IN THE SUPREME COURT OF FLORIDA

COSTA T. VATHIS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC03-2268

RESPONDENT'S ANSWER BRIEF

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT R. WHEELER
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 0796409

GISELLE LYLEN RIVERA
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0508012

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Costa T. Vathis, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of one volume, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent facts as they appear in the decision of the First District Court of Appeals in Vathis v. State, 859 So.2d 517 (Fla. 1st DCA 2003), are as follows:

> The defendant, Costa T. Vathis, appeals a final order summarily denying his postconviction motion under rule 3.850 of the Florida Rules of Criminal Procedure. Seven arguments are presented in the appeal but only one merits discussion. The defendant contends that his lawyer should have objected to an emotional outburst in the courtroom. We conclude that this claim is facially insufficient and we therefore affirm the summary denial of the motion.
>
> A jury convicted the defendant of sexual battery on a child under the age of twelve. The child testified

for the state during the trial, and when she was finished, her parents allegedly rushed forward in the presence of the jury to escort her back to her seat. The defendant maintains that the parents' conduct was a form of nonverbal bolstering of the child's testimony and that he did not receive effective assistance of counsel because his lawyer failed to object or move for a mistrial.

This allegation fails to meet either part of the standard set by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must allege facts that would support a conclusion that his lawyer's performance was deficient. As the Court explained in Strickland, "This requires [a] showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 104 S.Ct. 2052. We cannot say that the trial lawyer in this case made an error at all, much less an error so serious as to be the equivalent of a deprivation of the constitutional right to counsel.

All we know from the defendant's allegation is that his lawyer did not object to the emotional outburst. The argument advanced by the defendant proceeds from this simple fact to an assumption that an evidentiary hearing is required. However, the defendant has not alleged that an objection was necessary, or even that it would have been wise. Some lawyers might conclude that the jurors would see the parents' emotional display for what it is, and that an objection would be out of place.

The defendant contends that the actions or inactions of an attorney cannot be justified as a trial strategy unless the court has made a finding to that effect after an evidentiary hearing, but this argument assumes that the postconviction motion has first identified some act or omission that is below the applicable standard of performance. If the motion fails to establish that a particular act or omission fell below the standard, there is no need for counsel to explain, or for the court to consider whether the act or omission was strategic. The question here is not whether the defendant's trial counsel could have objected; rather, it is whether a reasonably effective lawyer would have objected.

In addressing this question we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S.Ct. 2052. Furthermore, we have been warned that we should

"eliminate the distorting effects of hindsight" in evaluating an attorney's performance. Id. There are many different ways to provide effective assistance of counsel. That is why the Supreme Court said, "[T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). In this case, the defendant has succeeded only in showing that there was no objection. That is not enough to support a conclusion that his lawyer's performance was constitutionally defective.

The second part of the test in Strickland requires a showing that the action or inaction of counsel was prejudicial. This means that counsel's errors must have been "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687, 104 S.Ct. 2052. In our view, the allegations of the postconviction motion fall short of meeting this standard. The defendant claims that the parents' outburst was a form of nonverbal "bolstering" of the child's testimony, but that is not necessarily so. A more logical deduction from these facts is that the parents were trying, in their way, to comfort a child who had been through the ordeal of testifying. In any event, we would be giving very little credit to the jurors to say that the incident made them more likely to believe the child's account of the crime. Few criminal trials are completely devoid of emotion. We cannot presume that the emotion shown in this one must have been prejudicial.

Even if we were to speculate that the incident caused some jurors to become unduly sympathetic, that would not establish prejudice. As the documents attached to the trial judge's order reveal, the jurors were instructed that "[the] case must not be decided for or against anyone because [they] feel sorry for anyone or are angry at anyone." This instruction was given for a purpose, and we must assume that the jurors followed it in deciding their verdict.

For these reasons we conclude that the defendant's postconviction motion was properly denied without a hearing.

859 So.2d at 518-19.

SUMMARY OF ARGUMENT

ISSUE I

Petitioner contends that the First District Court of Appeal reversibly erred in affirming the trial court's summary denial of his claim that counsel was ineffective for failing to object and move for mistrial when the parents of the child sexual battery victim allegedly engaged in an emotional display by escorting her from the stand following her testimony.

The State asserts that conflict jurisdiction does not lie because the cases relied upon by Petitioner do not present identical factual situations to which the same law is applied to yield contrary results. This Court should decline review and determine that jurisdiction was improvidently granted.

