IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC11-1322

TOMMY LEE ALCORN,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S SUPPLEMENTAL ANSWER BRIEF ON THE MERITS

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Bureau Chief
West Palm Beach, Florida

JEANINE M. GERMANOWICZ
Assistant Attorney General
Florida Bar No. 0019607
1515 N. Flagler Drive
Suite 900
West Palm Beach, Florida 33401-3432
Telephone: (561) 837-5000
CrimAppWPB@MyFloridaLegal.com
jeanine.germanowicz@myfloridalegal.com
Counsel for Respondent

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as "the State."

In this brief, the symbol "IB" will be used to denote the Initial Brief on the Merits and it may be followed by the appropriate page number for that document. Similarly, the symbol AB" will be used to denote the Answer Brief on the Merits and the symbol "SIB" will be used to denote the Supplemental Initial Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

The State continues to accept Petitioner's Statement of the Case and Facts as set forth in his initial brief on the merits except for any minor additions, corrections or clarifications in the argument that follows.

SUMMARY OF THE ARGUMENT

In light of Lafler v. Cooper, 132 S.Ct. 1376 (2012), this Court has directed the parties to answer several questions regarding the relief to be afforded in the event that there was ineffective assistance of counsel. This Court has stated that briefing may also include any supplemental argument regarding the issues in this case in light of Lafler.

The State submits that, even under the new standards set forth in Lafler, and the companion case of Missouri v. Frye, 132 S.Ct. 1399 (2012), Petitioner cannot establish that he has suffered prejudice despite counsel's allegedly deficient representation. Petitioner was told, in connection with the plea offer, that he faced a maximum sentence of thirty years but chose to reject the plea offer. Following the trial, Petitioner still faced a maximum sentence of thirty years; he was not exposed at sentencing to a maximum sentence greater than that which he was told he faced when he rejected the plea offer. Petitioner did not sufficiently demonstrate prejudice.

Assuming, arguendo, that Petitioner established ineffective assistance of counsel, Lafler set forth several remedies which depended upon the factual scenario presented. None of the factual scenarios presented in Lafler is identical to the

factual scenario presented here. However, the Court, in Lafler, made it clear that it intended to grant a trial court discretion in crafting a remedy and to leave open to the trial court how best to exercise that discretion in all the circumstances of a case. Therefore, the most logical remedy is a hybrid of the two remedies proposed in Lafler: the trial court has the discretion to vacate the conviction(s) from trial and resentence the defendant pursuant to the plea agreement, to leave the conviction(s) and sentence(s) undisturbed, or to sentence the defendant to something in between the plea offer and the sentence(s) he received at trial.

ARGUMENT

A BRIEF OVERVIEW OF LAFLER AND FRYE:

In light of Lafler v. Cooper, 132 S.Ct. 1376 (2012), this Court has directed the parties to answer several questions regarding the relief to be afforded in the event that there was ineffective assistance of counsel in the instant case. This Court has stated that briefing may also include any supplemental argument regarding the issues in this case in light of Lafler. Before doing so, it is useful to discuss Lafler and the companion case of Missouri v. Frye, 132 S.Ct. 1399 (2012), generally.

In Frye, the Court was faced with a case in which defense counsel was deficient for failing to communicate several plea offers, including an offer to plead to a misdemeanor instead of a felony and to serve a ninety day sentence, to the defendant before they expired. However, less than a week before the defendant's preliminary hearing, the defendant was again arrested for the same type of offense. The defendant ultimately entered an open plea and was sentenced to three years in prison. The Supreme Court made it clear that defense counsel has the duty to communicate formal plea offers to the defendant and that Frye's counsel was deficient. Frye, 132 S.Ct. at 1408.

In Lafler, the Court was faced with a case where the prosecutor offered to dismiss two charges and to recommend a 51 to 85 month sentence on the other two charges in exchange for a guilty plea. The defendant communicated with the court, admitting his guilt and expressing a willingness to accept the offer. However, the defendant rejected the offer after his attorney misadvised him that he had a defense to the charges. The defendant was tried, convicted on all four counts, and sentenced to a mandatory minimum sentence of 185 to 360 months. The parties agreed that counsel's performance was deficient.

In both Frye and Lafler, the Court addressed the question of how to apply the prejudice test in Strickland v. Washington,

104 S.Ct. 2052 (1984), to cases where counsel's deficient performance resulted in a rejection of a plea offer. The Court said, in Frye:

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show 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.

