IN THE SUPREME COURT OF FLORIDA

ROBERT EY,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

Case No.: SC03-2161

DCA Case No.: 2D03-2811

REPLY BRIEF OF PETITIONER ROBERT EY

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STATEMENT OF THE CASE AND FACTS

The State in its Preliminary Statement in the Answer Brief stated that the Record is twenty-eight pages in one volume. While the Record is in one volume, the Record runs sixty pages.

Mr. Ey relies on his Statement of the Case and Facts contained in his Initial Brief.

SUMMARY OF THE ARGUMENT

Mr. Ey in his Initial Brief presented four issues, each of which on its own would entitle Mr. Ey to an evidentiary hearing.

The State's initial argument that Mr. Ey did not raise with sufficient detail the issue of misadvice concerning the future sentence enhancing effects a plea would have on alleged crimes previously committed known to trial counsel and therefore this issue is not preserved misses the mark. Mr. Ey pro se did raise this matter within his 3.850 motion, although maybe not with the exactitude an attorney would have done. In all events though, Mr. Ey did raise and argue this matter clearly to the Second District. The Second District permitted the argument and denied it on its merits.

The State's argument on the merits essentially states that there can be no deficient performance where the state-appointed, state-paid attorney affirmatively

misadvises an indigent defendant to induce a plea. That argument is constitutionally inadequate. The State cannot – and did not – challenge the case law Mr. Ey cited in his Initial Brief demonstrating that his plea was involuntary.

Furthermore, the State's argument that there can be no prejudice here also misses the mark. The State tries to confuse the situation where the defendant commits a new crime after a plea with this situation, where the alleged crime occurred prior to the plea and such alleged fact was known to trial counsel. Prejudice is met because Mr. Ey would not have pled in Case Number 99-21195 had his attorney's advice been correct.

Notwithstanding the affirmative misadvice on the future sentence enhancing effects issues, Mr. Ey's trial counsel also erred in other areas, with each error requiring an evidentiary hearing. The State's contention that Mr. Ey could have known or determined by the time he pled that trial counsel's statement that voluntary intoxication no longer was a defense in Florida was error. The fallacy of that argument is glaring – the system requires that indigent defendants rely on the correctness of their attorney's advice. There is no mechanism – and no ability – for an indigent defendant to go behind their attorney's advice during the pendency of a case. The United States Constitution requires that trial counsel's advice be competent.

Finally, the State contends that Mr. Ey should have been checking on the status of his previously filed pro se motion to withdraw his plea. Practically, the State's argument cannot work, as this would require prison inmates to call the judicial assistant of the trial court judge on the case for status updates. In Mr. Ey's case, nothing in the Record rebuts his contention that he never received the trial court's order dismissing his pro se motion to withdraw his plea. When he became aware of it, he quickly filed pro se the instant 3.850 motion.

In all events, Mr. Ey's trial counsel agreed to pursue postconviction relief on his behalf but failed to do so. Under this Court's case law, Mr. Ey is entitled to an evidentiary hearing on this matter.

STANDARD OF REVIEW

Mr. Ey relies on his Standard of Review contained in his Initial Brief.

ARGUMENT

I. MR. EY'S TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE BY AFFIRMATIVELY MISADVISING MR. EY THAT HIS PLEA IN CASE NUMBER 99-21195 COULD NOT BE USED TO ENHANCE A SENTENCE FOR A CRIME TRIAL COUNSEL KNEW MR. EY HAD ALREADY ALLEGEDLY COMMITTED.

The State challenges Mr. Ey's 3.850 motion primarily on the argument that Mr. Ey in his pro se motion did not raise this issue with enough specificity and

therefore this issue is not properly before the Court. To the contrary, he did, while maybe not with as much detail as an attorney would have provided. Mr. Ey did state in his motion that the unrelated charge "originated prior to the plea of this cause, 00-07093CF." (R 14).