On the merits, the Petitioner failed to present a legally sufficient claim for relief. The trial court correctly denied relief summarily disposing of the claim.

ISSUE II

Petitioner contends that the trial court erred in summarily denying his claim that counsel rendered ineffective assistance by advising him to take a polygraph examination and in entering into a stipulation that the results would be admissible at trial. He asserts that even where the lower court did not address this issue in its opinion, this Court should exercise its jurisdiction to review this issue.

The State disagrees. While this Court has authority to consider issues other than those upon which jurisdiction is based, its authority is discretionary and is properly exercised only when these other issues have been properly briefed and argued and are dispositive of the case. Here, as shown in issue one, conflict jurisdiction does not lie. Even if it did, this issue is not dispositive of the case and the Court should decline review.

On the merits, the State submits that Petitioner is unable to show either deficient performance or prejudice. The record attachments establish that counsel had no reason to advise him not to take the examination where Petitioner steadfastly maintained his innocence and the fact that Petitioner was not able to obtain a favorable result, does not make counsel's actions ineffective. Should this Court find that the attachments do not conclusively refute the claim, then the cause should be remanded for attachment of additional documentation or for an evidentiary hearing.

ARGUMENT

ISSUE I

WHETHER THE DISTRICT COURT ERRED IN FINDING PETITIONER'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE CHILD VICTIM'S PARENTS ESCORTING HER FROM THE WITNESS STAND WAS FACIALLY INSUFFICIENT AFTER THE TRIAL COURT SUMMARILY DENIED RELIEF? (Restated)

Petitioner contends that the First District Court of Appeal reversibly erred in affirming the trial court's summary denial of his claim that counsel was ineffective for failing to object and move for mistrial when the parents of the child sexual battery victim allegedly engaged in an emotional display by escorting her from the stand following her testimony. The State disagrees.

Jurisdiction

Appellant asserts that this Court has jurisdiction to review this case based upon Fla.R.App.P. 9.030(a)(2)(A)(iv) and Article V, § 3(b)(3) which grant the Court discretionary jurisdiction to review those decisions of a district court of appeal which expressly and directly conflict with a decision of another district court or this Court on the same question of law.

A conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling

Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejecting "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, supra; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980)("regardless of whether they are accompanied by a dissenting or concurring opinion"). In addition, it is the "conflict of *decisions*, not conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari." Jenkins, 385 So. 2d at 1359.

All of the cases relied upon by Petitioner fail to satisfy the standard by which conflict jurisdiction is established. For example, Beasley v. State, 774 So.2d 649 (Fla. 2000) was a direct appeal in which Beasley challenged imposition of the death penalty. It is distinguishable from the instant case as Beasley did not address whatsoever a claim of ineffective assistance of counsel at trial. Additionally, Beasley challenged the court's failure to sequester members of the victim's family who were also witnesses in the case and the potential prejudice caused by their emotional reactions. Also unlike this case, the incidents involving the family appear on the record as Beasley's trial counsel repeatedly brought to the court's attention disruptions caused by the family and the trial court repeatedly cautioned persons in the courtroom to keep their comments and emotions in check, ensuring the jury was not distracted by emotional reactions. Beasley is thus factually distinguishable

from this case since the 'emotional outburst' complained of by Petitioner was not even recorded by the court reporter.

Reaves v. State, 826 So.2d 932 (Fla. 2000), also relied upon by Petitioner, is also distinguishable from the instant case. There, Reaves asserted entitlement to an evidentiary hearing after the trial court summarily denied his claim that counsel, on retrial, was ineffective for failing to present a voluntary intoxication defense despite the fact that Reaves' confession could have supported such a defense and it was determined during the charge conference that because the jury had been informed of this defense during his first trial, an instruction on voluntary intoxication should be given. The trial court denied relief finding that voluntary intoxication was not an available defense since Reaves' expert testified during a proffer that Reaves was not so intoxicated he did not know right from wrong. The appellate court reversed because the lower court's reasoning obscured the difference between an insanity defense and a voluntary intoxication defense, voluntary intoxication was an available defense supported by the record, the claim of ineffective assistance was legally sufficient and the record was inconclusive as to why counsel did not advance the defense. The instant case simply does not involve a factually identical situation to which the same law was applied to nonetheless yield different results.