Frye, 132 S.Ct. at 1409. The Court essentially reiterated that test in Lafler.[1] Lafler, 132 S.Ct. at 1385.

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[1] In Lafler, the Court said that:

> … a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Based on this test, the Frye Court remanded to the lower court to determine whether Frye could show prejudice. The Court was concerned with whether the defendant's intervening arrest for another crime would have caused the prosecution to withdraw the plea offer before it was accepted by the court or would have caused the trial court to reject the plea bargain. Frye, 132 S.Ct. at 1411. Frye did not address the issue of what remedy might be appropriate if prejudice could be established.

However, the Lafler Court, having established that prejudice existed under the facts of that case, went on to address the question of what constituted an appropriate remedy. The Court said that the specific injury suffered by defendants who had declined a plea offer could come in at least one of two forms. Lafler, 132 S.Ct. at 1389. In cases where the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted of after a trial, the Court said:

> In this situation, the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea. If the showing is made, the court may exercise discretion in determining whether the defendant should

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Lafler, 132 S.Ct. at 1385.

> receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.

Lafler, 132 S.Ct. at 1389.

However, the Court recognized that in some situations, resentencing alone would not be sufficient redress, such as where the plea offer was for a plea to counts less serious than those of which the defendant was convicted after a trial or if a mandatory sentence bound the trial judge's discretion after a trial. In those situations, the Court suggested that the remedy may be:

> to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.

Lafler, 132 S.Ct. at 1389.

In Lafler's own case, the Court stated:

> The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement. Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed. … Today's decision leaves open to the trial court how best to exercise that discretion in all the circumstances of the case.

Lafler, 132 S.Ct. at 1391.

PETITIONER CANNOT ESTABLISH INEFFECTIVENESS UNDER FRYE AND LAFLER.

The State submits that, even under the new standards set forth in Frye and Lafler, Petitioner cannot establish that he has suffered prejudice despite counsel's allegedly deficient representation. Under Frye and Lafler, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Frye, 132 S.Ct. at 1409; Lafler, 132 S.Ct. at 1385, 1389. In fact, Lafler stated that a trial court could conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea. Lafler, 132 S.Ct. at 1389.

Here, such an evidentiary hearing was held. As the District Court of Appeal recognized, Petitioner was told, in connection with the plea offer, that he faced a maximum sentence of thirty years but he nonetheless chose to reject the plea offer. Following the trial, Petitioner still faced a maximum sentence of thirty years; he was not exposed at sentencing to a maximum sentence greater than that which he was told he faced when he

rejected the plea offer. That being so, Petitioner did not sufficiently demonstrate prejudice.

ASSUMING, ARGUENDO, THERE WAS INEFFECTIVENESS IN THE INSTANT CASE, WHAT IS THE REMEDY UNDER LAFLER?

Assuming, arguendo, that Petitioner established ineffective assistance of counsel, which the State does **not** concede, Lafler set forth several remedies which depended upon the factual scenario presented. One scenario was that the charges that would have been admitted as part of the plea bargain were the same convictions of which the defendant was convicted of after a trial such that the only advantage the defendant would have gotten pursuant to the plea bargain was a lesser sentence. Another scenario was where resentencing alone would not redress the injury. For example, the plea offer was for admission to a charge or charges that were less serious than that of which the defendant was convicted of after a trial. Or, there was a mandatory sentence which bound the judge’s discretion after a trial. None of the examples presented in Lafler is identical to the factual scenario presented here which is that the plea offer contemplated a **greater** conviction than that obtained after the trial: the plea offer was for an admission to sale of cocaine within a thousand feet of a school but the defendant was convicted only of sale of cocaine after a trial. Moreover,

neither scenario in Lafler contemplated that the defendant would be determined to be a habitual felony offender following the trial.

The Court, in Lafler, was aware that the several factual examples it gave were not the only possibilities. Lafler, 132 S.Ct. at 1389. Thus, the Supreme Court made it clear it intended to leave open to the trial court how best to exercise that discretion in all the circumstances of a case. Lafler, 132 S.Ct. at 1391 ("Today's decision leaves open to the trial court how best to exercise that discretion in all of the circumstances of the case.").

