IN THE COURT OF APPEAL FOR THE STATE OF FLORIDA
FOURTH DISTRICT COURT OF APPEAL

X,

Appellant,

CASE NO:
L.T. NO:

v.

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE]JUDICIAL CIRCUIT COURT,

Gray R. Proctor, Esq.
LAW OFFICE OF GRAY PROCTOR
Fla. Bar No. 48192
122 E. Colonial Dr., Ste. 100
Orlando, FL 32801
Ph: 321-445-1951
Fax: 321-445-5484
Em: gray@appealsandhabeas.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

ARGUMENT

As did the lower court, the State fails to engage with the relevant law and facts in this case. The State's answer brief consists almost entirely of statements of the law. The only argument is found in two paragraphs on pages 9 and 10. The initial brief adequately states the governing law. In this reply, Mr. X strives to highlight the portions of the record which demonstrate that counsel's performance was deficient, and that a reasonable probability exists that Mr. X would have accepted a plea agreement otherwise.

I. Deficiency.

Every Heineken bottle has an identification number shared only with bottles made at the same facility on the same minute. Heineken beers are to be removed from the shelf after six months. Mr. X was found on March 11, 2010 with a Heineken bottled on March 10, 2009, with an identification number that matched the beers in the victim's refrigerator.

The advice that Mr. X should have received in connection with the initial plea was along the following lines: "With the identification numbers on the Heineken matching the ones in the victim's refrigerator, they might as well have your fingerprints. There is no realistic possibility of acquittal at trial. We should see if we can get a better deal than 15 years; the State

apparently thinks you're eligible for the habitual felony offender enhancement, and they might not have meant to offer the actual statutory maximum. Regardless, the possibility of a more serious charge is out there; you would be getting a benefit from this plea even if you took it as-is."

Trial counsel rendered deficient performance by failing to investigate and discover, before the first offer expired, that the bottle of Heineken could be linked to the bottles in the victim's refrigerator with nearly absolute certainty. Counsel's advice on the strength of the case against him could not have been based on reasonable investigation. In fact, there was merely the unrealized "hope[] that there would be thousands upon thousands of beers with that same lot number." (HT 87)[1] Thus, counsel's performance was deficient with respect to the initial, most favorable plea offer, rendering it irrelevant that eventually "counsel in fact investigated" the evidence against Mr. X. (Answer Br., at 10).

Trial counsel also rendered deficient performance by failing to recognize that Mr. X was not HFO-eligible in time to attempt to negotiate a more favorable sentence. The State argues that trial counsel was not deficient because Mr. X was aware he did not qualify for the habitual felony offender enhancement. Counsel's notes on the file, however, appear

[1] References to the transcript of Mr. X's evidentiary hearing are designated "HT."

to show that he only learned Mr. X was HFO-ineligible on September 21, 2010. (HT 35, 52, 83-84).[2] Whichever portion of Mr. Smith's inconsistent testimony one credits, he did not discuss with opposing counsel whether she intended to offer him a plea to the maximum, or whether she believed she was offering half of the maximum, as indicated by her notice of intent to habitualize (filed in July and August of 2010). The initial period for negotiating the most favorable plea deal possible passed, and only after Mr. X was charged with home invasion robbery[3] did an opportunity exist to negotiate as a non-HFO-eligible defendant.

II. Prejudice

"Prejudice is not determined by a 'more likely than not' standard but rather is expressed in terms of undermining confidence in the outcome" of the criminal proceedings. Ibar v. State, 41 Fla. L. Weekly S30 (Fla. February 4, 2016) (citations omitted). Prejudice must be found when there exists "'a probability sufficient to undermine confidence in [that] outcome.'" Porter v. McCollum, 558 U.S. 30, 44 (2009). When counsel's performance is deficient with respect to a rejected plea agreement, prejudice

[2] References to September 15, 2010, the date the trial court found that Mr. Smith learned Mr. X's status, are on pages 51, 56, and 83 of the hearing transcript.