Petitioner's relies upon Rose v. State, 774 So.2d 629 (Fla. 2000) in his attempt to establish the existence of conflict

jurisdiction, Rose is similarly misplaced. Rose appealed the trial court's summary denial of a successive motion for post-conviction relief which asserted that the State had withheld material evidence regarding two of its witnesses pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and had violated Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), by intentionally misleading the defense and jury about the motives of those witnesses to testify against him. Rose therefore not only presented a different procedural and factual scenario, the legal issues presented were also different than in this case.

Finally, Seminole Shell Company, Inc. v. Clearwater Flying Company, Inc., 156 So.2d 543 (Fla. 1963) is also distinguishable from this case. Seminole Shell is a civil litigation case seeking damages following an aircraft accident. There, the court held that the inadvertent reference of the owner's witness to the existence of insurance, to which opposing counsel did not object, did not justify a later attempt by opposing counsel to determine if the owner had in fact been compensated by insurance, and the court's belated instruction, in general instructions at the close of the case, that insurance was not an issue, was deemed insufficient to cure the error. Once again, the two cases simply do not present identical facts to which the same law is applied and which yielded contrary results. Conflict jurisdiction does not lie. For all of these reasons, the State

submits that this Court should decline to review this case and find that jurisdiction was improvidently granted.

Standard of Review

An order summarily denying post-conviction relief generally presents an appellate court with a pure question of law, since the issue is whether the claim is cognizable and whether the allegations are sufficient. Orders summarily denying relief are therefore more likely to be resolved by a de novo application of the pertinent legal principles. 2 Fla. Prac., Appellate Practice, § 25.7, Philip J. Padovano, (2004 Ed.). Thus, the decision of the First District Court of Appeal, which affirmed the denial, finding the claim to be facially insufficient, must be reviewed de novo.

Preservation

This issue is preserved.

Burden of Persuasion and Presumption of Correctness

Appellant bears the burden of demonstrating prejudicial error. According to statute:

> In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

§924.051(7), Fla. Stat. (2000); see also, Savage v. State, 156 So. 2d 566, 568 (Fla. 1st DCA 1963) (Judgments are presumed

correct and appellants carry the burden of demonstrating harmful error arising from actions of the trial judge.)

Merits

It is generally recognized that where a post-conviction motion lacks sufficient factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied. Randolph v. State, 853 So. 2d 1051 (Fla. 2003).

A defendant seeking an evidentiary hearing on a post-conviction relief motion bears the burden of establishing a prima facie case based upon a legally valid claim. Fla.R.Crim.P. 3.850; Atwater v. State, 788 So. 2d 223 (Fla. 2001). This Court has indicated on numerous occasions that a defendant is entitled to an evidentiary hearing on his initial post-conviction motion unless (1) the motion, files and records in the case conclusively show that the defendant is not entitled to any relief, or (2) the motion or a particular claim is legally insufficient. See Maharaj v. State, 684 So.2d 726 (Fla. 1996); Holland v. State, 503 So.2d 1250 (Fla. 1987).

A defendant may not simply file a motion for post-conviction relief containing conclusory allegations and then expect to receive an evidentiary hearing; the defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record. Allen v. State, 854 So.2d 1255 (Fla. 2003); Irby v. State, 454 So.2d 757 (Fla. 1st DCA 1984). See also: Paul Michael Nelson v.

State, 2004 WL 1207517, (Fla. June 3, 2004) wherein this Court approved the District Court's ruling requiring appellant to file a facially sufficient post-conviction motion to warrant relief.).

Petitioner contends that the District Court erred in denying relief by finding that the claim was facially insufficient. He asserts that this ruling conflicts with decisions of this Court in that the court was obligated to accept his factual allegations as true, to the extent they were not refuted by the record, and it instead weighed and rejected those allegations. Petitioner's argument, however, improperly proceeds from the assumption that the allegations were facially sufficient.

In finding that Petitioner's allegation that counsel was ineffective was facially insufficient, the First District Court found that he failed to sufficiently allege that counsel's performance was deficient in that "[a]ll we know from the defendant's allegation is that his lawyer did not object to the emotional outburst. The argument advanced by the defendant proceeds from this simple fact to an assumption that an evidentiary hearing is required. However, the defendant has not alleged that an objection was necessary, or even that it would have been wise." 859 So.2d at 518. The court went on to add that if a post-conviction motion fails to establish that a particular act or omission of counsel fell below the standard of reasonably effective assistance, there is no need for counsel to explain, or for a reviewing court to consider whether the act or omission

was strategic, because the issue presented was “not whether the defendant’s trial counsel could have objected; rather, it is whether a reasonably effective lawyer would have objected.” Id.

