IN THE SUPREME COURT OF FLORIDA

THOMAS J. MORGAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC06-2350
4th DCA Case No. 4D04-4448

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RESPONDENT'S ANSWER BRIEF

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BILL McCOLLUM
ATTORNEY GENERAL
Tallahassee, Florida

CELIA TERENZIO
Senior Assistant Attorney General
Bureau Chief
Florida Bar No. 0656879

MARK J. HAMEL
Assistant Attorney General
Florida Bar No. 0842621
1515 North Flagler Drive
Ninth Floor
West Palm Beach, FL 33401
(561) 837-5000

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

OTHER AUTHORITY

STATEMENT OF THE CASE

On November 27, 2000, Petitioner was charged by amended information with two counts of aggravated assault (R 33-34). On November 29, 2000, a jury found Petitioner guilty as charged (R 35-36). The trial court adjudicated Petitioner guilty and sentenced Petitioner as a Habitual Felony Offender to two concurrent terms of ten years in prison with five-year mandatory minimums as a Prison Releasee Reoffender (R 67-73).

The Fourth District Court of Appeal affirmed Petitioner's conviction and sentence on direct appeal in a per curiam decision without a published opinion. Morgan v. State, 818 So. 2d 519 (Fla. 4th DCA 2002).

On August 4, 2003, Petitioner submitted a motion for postconviction relief to the trial court (R 1-91). On November 10, 2003, the State submitted a response to Petitioner's motion for postconviction relief (R 96-393). The trial court summarily denied Petitioner's motion for postconviction relief without conducting an evidentiary hearing (R 396-98). Petitioner appealed the denial of his motion for postconviction relief to the Fourth District Court of Appeal (R 399).

On November 8, 2006, the Fourth District Court of Appeal affirmed the denial of Petitioner's motion for postconviction relief, stating:

> Thomas Morgan seeks review of an order that denied his motion for postconviction relief. See Fla. R. Crim. P. 3.850. We affirm the trial court's denial of relief as to the eight points presented, but write to certify conflict associated with one claim.
>
> In his fourth point, Morgan alleges ineffective assistance of trial counsel regarding counsel's advice that Morgan reject a favorable plea offer. Morgan alleges that counsel assured him a win at trial, or at worst, a conviction for a reduced offense. This court affirmed the summary denial of a similar claim in Gonzales v. State, 691 So. 2d 602 (Fla. 4th DCA), rev. denied, 700 So. 2d 685 (Fla. 1997). We certify conflict with the Third District's decisions in Gomez v. State, 832 So. 2d 793 (Fla. 3d DCA 2002), and Sharpe v. State, 861 So. 2d 483 (Fla. 3d DCA 2002[sic]), on this point.

Morgan v. State, 941 So. 2d 1198 (Fla. 4th DCA 2006).

On January 17, 2007, this Court postponed its decision on jurisdiction and ordered briefs on the merits.

STATEMENT OF THE FACTS

Petitioner raised the following factual assertions in ground four of his motion for postconviction relief:

> Defense counsel advised the Defendant that the State submitted a plea offer of five years imprisonment in exchange for a guilty plea. Counsel advised the Defendant that she felt she would win at trial and that, at worst, the charges should be domestic violence, if that. She strongly encouraged Defendant to proceed with a trial and to decline the State's offer. The Defendant,

> following counsel's advice went to trial and was convicted.

(R 21).

Petitioner further alleged that he was prejudiced as follows:

> Defendant now submits that based on counsel's assurances that she would win at trial, he declined to accept the State's offer of five years imprisonment. Counsel did not win at trial and as a result of exercising his right to stand trial, the Court sentenced Defendant to two (2) ten (10) year terms of imprisonment as a Habitual Offender and sentenced him as a Prison Release [sic] Re-offender, ordering that he serve five years on each count concurrently in accordance with § 775.082(8)(a)(2), Florida Statutes. Had Defendant known that counsel would not win at trial, he would have accepted the State's offer of five years imprisonment. Gomez v. State, [832 So. 2d 793 (Fla. 3d DCA 2002)].