Furthermore, the Record also discloses that the Second District entertained – and ruled on – Mr. Ey's claim that his counsel knew of the alleged yet-to-be charged crimes that occurred prior to the plea in case number 99-21195. (R 58, 59). Specifically, Mr. Ey pro se stated:

> 1) The affirmative bad advise [trial counsel] administered was given on April 10th 2000 after the defendant told counsel he had criminal charges pending and needed to be sure the conviction on this case could not be used in anyway on those cases.
>
> 2) [Trial counsel] said "no."
>
> 3) This bad advice coerced the plea.
>
> 4) This case was used as a predicut [sic] conviction 2 months later on those pending cases.

(R 58). The Second District – on the merits – denied this claim. (R 59).

Accordingly, this Court can address Mr. Ey's contention because he raised it in his pro se 3.850 motion, he more clearly articulated that position before the Second District, and the Second District ruled against Mr. Ey on the merits.

A. Deficient performance.

The State in its Answer Brief also challenges the deficient performance and prejudice prongs in the establishment of ineffective assistance. Initially, the State argues that trial counsel's affirmative misadvice cannot be deficient performance because "any wrong advice about the potential for future sentence enhancement would not impact the voluntariness of the plea to felony petit theft." An Br. at 12. The State continues the deficient performance argument by asserting that due process only requires the direct consequences, and not collateral consequences, be advised to a pleading defendant. See An. Br. at 12-13. The State concludes by contending that the sentence enhancement was not the result of misadvice; but instead the sentence enhancement was due to the subsequent prosecution and the State's decision to seek enhancement. See An Br. at 13.

Reduced to its essence, the State's argument on deficient performance is this: the state-appointed, state-paid attorney that affirmatively misadvised a defendant that directly lead to the defendant's plea on a charge the State brought cannot be deficient performance.

Mr. Ey initially notes that the State did not respond to or contest Mr. Ey's contentions concerning the constitutional requirement that pleas be voluntary. The State's bald assertion that the misadvice could not affect the voluntariness because the misadvice did not directly result in the enhanced sentence confuses the case

law cited in the Initial Brief. While collateral consequences may not need to be given to a defendant prior to a plea, the plea must still be voluntary. A plea's voluntariness is a separate requirement. Affirmative misadvice leads to a defendant's incomprehension of the plea, making it involuntary.

The State's contention that the direct cause of the sentence enhancement was the "separate successful prosecution" and the State's decision "in a separate criminal proceeding to adjudicate and sentence Ey as a habitual felony offender" certainly is true, at least in the process. See An. Br. at 13. But that argument overlooks the obvious: if it were not for the plea in the felony petit theft case, the State could not have sought habitualization. The deficient performance associated with the legally incorrect advice is evident.

B. Prejudice.

Next, the State challenges the prejudice prong. The State contends on page 15 of its Answer Brief that Mr. Ey did not establish prejudice because Mr. Ey's contentions that he would not have pled guilty in Case Number 99-21195 was "self-serving." In support, the State cites Justice Wells' specially concurring opinion in Bates. In that opinion, Justice Wells concluded that the cause of prejudice in an affirmative misadvice on sentence enhancing consequence to a plea was "a separate and independent new crime . . . ." Bates 887 So. 2d 1214, 1221 (Fla. 2004) (Wells, J, concurring specially) (emphasis added).

Mr. Ey has no quarrel with Justice Wells' reasoning; instead, Mr. Ey points out that his situation does not involve a "new" crime – it was a previous crime. Thus, the State's reliance on this reasoning is inapplicable. This leaves the State's bald "self-serving" assertion that Mr. Ey cannot establish prejudice, even though nothing in the record refutes Mr. Ey's contention that he would not have pled guilty. Under this Court's case law – which the State did not contest – this is a sufficient allegation of prejudice. See Grosvenor v. State, 874 So. 2d 1176, 1181 (Fla. 2004).

Mr. Ey is entitled to an evidentiary hearing on his ineffective assistance claim.

II. MR. EY'S TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE BY AFFIRMATIVELY MISADVISING MR. EY THAT HIS PLEA IN CASE NUMBER 99-21195 COULD NOT BE USED TO ENHANCE A SENTENCE BECAUSE THE PETIT THEFT CHARGE WAS ALREADY ENHANCED.