Petitioner’s claim ignores the fact that in reviewing a motion for post-conviction relief, a court must first determine whether the motion is legally sufficient. If, upon examination, the motion is found to be defective either in form or substance, and is thus insufficient to state a prima facie case entitling the petitioner to relief, summary disposition is proper. State v. Reynolds, 238 So.2d 598 (Fla. 1970). In other words, as the party challenging the reliability of his conviction, a defendant seeking post-conviction relief, bears the burden of establishing that his judgment is vulnerable to collateral attack. Arbelaez v. State, 775 So.2d 909 (Fla. 2000). Here, where the Petitioner, as found by the lower court, failed to establish that objection was legally required and appropriate under the circumstances, his allegations were insufficient to warrant an evidentiary hearing. Sweet v. State, 810 So.2d 854 (Fla. 2002); Patton v. state, 784 So.2d 380 (Fla. 2000) (Post-conviction relief petitioner bears the burden of establishing a prima facie case based upon a legally valid claim). Thus, the lower court properly denied relief, where appellant failed to establish such a prima facie case.

Additionally, as previously stated, it is the "conflict of *decisions*, not conflict of *opinions* or *reasons* that supplies

jurisdiction for review by certiorari." Jenkins, supra. the State notes that Petitioner's argument fails to comport with this jurisdictional requirement. The holding in the opinion below was that appellant's claim was facially insufficient. This is the "result" contemplated by Jenkins. Nevertheless, Petitioner improperly attempts to rely upon a dissenting opinion and dicta to attempt to establish entitlement to review. Nor may he now advance argument not presented to the trial court to establish a legally valid claim.

Also of note is the fact that summary denial of a post-conviction motion is appropriate where the petitioner's claim is procedurally barred because it either was, or should have been raised on direct appeal. Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987). Here, the lower court attached documentation establishing that Petitioner previously raised this issue on direct appeal. While Petitioner complains that this attachment is somehow not one which may properly be relied upon to prove the issue is barred, his complaint is without merit. Not only did Petitioner never challenge the adequacy of the attachment below on the grounds he now asserts, his argument ignores the fact that the trial court may properly take judicial notice of its own files and records, just as it may take judicial notice of those of other courts of this State. Furthermore, the court was not obligated to rely only upon documents filed by Petitioner to establish that the issue was, in fact, raised by him.

Finally, the State asserts that Petitioner is attempting to assert that jurisdiction exists in this Court so that he may challenge the verdict of the jury, something he may not properly do. In essence, Petitioner is seeking to go behind the verdict to determine if an incident, not reported on the record, somehow effected the jury's verdict. Petitioner may not challenge matters inherent in the verdict by direct means, and he certainly should not be permitted to do so via a collateral appeal.

For all of these reasons, this Court should affirm.

ISSUE II

WHETHER THIS COURT SHOULD CONSIDER PETITIONER'S CLAIM THE TRIAL COURT ERRED IN SUMMARILY DENYING A CLAIM WHICH WAS NOT ADDRESSED BY THE FIRST DISTRICT COURT OF APPEAL IN ITS OPINION? (Restated)

Petitioner contends that the trial court erred in summarily denying his claim that counsel rendered ineffective assistance by advising him to take a polygraph examination and in entering into a stipulation that the results would be admissible at trial. He asserts that even where the lower court did not address this issue in its opinion, this Court should exercise its jurisdiction to review this issue. The State disagrees.

Jurisdiction and Standard of Review

Petitioner asserts that this Court has jurisdiction to consider this claim by virtue of the existence of conflict jurisdiction. Murray v. Regier, 27 Fla. L. Weekly S1008, S1009 (Fla. December 5, 2002). While it is true that once this Court accepts jurisdiction over a cause in order to resolve a legal issue in conflict, it has jurisdiction over all issues, Savoie v. State, 422 So.2d 308 (Fla. 1982), its authority to consider issues other than those upon which jurisdiction is based is discretionary and is exercised only when these other issues have been properly briefed and argued and are dispositive of the case. See Savona v. Prudential Ins. Co. of America, 648 So.2d 705, 707 (Fla. 1995). The State submits that conflict jurisdiction does not lie over issue one and therefore jurisdiction over this issue does not lie. Even if it did, this

issue should not be reviewed since it certainly is not dispositive of the case.

Additionally, where, as here, the District Court declined to address the issue in its opinion, this Court should decline to exercise its jurisdiction, since the lower court, in effect, entered a per curiam affirmance as to this claim.