(R 21).

SUMMARY OF THE ARGUMENT

Petitioner's claim fails to assert any deficiency in his counsel's performance. Petitioner's attorney provided Petitioner with the candid advice that she was obligated to provide. Furthermore, Petitioner's claim involves a judgmental act or decision by his attorney and is not reviewable in a claim of ineffective assistance of counsel.

ARGUMENT

PETITIONER'S CLAIM IS FACIALLY INSUFFICIENT.

A. Standard of Review

Whether a defendant has presented a facially sufficient allegation that counsel was ineffective is a question of law that is reviewed de novo. Nelson v. State, 875 So. 2d 579, 581 (Fla. 2004) (citing State v. Glatzmayer, 789 So. 2d 297, 301-02 n.7 (Fla. 2001)).

B. Law

This Court provided the following standard for determining whether an evidentiary hearing is required in a postconviction proceeding:

> [A] defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. However, in cases where there has been no evidentiary hearing, we must accept the factual allegations made by the defendant to the extent that they are not refuted by the record.

Hannon v. State, 941 So. 2d 1109, 1138 (Fla. 2006) (quoting Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000)).

To establish ineffective assistance of counsel, a defendant

must first "show that counsel's performance was deficient." Strickland v. Washington, 466 U.S. 668, 687 (1984). An attorney's performance is deficient when it falls below an objective standard of "reasonableness under prevailing professional norms." Id. at 688. The Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Second, the defendant must show "that the deficient performance prejudiced the defense." Id. at 687.

"Not all decisions of counsel are reviewable under Strickland as constituting ineffective assistance of counsel." Griffin v. State, 866 So. 2d 1, 10 (Fla. 2003). "[A]ny specific discretionary or judgmental act or position of trial counsel, whether tactical or strategic, on an inquiry as to effectiveness of counsel will not be considered under Strickland." Id. (citation and internal quotation marks omitted). Therefore, "an attorney is not ineffective for decisions that are a part of a trial strategy that, in hindsight, did not work out to the defendant's advantage." Mansfield v. State, 911 So. 2d 1160, 1174 (Fla. 2005) (citing Strickland, 466 U.S. at 689).

The United States Supreme Court explained that the decision to plead guilty involves difficult judgments:

> All the pertinent facts normally cannot be

> known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant's guilt? On those facts would evidence seized without a warrant be admissible? Would the trier of fact on those facts find a confession voluntary and admissible? Questions like these cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.

McMann v. Richardson, 397 U.S. 759, 769-70 (1970). The decision to accept a plea offer "is often inescapably grounded on uncertainties and a weighing of intangibles." Wofford v. Wainwright, 748 F.2d 1505, 1508 (11th Cir. 1984).

A prima facie case of ineffective assistance of counsel based on the rejection of a plea offer requires allegations and proof (1) that counsel failed to communicate a plea offer or misinformed the defendant concerning the penalties; (2) that the defendant would have accepted the plea offer but for the inadequate communication; and (3) that acceptance of the plea

offer would have resulted in a lesser sentence. Cottle v. State, 733 So. 2d 963, 967 (Fla. 1999).

"In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." R. Regulating Fla. Bar 4-2.1. & American Bar Association Model Rule of Professional Conduct 2.1.

C. Discussion

Petitioner contends that an evidentiary hearing is required on his claim that his attorney advised him that she felt Petitioner's chances of success at trial were good. However, Petitioner's attorney properly provided this candid advice regarding Petitioner's chances of prevailing at trial, something inherently difficult to accurately predict. The trial court properly denied this claim as facially insufficient.

Petitioner's allegations must be accepted as true. See Hannon, 941 So. 2d at 1138 ("in cases where there has been no evidentiary hearing, we must accept the factual allegations made by the defendant to the extent that they are not refuted by the record"). Petitioner alleges that "[c]ounsel advised the Defendant that she felt she would win at trial and that, at worst, the charges should be domestic violence, if that" (R 21). Petitioner further alleges that his defense counsel "strongly encouraged Defendant to proceed with a trial and to decline the

State's offer" (R 21).