In the instant case, the State submits the best remedy is a hybrid of the two remedies proposed in Lafler: the trial court has the discretion to vacate the conviction(s) from trial and resentence the defendant pursuant to the plea agreement, to leave the conviction(s) and sentence(s) undisturbed, or to sentence the defendant to something in between the plea offer and the sentence(s) he received at trial. Naturally, the State submits that maintaining the convictions and the habitual felony offender sentence of thirty years which Petitioner got after a jury trial is the best outcome in the instant case but the State acknowledges that the judge could properly convict the defendant of sale of cocaine and possession of cocaine and sentence the

defendant to any sentence from twelve (the plea offer) and thirty years (the sentence he received after trial).

Petitioner's claim that the only remedy is to either resentence him to the twelve years first offered by the State or give him a new trial is erroneous. As Lafler makes clear, the trial court's discretion is both much broader and narrower than that. As previously stated, the trial court has the discretion to vacate the conviction(s) from trial and resentence the defendant pursuant to the plea agreement, to leave the conviction(s) and sentence(s) undisturbed, or to sentence the defendant to something in between the plea offer and the sentence he received at trial. However, as Lafler and U.S. v. Watson, 2012 WL 1831430 (N.D. Okla. May 18, 2012), make clear, the trial court does not have the discretion to grant the defendant a new trial in cases where the defendant has already had a fair trial with effective assistance of counsel. Lafler, 132 S.Ct. at 1388-89 (the remedy must not "grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution;" and the remedy "does not require the prosecution to incur the expense of conducting a new trial."); Watson, 2012 WL 1831430, *5 (N.D..Okla. May 18, 2012)(Lafler remedy is in effect a sentencing remedy and a new trial is not the remedy under

Lafler). See also, <u>State v. Gordon</u>, 2012 WL 2890623, *7 (N.J.Super. A.D. July 17, 2012)(defendant not entitled to new trial as a remedy, especially years after the victim has died)(not reported in A.3d).

Having been fairly tried and convicted, the defendant is not entitled to a second chance at acquittal. <u>State v. Greuber</u>, 165 P.3d 1185 (Utah 2007). The State clearly has a strong interest in upholding the convictions entered after a fair trial: "The State will have incurred the costs of prosecution, and Petitioner has defended and tested the State's case; yet he will now be able to obtain the benefits of the plea offer." <u>Williams v. Jones</u>, 571 F.3d 1086, 1090-94 (10th Cir. 2009), cert denied 130 S.Ct. 3385, 177 L.Ed.2d 302 (2010). The only time where a new trial might ever be appropriate is where the defendant was provided with ineffective assistance of counsel at trial as well as during the plea process. <u>People v. Douglas</u>, - N.W.2d -, 296 Mich. App. 186, 2012 WL 1232625 *10 (Mich.App. April 12, 2012)(new trial appropriate where counsel ineffective at trial stage as well). That is not the case herein.

This Court requests a discussion of the parameters of a trial court's discretion in deciding whether to impose or refuse to impose the sentencing terms of the plea proposal. To begin with, those parameters are defined, of course, by the usual

abuse of discretion standard: whether no reasonable person would take the view adopted by the trial court. In Booker v. State, 514 So. 2d 1079, 1085 (Fla. 1985), this Court cited the following language with approval:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Further, Lafler did offer several considerations regarding a trial court's discretion. First, a trial court may take into account "a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions" Second, the trial court need not disregard any information concerning the crime that was discovered after the plea offer was made. Lafler, 132 S.Ct. at 1389. However, a trial court can consult the baseline established by the precise positions in which the defendant and the prosecution were in prior to the rejection of the plea offer in "finding a remedy that does not require the prosecution to incur the expense of conducting a new trial." Lafler, 132 S.Ct. at 1389.

Beyond that, the United States Supreme Court purposefully left the trial court with broad discretion in deciding what remedy to provide. "In implementing a remedy … the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge's discretion." Lafler, 132 S.Ct. at 1389. The State submits that, just as the United States Supreme Court declined to define the trial court's boundaries further, this Court should decline to place limits on the trial court's discretion as of yet. Rather, this Court should let trial judges in individual cases exercise their discretion until the fullness of time serves to suggest where the bounds of such discretion may need to be set.

