 L. Ed. 2d 603 (2017) (citations omitted); see also Rutherford v. Moore, 774 So. 2d 637, 644 (Fla. 2000)

("The failure to raise meritless claims does not render appellate counsel's performance ineffective.") (citations omitted).

Petition denied.