Petitioner failed to assert a factual basis that his attorney's performance was deficient (R 21). Petitioner merely alleged that, prior to trial, his attorney viewed Petitioner's chances of prevailing at trial as good, she advised him to proceed to trial, and Petitioner was ultimately convicted as charged (R 21). Since it is difficult to accurately predict the results of trial, an inaccurate prediction does not amount to deficient performance. See Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight"); McMann, 397 U.S. at 770 (stating that the decision to plead guilty involves "unavoidable uncertainty"). Cf. Bush v. Wainwright, 505 So. 2d 409, 411 (Fla. 1987) (stating that the fact that defense counsel's "strategies resulted in a conviction augurs no ineffectiveness of counsel"). The Second District Court of Appeal recognized that such claims are legally insufficient:

> To state a claim under Strickland, the defendant must assert more than merely that counsel advised against accepting a plea, that the defendant took the advice, and that ultimately a greater sentence was imposed. On its face, such an allegation identifies no failing on counsel's part. Rather, some specific deficiency must be alleged: for instance, that counsel advised the client to reject the plea without preparing or knowing the operative facts of the case, or that

> counsel neglected to identify the material legal issues, or that counsel otherwise did not fully perform as a lawyer. Mr. Dines has made no such allegation; thus, his first ground failed to state a facially sufficient claim.

Dines v. State, 909 So. 2d 521, 523 (Fla. 2d DCA 2005).

Furthermore, Petitioner's claim is legally insufficient because it relates to a tactical or strategic decision, "which cannot be the basis of an ineffective assistance of counsel claim." Gonzales v. State, 691 So. 2d 602, 604 (Fla. 4th DCA 1997). This Court recognized that "[n]ot all decisions of counsel are reviewable under Strickland as constituting ineffective assistance of counsel." Griffin, 866 So. 2d at 10. See Davis v. State, 928 So. 2d 1089, 1116 (Fla. 2005) ("Counsel's strategic decisions do not demonstrate ineffective assistance"). "[A]ny specific discretionary or judgmental act or position of trial counsel, whether tactical or strategic, on an inquiry as to effectiveness of counsel will not be considered under Strickland." Griffin, 866 So. 2d at 10. In the instant case, counsel's advice constituted a "judgmental act or position" that is not reviewable because it involved counsel's subjective evaluation of Petitioner's chances of success at trial, advice that Petitioner was free to accept or reject.

Petitioner argues that assuring victory is a foolish

promise (Initial Brief at 12). However, no guarantees of victory were made in this case (R 21). Instead, counsel advised Petitioner that she felt she would win at trial and that, at worst, the charges should be domestic violence, if that (R 21). The advice given was the candid advice that counsel is required to provide. See R. Regulating Fla. Bar 4-2.1. & American Bar Association Model Rule of Professional Conduct 2.1. ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice"). Petitioner's argument that the advice was reckless is based on nothing more than hindsight. This is not the proper perspective to view claims of ineffective assistance of counsel. See Strickland, 466 U.S. at 668.

CONCLUSION

The trial court properly denied Petitioner's claim because Petitioner failed to assert a sufficient factual basis for deficient performance and because the claim pertained to a strategic or tactical decision. Therefore, the State requests that this Honorable Court affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL
Tallahassee, Florida

_____
CELIA TERENZIO
Senior Assistant Attorney General
Bureau Chief
Florida Bar No. 0656879

_____
MARK J. HAMEL
Assistant Attorney General
Florida Bar No. 0842621
1515 North Flagler Drive
Ninth Floor
West Palm Beach, FL 33401
(561) 837-5000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail to Bruce Rogow, 500 East Broward Blvd., Suite 1930, Fort Lauderdale, FL 33394, this 3d day of April 2007.

_____
MARK J. HAMEL
Counsel for Respondent

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Courier New font, 12 point, and double spaced.

_____
MARK J. HAMEL
Counsel for Respondent