IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

STEVEN E. POWELL,

Appellant,

v.

DCA CASE NO.: 5D12-4498
L.T. CASE NO.: 2010-CF-73-A-X

STATE OF FLORIDA,

Appellee.

_____/

AMENDED INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT, MARION COUNTY, FLORIDA, OF A DENIAL OF A MOTION TO WITHDRAW PLEA UNDER RULE 3.170(l), FLORIDA RULES OF CRIMINAL PROCEDURE

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STATEMENT OF THE CASE AND FACTS

1. On January 6, 2010, Steven E. Powell was charged by information in Case Number 2010-73-CF with five crimes: armed kidnapping in violation of section 787.01, Florida Statutes; sexual battery with threatened use of force in violation of section 794.011, Florida Statutes; robbery in violation of section 812.13, Florida Statutes; battery in violation of section 794.03, Florida Statutes; and, violating an injunction against domestic violence in violation of section 741.31, Florida Statutes. (R. 36).

2. Also on January 6, 2010, Mr. Powell was charged by information in Case Number 2010-75-CF with three additional crimes: felony fleeing or attempting to elude police, in violation of section 316.1935, Florida Statutes; driving on a suspended license (third offense), in violation of section 322.34(2)(c); and, resisting or obstructing an officer without violence, in violation of section 843.02, Florida Statutes. (*Id.*).

3. On August 29, 2011, the court consolidated all of the pending charges into Case Number 2010-73-CF. (*Id.*).

4. On December 5, 2011, without a written plea offer, Mr. Powell pled as follows:

   a. No contest as to felony fleeing or attempting to elude police (Count IV of the consolidated information).

b Guilty as to driving on a suspended license (Count V).

c. No contest as to battery (Count VI).

d. Guilty as to violating a domestic violence injunction (Count VII).

e. Guilty as to resisting or obstructing an officer, without violence (Count VIII).

(R. 27). The state file a notice of intent to seek habitual offender status that day, and it is not clear that Mr. Powell received notice before entering his plea.

5. During the plea colloquy, the trial court explained that Count IV is a second-degree felony normally punishable by up to fifteen years in prison and a $10,000 fine. The court then confirmed that the State filed a habitual offender notice and advised Mr. Powell that he faced up to thirty years in prison. (See Appx. B, Appellant's Initial *Pro Se* Brief, for a transcript of the colloquy).

6. The court then verified that no one had tried to coerce or pressure Mr. Powell into pleading, and Mr. Powell affirmed that no one had promised him anything at all in exchange for his plea. (R. 79).

7. However, the court neglected to inform Mr. Powell that as a habitual offender his sentence would be served day for day, without eligibility for various early release programs, including controlled release and provisional release. *See Ashley v. State,* 614 So.2d 486, 490 n.8 (Fla. 1993) (holding that in order for a defendant to be habitualized following a guilty or nolo plea, the trial court must confirm that he is

personally aware of the possibility and reasonable consequences of habitualization, including "the fact that habitualization may affect the possibility of early release through certain programs.").

8. On December 10, 2011, Mr. Powell proceeded to a jury trial on the following charges:

a. Armed kidnapping (Count I).

b. Sexual battery with threatened use of force (Count II).

c. Robbery (Count III).

(R. 37).

9. On December 10, 2011, the jury acquitted Mr. Powell on all charges tried. (*Id.*).

10. On February 27, 2012, the court sentenced Mr. Powell as follows:

a. On Count IV (felony fleeing or eluding police), a fifteen-year term of imprisonment, enhanced pursuant to section 775.084, Florida Statutes (the habitual offender statute).

b. On Count V (driving on a suspended license, third offense), a five-year term of imprisonment, to run consecutive to the fifteen-year sentence imposed in Count IV.

c. On Counts VI, VII, and VIII - 365 days in the Marion County Jail, to run concurrently with the sentence in Count IV.

(R. 43-44). Thus, the court sentenced Mr. Powell to a total of twenty years in the custody of the Department of Corrections.