The instant case is the exception to the rule that shows why there should be no rule, at least as of yet. First, the plea offer was for twelve years in exchange for a guilty plea to 1) sale of cocaine within a thousand feet of a school and 2) possession of cocaine; however, Petitioner was convicted only of 1) sale of cocaine and 2) possession of cocaine after the trial. So, Petitioner was convicted of a lesser crime following trial than was contemplated as part of the plea offer which begs the

question of whether the plea offer could even legally be reoffered. Second, the plea offer (incorrectly) assumed Petitioner did not qualify as a habitual offender; however, Petitioner was later determined to be a habitual offender and was sentenced as same. Notably, an earlier plea offer had been for twenty years as a habitual felony offender. Third, Petitioner was incorrectly told in connection with the plea offer that his maximum exposure was thirty years but did not take the plea; post-trial, it turned out his maximum exposure was thirty years. Fourth, Petitioner was provided a fair trial with effective assistance of counsel at trial. Given all the factual permutations in the instant case, it is clear the trial judge needs, and should be permitted to exercise, full discretion to determine what the proper convictions and sentences should be under all the circumstances of the instant case. It is further clear that no parameters should be placed on any trial court's discretion as of yet.

Despite Petitioner's invitation, there is no need to engraft additional parameters on the trial court's discretion as a matter of state law, at least until it is clear that the new system proposed in Lafler is not workable and such additional protections are needed. Significantly, this Court has never felt the need to adopt a different or more stringent test for

ineffective assistance of counsel claims than the federal test laid out in Strickland v. Washington, 104 S. Ct. 1052 (1984), and adopted by this Court in Downs v. State, 453 So. 2d 1102 (Fla. 1984). See e.g., Thompson v. State, 990 So. 2d 482, 488 (Fla. 2008); Carratelli v. State, 961 So. 2d 312, 320 (Fla. 2007); and Cottle v. State, 733 So. 2d 963, 965 (Fla. 1999)(endorsing Strickland as the test for ineffective assistance of counsel claims).

In State v. Powell, 66 So. 3d 905 (Fla. 2011), although there was a clear invitation by the defendant to do so, this Court declined to find that the defendant had state law rights distinct from and broader than those federal rights delineated by the Fifth Amendment to the United States Constitution and described in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Florida Supreme Court acknowledged that, although the United States Supreme Court had declined to find that the Miranda warnings given in the Powell case were inadequate under the federal constitution, the Florida Supreme Court had the authority to uphold the decision of the Second District should the Court find the warnings deficient under the Florida Constitution. Powell, 66 So. 3d at 910. The Court stated, “As we have previously explained, however, our conclusions in Traylor ‘were no different than those set forth

in prior holdings of the United States Supreme Court.’ Owen, 696 So.2d at 719. Moreover, we find no basis for concluding that different pre-interrogation warnings are required by the Florida Constitution than are required by the Fifth Amendment.” Powell, 66 So. 3d at 910. Therefore, the Miranda warnings were sufficient under both Federal and Florida Constitutions.

Just as Powell saw no need to expand a defendant’s rights under the Florida Constitution beyond those federal rights delineated in Miranda, so too should this Court see no need to expand a defendant’s rights under the Florida Constitution beyond those federal rights delineated in Strickland and Lafler. Certainly, this Court has the power to do so but Petitioner has cited no good reason for such an expansion beyond the standard delineated in Strickland and Lafler that was not already considered at great length by the United States Supreme Court in deciding Lafler and Frye. The federal high court took into account all of these arguments but determined that it made more sense to give trial courts broad sentencing discretion to address the peculiar circumstances of each case than it did to fetter these courts. This Court should conclude the same, especially given the peculiarities of the instant case and all the possible unusual permutations of the cases that are sure to follow.

CONCLUSION

In conclusion, the State respectfully requests this Court accept the State's supplemental briefing on this issue.

Respectfully submitted,

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

____
CELIA TERENZIO
BUREAU CHIEF
Florida Bar Number 656879

____
JEANINE M. GERMANOWICZ
Assistant Attorney General
Florida Bar No. 0019607
1515 North Flagler Drive
Ste. 900
West Palm Beach, FL 33401-3432
Telephone: (561) 688-7759
CrimAppWPB@MyFloridaLegal.com
jeanine.germanowicz@myfloridalegal.com
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on Jurisdiction" complete with Appendix has been furnished by courier to RICHARD B. GREENE, Assistant Public Defender, Fifteenth Judicial Circuit of

Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401, and by email to the Office of the Public Defender at appeals@pd15.state.fl.us and to this Court at e-file@flcourts.org on _______________, 2012.