The State's response to Mr. Ey's Issue II is that the "factual underpinnings" of his claim could have been discovered earlier. See An. Br. at 16. That argument, however, ignores the reality that the system is dependent on defendants being able to rely on their attorneys. Mr. Ey did not know of the possibility of habitualization until he was served with the notice. (R 21, 22). The Record reveals that notice

was date stamped August 30, 2000. Mr. Ey within two years of that date filed his pro se 3.850 motion. His motion was timely.

III. MR. EY IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS ALLEGATIONS THAT HIS ASSISTANT PUBLIC DEFENDER AFFIRMATIVELY MISADVISED HIM THAT VOLUNTARY INTOXICATION WAS NOT A DEFENSE TO HIS THEFT CHARGE.

Regardless of this Court's disposition of Issues I and II, Issues III and IV each provides a separate and independent basis to quash the decision below and remand for an evidentiary hearing. As this case has been pending at this Court for approximately four years, this Court should exercise its discretion to rectify the glaring errors below and permit Mr. Ey an evidentiary hearing.

The State confines its response to Mr. Ey's Issue III to one paragraph on page 17 of its Answer Brief. Labeling the claim "stale," the State contends that the intoxication defense "was a known claim and/or ascertainable by Ey when he entered his plea." An. Br. at 17. That argument overlooks the reality of this case – that Mr. Ey's appointed attorney specifically advised Mr. Ey that voluntary intoxication no longer was a valid defense in Florida. (R 7).

The unstated premise of the State's argument is that Mr. Ey – and presumably all indigent defendants – has a duty to go behind his attorney's advice

prior to pleading to ascertain whether the appointed attorney's advice is correct. That argument is dangerous, and constitutionally incorrect.

Suggesting that an indigent defendant must independently confirm the veracity of an appointed attorney's legal advice during the pendency of the proceeding would only undercut the viability of the criminal justice system. (It also presumes that an indigent defendant, who likely remains in jail awaiting trial, would have the means and access to a separate attorney to confirm the correctness of the appointed attorney's advice. The State fails to address who would pay for this separate attorney.) Allowing a system that permits an appointed attorney to give legally incorrect advice that induces a plea and then does not permit an evidentiary hearing on that issue is the bad public policy discussed by then Chief Judge Blue. See Alexander v. State, 830 So. 2d 899, 900 (Fla. 2d DCA 2002) (Blue, C.J., concurring).

In all events, the Sixth Amendment requires the State to provide indigent defendants like Mr. Ey with a constitutionally competent counsel. See, e.g., Strickland v. Washington, 466 U.S. 668, 685-86 (1984). An attorney's affirmative misadvice on the availability of a voluntary intoxication defense renders counsel's advice constitutionally inadequate. See, e.g. Reaves v. State, 826 So. 2d 932, 937-939 (Fla. 2002) (reversing trial court's summary affirmance of postconviction

motion for evidentiary hearing to establish whether counsel performed deficiently in failing to pursue known intoxication defense).

Mr. Ey is entitled to an evidentiary hearing on this issue.

IV. MR. EY TIMELY SOUGHT POSTCONVICTION RELIEF CONTENDING THAT HIS TRIAL COUNSEL WAS INEFFECTIVE AND HIS PLEA IN CASE NUMBER 99-21195 WAS INVOLUNTARY.

A. Mr. Ey's instant postconviction motion was timely.

1. The date of notice of counsel's error controls.

The State first claims that Mr. Ey does not allege below that he knew he was under investigation for crimes allegedly committed prior to his plea. See An. Br. at 17-18. The State's argument misses the point – Mr. Ey's contention is that he did not know that counsel's advice that the theft plea in Case Number 99-21195 could be used to habitualize him was wrong until he received the State's notice of intent to habitualize him. Mr. Ey filed the instant 3.850 motion within two years of that date.

Without citation to any case law, the State continues its argument referenced in Issue III that Mr. Ey should have gone behind his appointed attorney's legal advice prior to pleading in 99-21195. As noted above, that argument is meritless. In all events, Mr. Ey would have no basis to know that his counsel's advice was incorrect until he received the habitual offender notice.