11. On March 14, 2012, Mr. Powell filed his motion to withdraw his pleas of guilty and no contest. (R. 1-5). Mr. Powell sought to withdraw his plea because his attorney had advised Mr. Powell that we would only receive a five-year sentence if he pled guilty, but that Mr. Powell would receive the same sentence if he lost in trial on a third degree fleeing and eluding charge. (R. 3). Mr. Powell explained that he would have exercised his right to a jury trial if he'd known he faced a sentence longer than five years. (R. 4-5).

12. On March 22, 2012, Mr. Powell filed a notice of appeal. (R.55). This deprived the trial court of jurisdiction over his 3.170 motion.

13. Accordingly, on May 29, 2012, the trial court issued an order dismissing Mr. Powell's motion to withdraw his guilty and nolo pleas. (R. 56).

14. This Court granted Mr. Powell's motion to voluntarily dismiss his appeal on July 19, 2012. (*Id.*)

15. Mr. Powell, through counsel, subsequently filed an Amended Motion to Withdraw Plea after Sentencing. (R. 36-42).

16. On September 4, 2012, the trial court issued an order vacating the order of dismissal and denying Mr. Powell's pro se 3.170 motion. (R. 43-63).

17. On October 12, 2012, in response to counsel's letter, the trial court vacated its previous order, instead denying on the merits the counseled motion to withdraw his plea. (R. 76-81).

18. On October 22, 2012, Mr. Powell filed a pro se Motion for Rehearing on the denial of his amended motion. (R. 103-108). In addition to raising all of the claims previously raised, Mr. Powell claimed that his counsel had neglected to inform him that video of his chase did not show that he had run two red lights, contrary to the officers' testimony. (*Id.*). Mr. Powell also explained that he was not aware of the early release consequences of habitualization. (R. 106).

19. On November 5, 2012, the trial court denied Mr. Powell's pro se Motion for Rehearing. (R. 118-119).

20. Mr. Powell now appeals the final Order Denying Defendant's Amended Motion to Withdraw Plea After Sentencing. (R. 76-81). Timely notice of appeal was given (R. 124-126) and this appeal follows.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in denying Mr. Powell's 3.170 motion without any hearing. Florida law guarantees citizens facing habitual offender sentencing written notice of the intent to habitualize, and the trial court must confirm that the defendant is personally aware of the possibility and reasonable consequences of habitualization. *State v. Thompson*, 735 So.2d 482, 485 (Fla. 1999); *Ashley v. State,* 614 So.2d 486 (Fla. 1993). The state filed its notice of intent to habitualize on the same day that Mr. Powell plead guilty. Mr. Powell did not receive written notice of intent to habitualize in time to effectively consult with counsel. Additionally, Mr. Powell was not informed by counsel before plea proceedings that the habitual offender rendered him ineligible for any early release programs, and mandated that he could only be released to conditional release under section 947.1405, Florida Statutes. In fact, when Mr. Powell told counsel that he did not believe he could be sentenced as a habitual offender, counsel told Mr. Powell that the habitualization issue could be argued at sentencing when Mr. Powell explained that he did not think he qualified for habitual offender status. Additionally, counsel told Mr. Powell that, based on counsel's prior experiences with the sentencing judge, Mr. Powell could rely on receiving a maximum sentence of five years. Counsel's ineffective assistance rendered Mr. Powell's plea involuntary. Thus, Mr. Powell's pleas should be withdrawn.

ARGUMENT

A. STANDARD OF REVIEW

In order to withdraw a plea "after a sentence is imposed, the burden is on the defendant to prove that a manifest injustice has occurred[.]" *LeDuc v. State*, 415 So.2d 721, 722 (Fla. 1982); *see also Miller v. State,* 814 So.2d 1131, 1132 (Fla. 5th DCA 2002) ("[T]he standard applicable to cases in which a defendant seeks to withdraw a plea after sentencing" is that the "withdrawal of the plea is necessary to correct a manifest injustice." (citing *Williams v. State*, 316 So. 2d 267 (Fla. 1975))).