____
Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Administrative Order of this Court dated July 13, 1998, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type.

____
Of Counsel

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC11-1322

TOMMY LEE ALCORN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX TO RESPONDENT'S BRIEF ON JURISDICTION

Appendix Page

Alcorn v. State, __ So. 3d __, 2011 WL 2200625 (Fla. 4th DCA Jun 8, 2011)……………………………………2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Appendix to Respondent's Supplemental Answer Brief on the Merits" complete with a copy of the opinion under review has been furnished by courier to RICHARD B. GREENE, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on _____________, 2012.

____

Of Counsel

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,
Fourth District.
Tommy Lee ALCORN, Appellant,
v.
STATE of Florida, Appellee.

No. 4D08–5049.
June 8, 2011.

Background: Defendant who was convicted of sale of cocaine and possession of cocaine, and was sentenced as a habitual felony offender (HFO) to 30 years in prison on the sale charge and a concurrent five-year term on the possession charge, filed motion for postconviction relief alleging, among other things, ineffective assistance of counsel. The Nineteenth Judicial Circuit Court, Indian River County, Robert L. Pegg, J., denied motion. Defendant appealed.

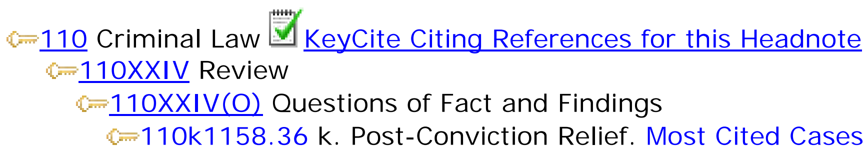
Holdings: The District Court of Appeal held that:
(1) competent substantial evidence supported trial court's finding that State's 12-year plea offer was conveyed to, and rejected by, defendant, and
(2) defendant was not prejudiced by trial counsel's failure to advise him before trial that he could be sentenced to life as an HFO.

Affirmed.

West Headnotes

[1] KeyCite Citing References for this Headnote

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In General. Most Cited Cases


110 Criminal Law KeyCite Citing References for this Headnote
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.36 k. Post-Conviction Relief. Most Cited Cases

After a postconviction evidentiary hearing, a trial court's factual findings are subject to a deferential standard of review and should be affirmed if supported by competent substantial evidence while the postconviction court's legal conclusions are reviewed de novo.

[2] KeyCite Citing References for this Headnote

110 Criminal Law

110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)2 Affidavits and Evidence
110k1616 Sufficiency
110k1617 k. In General. Most Cited Cases

A court hearing a postconviction motion is not required to accept a movant's self-serving testimony about a matter simply because trial counsel cannot specifically recall the transaction and testifies about a standard practice; the court should consider the totality of the circumstances and the credibility of the witnesses in making its determination.

[3] KeyCite Citing References for this Headnote

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)2 Affidavits and Evidence
110k1616 Sufficiency
110k1618 Particular Issues
110k1618(10) k. Defense Counsel. Most Cited Cases

Competent substantial evidence supported trial court's finding that State's 12-year plea offer was conveyed to, and rejected by, defendant who was ultimately convicted of sale of cocaine and sentenced as a habitual felony offender (HFO) to 30 years in prison, so as to support denial of defendant's ineffective assistance claim, even if counsel did not have a specific recollection of conveying the offer; counsel testified that she was certain she conveyed the offer based on her general practice and the circumstances, and counsel's testimony was corroborated by notes on the case file and e-mails between counsel and the prosecutor concerning the offer. U.S.C.A. Const.Amend. 6.

[4] KeyCite Citing References for this Headnote

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1920 k. Plea. Most Cited Cases

Defendant who was originally charged with sale of cocaine within 1,000 feet of a church, and who was ultimately convicted of the lesser offense of sale of cocaine and sentenced as a habitual felony offender (HFO) to 30 years in prison, was not prejudiced by trial counsel's failure to advise him before trial, and before he rejected 12-year plea offer, that as an HFO he could be sentenced to life in prison on the original charge, and thus such failure did not constitute ineffective assistance of counsel; defendant was aware that he could receive up to a 30-year sentence on the original charge, which was the sentence he eventually received. U.S.C.A. Const.Amend. 6; West's F.S.A. § 775.084(1)(a), (4)(a).