[3] Although he did not anticipate the precise charge in the amended information, trial counsel anticipated that Mr. X might receive a more serious charge, such as burglary with a battery. (HT 93-94).

– i.e., "a reasonable probability of a different result" – requires an "objectively reasonable" claim that the defendant would have accepted a plea offer. Capalbo v. State, 73 So. 3d 838, 843 (Fla. 4th DCA 2011).

The State offered Mr. X a 15-year sentence, or half of the enhanced maximum of 30 years it requested in its HFO notice. If the State offered Mr. X a 7.5 year sentence – half of the actual statutory maximum of 15 years – Mr. Smith testified that the offer would have been accepted. (HT 69 (recalling that Mr. X sought a 6-8 year sentence)). Even if the State only offered the actual maximum of 15 years for the initial charges, counsel understood that the offer could beat the alternative if more serious charges were filed. (HT 93-94).

Even if Mr. Smith is credited, his testimony that Mr. X was "adamant"[4] about fighting the charges after the initial plea describes the situation at the time: a poor identification (HT 62-63), poor quality shoeprint evidence (HT 65-66), and weak evidence such as possession of a lighter and partial matches of the denominations allegedly taken (HT 66-

[4] Mr. X does not concede that the lower court actually found as fact that he would not have accepted the plea offer if he had been advised of the strength of the bottle identification evidence. The court wrote that he "was adamant about having a trial," not that he would have been, and the only explicit finding appears to be that "I am convinced that the defendant was made aware of the plea offer and rejected it outright." (R. 890-91). The lower court does not appear to have applied the correct law.

67). And his testimony that Mr. X wanted to be free for "a high school graduation or something, fifteenth birthday," (HT 69) was actually basically consistent with accepting, because a defendant serving 85% of a fifteen-year sentence (12.75 years), starting at his pretrial incarceration when his daughter was three years old (HT 8, daughter born 11/27/2007), would be released when his daughter is approximately 15¾ years old.

The court below, and the State here, reasoned that "because the state never presented [testimony on the strength of the identification numbers], the defendant suffered not [sic] prejudice." (Answer Br., at 10). But Mr. X could not have known or even expected this to occur at trial; it was due to pure luck that the distributor did not testify, not to any tactical decision. (HT 89). The State's reasoning contradicts the holding of the Florida Supreme Court that prejudice exists whenever "the defendant has shown a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." Alcorn v. State, 121 So. 3d 419, 432 (Fla. 2013). The only relevant inquiry is whether Mr. X would have accepted the plea offer. Because the bottle identification data was not timely discovered, and no strategy existed to keep it out at trial, its subsequent exclusion is irrelevant.

CONCLUSION

The Court is asked to decide three issues here:

1) Whether trial counsel has an obligation to investigate evidence as potentially damning as the bottle identification numbers in connection with a plea offer;

2) Whether trial counsel has an obligation to confer with the State to correct a plea offer apparently based on an erroneous 30-year statutory maximum instead of the correct 15-year offer; and,

3) Whether an objectively reasonable probability exists that a defendant in Mr. X's position would have pleaded guilty absent counsel's errors.

The Court should answer "yes" to each, and vacate the conviction with instructions to re-offer the initial plea agreement.

Respectfully Submitted,

/s/ Gray Proctor
Gray R. Proctor
Fla. Bar No. 48192
122 E. Colonial Drive
Suite 100
Orlando, FL 32801
p: 321-445-1951
f: 321-445-5484
gray@appealsandhabeas.com

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2016, a true and correct copy of the foregoing has been furnished by email to the Attorney General's Office, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401, via email to: crimappwpb@myfloridalegal.com

/s/ Gray Proctor

CERTIFICATE OF TYPEFACE COMPLIANCE

I certify that this Reply Brief of Appellant 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.

/s/ Gray Proctor