1. Motion to Withdraw Plea under Florida Rule of Criminal Procedure 3.170(l)

One basis for withdrawing a plea after sentencing is that the plea was not entered voluntarily. *See* Fla. R. Crim. P. 3.170(l); Fla. R. App. P. 9.140(b)(2)(A)(ii)(c). Before accepting a plea, trial courts must ensure that defendants understand the maximum penalties for each charge. *See* Fla. R. Crim. P. 3.172(c). In addition to the maximum term of incarceration, the Florida Supreme Court has explained the courts must inform defendants that, as habitual offenders, they are ineligible for certain early release programs. *Ashley v. State,* 614 So.2d 486, 490 n.8 (Fla. 1993). If the court fails in its duties, manifest injustice occurs, and the courts should allow defendant to withdraw the plea,

even if sentencing has already occurred. *Woodall v. State*, 39 So.3d 419, 421 (Fla. 5th DCA 2010).

Another example of a manifest injustice occurs when counsel's constitutionally deficient performance causes the defendant to waive his right to trial. *Woodall*, at 421. Ineffective assistance of counsel should be considered in determining "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill v. Lockhart,* 474 U.S. 52, 56 (1985).

2. Evidentiary Hearings in Rule 3.170 Proceedings

When a defendant files a facially sufficient motion to withdraw a plea, the trial court must either afford the defendant an evidentiary hearing or accept the defendant's allegations in the motion as true except to the extent that the record conclusively refutes them. *Iaconetti v. State*, 869 So.2d 695, 699 (Fla. 2d DCA 2004). In this context, "[D]ue process requires a hearing unless the record conclusively shows the defendant is entitled to no relief." *Snodgrass v. State*, 837 So.2d 507 (Fla. 4th DCA 2003).

In *Sheppard v. State*, 17 So.3d 275, 287 (Fla. 2009), the Florida Supreme Court outlined the procedure trial courts should follow when a defendant, through a motion under Rule 3.170, seeks to withdraw a plea based on an adversarial relationship with counsel. The Court stated:

> [T]he trial court should hold a limited hearing at which the defendant, defense counsel, and the State are represented. If it appears to the trial court that an adversarial relationship between counsel and the defendant has arisen and the defendant's allegations are not conclusively refuted by the record, the court should either permit counsel to withdraw or discharge and appoint conflict-free counsel to represent the defendant.

17 So.3d at 287.

B ANALYSIS

The record does not show that Mr. Powell received written notice of habitualization before the plea colloquy. Additionally, the transcript shows that the trial court failed to explain the early release consequences of habitualization. This violated *Ashley v State,* 614 So.2d 486 (Fla. 1993). Based on its statement that the State's filing of a habitual offender notice "could expose [Mr. Powell] to up to 30 years in prison" (R. 25), the trial court erroneously concluded that Mr. Powell was adequately apprised of the sentence he was facing on each of the charges. However, the plea colloquy is silent as to the other consequences of habitual offender sentencing.

Additionally, Mr. Powell's counsel rendered ineffective assistance by creating an expectation of a five-year sentence. Mr. Powell's counsel advised Mr. Powell that, in exchange for his pleas of guilty or no contest on Counts IV, V, VI, VII and VIII, he should expect the trial court to impose a five-year

prison sentence. Mr. Powell relied on counsel's advice, accepting counsel's representation that he could accurately predict the sentence based on his prior experience with the sentencing judge. Had Mr. Powell known that a longer sentence was a realistic possibility, he would have proceeded to trial on all of his charges. Therefore, Mr. Powell has made a prima facie showing that relief pursuant to 3.170 is appropriate and he deserves an evidentiary hearing to make his case.

CONCLUSION

Because Mr. Powell has established his right to relief, this Court should reverse the order denying Mr. Powell's Amended Motion to Withdraw Plea and order the lower court to vacate Mr. Powell's conviction. In the alternative, this Court should remand this cause for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 13, 2013, a true and correct copy of the foregoing has been furnished by email to the Attorney General's e-filing account at crimappdab@myfloridalegal.com.

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CERTIFICATE OF COMPLIANCE

I certify that this Initial Brief of Appellant Steven E. Powell complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l). The brief has been prepared using Times New Roman, 14-point font.

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