Preservation

This issue was raised by Petitioner in his post-conviction motion.

Merits

This claim is without merit. As the State noted in its Response to the post-conviction motion, which was thereafter adopted by the trial court in its order,:

> 2. The record reflects, however, that the defendant's attorney, and Mr. Robinson were aware of the defendant's medical condition. See Trial Transcript, pgs. 151-152. Mr. Robinson was told, by the defendant, that he had an irregular heartbeat for five years, was on Xanax medication, was in good health, and did not have blood pressure problems. See Trial Transcript, pg. 151. Defense counsel asked Mr. Robinson whether physiological conditions and medications had an affect on polygraph readings. Id. at 148-149. While Mr. Robinson acknowledged a heart condition and medication could affect the readings, the expert indicated that medication doesn't affect one question more than the other, it changes the response to all questions, so it does not affect the outcome of the polygraph. Id. Nor did the defendant's treating physician, or any other expert, testify to the severity of the defendant's irregular heartbeat, or the implied affect it would have upon a polygraph exam. Id. at 207. Therefore, there is ample undisputed expert testimony in the record to refute the defendant's allegation that his medical condition affected the outcome of the polygraph exam, and confirms that the defendant's attorney was aware of the defendant's medical condition.

3. The defendant was aware of the positive and negative consequences of the polygraph, and that the polygraph results could be used against him pursuant to the stipulated agreement. See Trial Transcript, pgs. 204-205. There is also nothing in the record to support the defendant's assertion that he has a reading comprehension level of about the eighth grade, which the defendant now alleges contributed to a diminished metal capacity at the time he entered into the stipulated agreement. The record also reflects that the defendant owned and operated his own business for ten years prior to being convicted, which refutes that the defendant has any learning disability that would have affected his ability to understand the stipulated agreement. See April 18, 1996, Transcript of Motion to Set Bond, pgs, 21-23.

4. The record reflects that Mr. Robinson has administered more than 500 polygraph examinations, and testified as an expert in polygraph examinations two times prior to this case. See Trial Transcript, pg. 124. Therefore, the record refutes the defendant's allegation that Mr. Robinson is inexperienced in testifying as an expert in trials. The record also reflects that the computerized polygraph machine used in this case has two scoring systems, two separate computer programs that look at the data "different than the eyeball does." Id. at 129. Not only did Mr. Robinson find that the defendant's answers were deceptive, the independent machine scoring methods also read deception in the defendant's responses. Id. at 157.

Further, Mr. Robinson subsequently ran the defendant's test results through the machine using the updated Axiton software, and the machine still read the defendant's responses as deceptive. See Trial Transcript, pg. 157. The objective machine programs came to the same conclusion that Mr. Robinson did regarding the defendant's deceptive responses. Therefore, there is ample evidence to establish that Mr. Robinson, who had previously administered K--- S---s' polygraph examination, was not biased regarding the defendant's results. There was no reason for defense counsel to question the expert credibility of Mr. Robinson. The Florida Supreme Court, and the First District Court of Appeal, have held that "counsel's failure to raise a non-meritorious issue is not ineffective assistance." Chandler v. Dugger, 634 So.2d 1066, 1068 (Fla. 1994); Canty v. State, 23 F.L.W. D1787a (Fla. 1st DCA July 27, 1998).

5. Even if the defendant's claim had merit, the United States Supreme Court has held that the

> reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Strickland v. Washington, 104 S.Ct. 2052, 2066 (U.S. Sup. Ct., May 14, 1984). "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id.. The defendant pled not guilty, and adamantly reiterated his innocence. See Trial Transcript, pgs. 36, 202. The Florida Supreme Court, in 1995, held that "putting polygraph misconduct into issue necessarily opens the door to all matters associated with the challenged examination. Thus, the decision to raise or not to raise the issue inherently is a strategic decision for the defense. Johnson v. State, 660 So.2d 637, 642 (Fla. Sup. Ct., July 13, 1995).
>
> The defendant voluntarily and of his own free will went to the Sheriff's Department to talk to them about the case. See Trial Transcript, pg. 206. The defendant, in the presence of his attorney, was asked to take a polygraph to verify his truthfulness. Id. at 107. The police officer was told by the defendant's attorney that he would discuss the possibility with his client and get back to the officer. Id. After discussion with the defendant, who affirmatively asserted his innocence, there was no reason for the defendant's attorney to advise his client not to take the stipulated polygraph examination to exonerate himself. The defendant's counsel did not render ineffective assistance. (I, 27-31).