2. Mr. Ey took steps to challenge the plea within two years of the plea.

The State next argues that Mr. Ey should have inquired about the status of his pro se motion to withdraw his plea, and therefore the fact that he never received the dismissal order is irrelevant. Again, the State's argument is without citation to case law.

The problem with the State's argument is a practical one – the State basically is arguing that inmates should be calling the trial court's judicial assistants to check on the status of pending motions. Mr. Ey doubts highly that the trial court judges and their judicial assistants would welcome these status calls (even assuming the judicial assistant would accept collect calls, if the call is long distance).

Nothing in the Record disputes Mr. Ey's contention that he did not receive the trial court's order dismissing his pro se filing. Mr. Ey also notes that the Record demonstrates at least three instances where there have been clerical mistakes in this case. (See R 2 – misfiled notice of appeal; 40 – 2d DCA admits "clerk error"; 59 – 2d DCA admits filing "overlooked.") Because Mr. Ey's original pro se filing occurred well within two years of the plea in 99-21195, and in the light of the numerous admitted clerical errors occurring in this case, Mr. Ey has demonstrated good cause to extend the two-year limit.

B. Mr. Ey is entitled to an evidentiary hearing on his allegation that counsel failed to advance a postconviction motion after counsel agreed to do so.

Finally, the State dismisses Mr. Ey's contention on this point, claiming that Mr. Ey's "trial counsel was not appointed for a collateral attack on his plea case." An. Br. at 21. The State's argument misses the mark, again. What Mr. Ey alleged below, and the Record does not dispute, is that his appointed attorney agreed to pursue postconviction relief for Mr. Ey. In other words, Mr. Ey hired trial counsel to pursue postconviction relief for him. Because that attorney failed to seek postconviction relief for Mr. Ey, Mr. Ey is entitled, at a minimum, to an evidentiary hearing on this issue. Steele v. Kehoe, 747 So. 2d 931, 934 (Fla. 1999). The State does not rebut this controlling law in its Answer Brief.

Instead, the State tries to avoid this Court's jurisprudence by arguing that this Court should not exercise its discretion to review this issue because there is no ruling on the merits below. See An. Br. at 22. Certainly, as the State concedes, this Court has the jurisdiction and discretion to reach this issue. The State's argument that there is no ruling on the merits below has no impact here: Mr. Ey is asking for an evidentiary hearing so there can be a ruling on the merits below. With very little analysis and citation to well-established case law, this Court can quash the decision below and remand for an evidentiary hearing.

This Court has the power to rectify the lower court's errors. In the interests of justice, this Court should do so.

CONCLUSION

Mr. Ey is entitled to an evidentiary hearing on each of his four issues. Each issue presents an independent basis for this Court to require an evidentiary hearing.

Mr. Ey's thirty-year sentence in Case Number 00-9494 – where fifteen years was the maximum without habitualization – rests on the involuntary plea in 99-21195. Nothing in the Record rebuts Mr. Ey's claims of ineffectiveness, and thus under the case law Mr. Ey is entitled to an evidentiary hearing. Mr. Ey has been waiting since 2002 for that evidentiary hearing.

The underlying theme of the State's Answer Brief is that an indigent criminal defendant has an obligation, during the pendency of a case, to independently verify the correctness of the state-paid, state-appointed attorney. The State's argument is dangerous, bad public policy, and constitutionally erroneous. Criminal defendants like Mr. Ey are constitutionally entitled to competent representation. The criminal justice system depends on it.

Where, as here, nothing in the Record rebuts the claims of ineffectiveness, this Court should vindicate the system and require an evidentiary hearing on these matters.

Accordingly, this Court should quash the decision below and remand for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY, this ___ day of July, 2007, that a true copy of the foregoing Reply Brief of Petitioner Robert Ey has been furnished by First Class U.S. Mail to:

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CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

I FURTHER CERTIFY, this ___ day of July, 2007, that the type size and style used throughout Petitioner's Initial Brief is Times New Roman 14-point font, which is compliant with Florida Rule of Appellate Procedure 9.210(a)(2).

_____
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