In denying relief on this claim, the trial court adopted the State's response as to this issue attaching record support, (I, 65-66), and, as previously stated, the First District affirmed this ruling without opinion.

In contending that the affirmance was error, Petitioner, "testifies" as to what is common practice by defense counsel with regard to entering into such a stipulation. Testimony by appellate counsel as to what is either common practice or an acceptable standard of practice is neither appropriate nor proof of deficient performance. Petitioner cites to no case that

supports the proposition that no reasonable counsel would, under the circumstances of this case, advise his client to take a polygraph examination.

While he relies upon Majewski v. State, 487 So.2d 32 (Fla. 1st DCA 1986) in support of his position, Majewski is distinguishable. There, Majewski claimed that counsel was ineffective for failing to interview alibi witnesses whose names were given to counsel by him and that the jury convicted him on the strength of unrebutted identification testimony of several State witnesses. The trial court concluded that Majewski had sufficiently alleged deficient performance, but found that no prejudice existed, since the testimony of the State's witnesses was not the only evidence linking him to the robbery, since the results of a lie detector test which Majewski had not passed had been placed before the jury via a stipulation between the parties. On appeal, the First District Court agreed with the trial court's findings as to the sufficiency of the allegation of the motion, but disagreed as to its finding that no prejudice existed, concluding that "the presentation of the polygraph evidence so strengthened the state's case as to render harmless defense counsel's failure (If any) to present an available defense on behalf of his client." 487 So.2d 32. Thus, Majewski did not present a case in which the sufficiency of the allegations or record attachments were at issue nor did it address a claim of ineffective assistance predicated upon a stipulation involving a polygraph examination.

The State notes that while it has not found a Florida case which is directly on point, other states have considered similar issues. It therefore directs this Court to these cases. See: People v. Reeder, 65 Cal. App. 3d 235, 135 Cal. Rptr. 421 (3d Dist. 1976) wherein the fact that counsel stipulated that both Reeder and his victim be administered polygraph examination and the results, together with testimony of the examiners, be admitted at trial, was found not to constitute ineffective assistance of counsel where Reeder signed the stipulation, placing his imprimatur on it, and the idea to submit to the test originated with Reeder. The court concluded that a defendant is no less bound by the polygraph merely because what might have been a winning stratagem turned out to be a foolhardy gambit. See also: Davidson v. State, 558 N.E.2d 1077 (Ind. 1990) (In prosecution for murder arising from drowning deaths of two infant children, counsel's advise to their mother to submit to polygraph examination did not constitute ineffective assistance of counsel where counsel explained the agreement to the accused who maintained her innocence throughout the proceedings, and where the stipulation provided that prosecution would not proceed if the results indicated the mother's noninvolvement in the drownings.); State v. Renfro, 96 Wash.2d 902, 639 P.2d 737 (Wash. 1982) (In prosecution for first-degree murder, in which counsel and defendant decided that defendant should take a polygraph examination and stipulate to the admissibility of its results, defendant was not denied effective assistance of

counsel when the results of the examination proved to be against defendant and counsel tried to make the best of a bad situation by using the fact defendant failed the polygraph to his advantage by attempting to show defendant's proclivity for lying was based upon his fear that if the police learned with whom he had been associating his probation for an earlier rape conviction would be revoked.).

Ultimately, this Court must determine if appellant's motion presented allegations which were facially and legally sufficient to merit a hearing and, if so, whether the record attachments provided by the trial court support summary denial. The State submits that the record supports summary denial of the claim. If the Court deems that the allegations were sufficient as to this claim and the attachments do not conclusively show appellant is not entitled to relief, then the cause must be reversed and remanded for additional attachments or for an evidentiary hearing on this claim.

CONCLUSION

Based on the foregoing, the State respectfully submits this Court should affirm the decision of the District Court of Appeal.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Robert Augustus Harper and Michael Robert Ufferman, Esq., 300 West Park Avenue, Post Office Box 10132, Tallahassee, FL 32302-2132, by MAIL on June _____, 2004.

Respectfully submitted and served,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
ROBERT R. WHEELER
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0796409

_____
GISELLE LYLEN RIVERA
Assistant Attorney General
Florida Bar No. 0508012

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300
(850) 922-6674 (Fax)

[AGO# L04-1-1086]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Giselle Lylen Rivera
Attorney for State of Florida

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