Carey Haughwout, Public Defender, and Richard B. Greene, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Jeanine M. Germanowicz, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

***1** We affirm the trial court's denial of appellant's postconviction motion. The trial court disposed of four of the five claims without an evidentiary hearing and held an evidentiary hearing on one claim. On appeal, appellant argues error as to two of the claims. The unargued claims are abandoned. *Hammond v. State,* 34 So.3d 58 (Fla. 4th DCA 2010). We affirm the trial court's dismissal of claim three without further discussion.

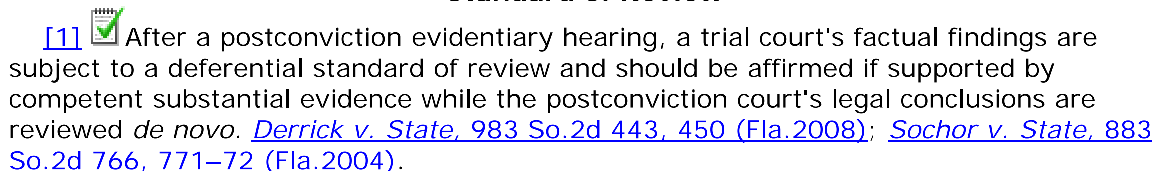
In claim five of his motion, appellant argued that his trial attorney failed to convey before trial a twelve-year plea offer and failed to advise him at the time of the offer that he qualified as a habitual felony offender (HFO) and faced a potential life sentence. He alleged that he would have accepted the twelve-year offer if he had known.

Appellant stated two distinct claims of ineffective assistance of counsel: (1) that he was not advised of the plea offer; and (2) that he was not advised of the maximum sentence he faced at the time of the plea offer. *Morgan v. State,* 991 So.2d 835, 839–40 (Fla.2008) (holding that to establish a claim of this type the movant must allege and prove that "(1) counsel failed to convey a plea offer or misinformed the defendant concerning the possible sentence he faced, (2) the defendant would have accepted the plea but for counsel's failures, and (3) acceptance of the plea would have resulted in a lesser sentence than was ultimately imposed"). *See also* *Cottle v. State,* 733 So.2d 963, 969 (Fla.1999) (recognizing the sufficiency of an ineffective assistance of counsel claim based on counsel's failure to convey a plea offer).

In Count I, appellant was charged with sale of cocaine within 1000 feet of a church, a first degree felony with a thirty-year statutory maximum. § 893.13(1)(e) 1., Fla. Stat. (2003). At trial, the State was unable to prove that the sale occurred within the correct distance, dismissed that charge, and proceeded on the lesser offense of simple sale of cocaine. The jury convicted appellant of the second-degree felony sale of cocaine, and the trial court sentenced him as an HFO to thirty years in prison. Appellant received a concurrent term of five years in prison on Count II, possession of cocaine.

The trial court found that counsel conveyed the twelve-year plea offer to appellant before trial but appellant was not satisfied with the offer and told counsel to demand a speedy trial. This factual finding is supported by competent substantial evidence, including notes that counsel made on the case file and emails with the prosecutor which the State introduced into evidence. Although appellant was under the misimpression that he did not qualify as an HFO when he rejected the plea offer, he ultimately received a sentence no greater than that which he knew could be imposed. We affirm.

Standard of Review



[1] After a postconviction evidentiary hearing, a trial court's factual findings are subject to a deferential standard of review and should be affirmed if supported by competent substantial evidence while the postconviction court's legal conclusions are reviewed *de novo.* *Derrick v. State,* 983 So.2d 443, 450 (Fla.2008); *Sochor v. State,* 883 So.2d 766, 771–72 (Fla.2004).

Failure to Convey the Plea Offer

***2** Appellant testified that he asked counsel to get him a plea offer before trial but never received any offers. Although he discussed the possibility of habitual offender sentencing with counsel, he believed going into trial that he did not qualify. He testified that he would have accepted the twelve-year plea offer.

Counsel did not have a specific recollection of conveying the offer but was certain based on her general practice and the circumstances, including the timing of events, the notes on the case file, and emails with the prosecutor, that she conveyed the offer.

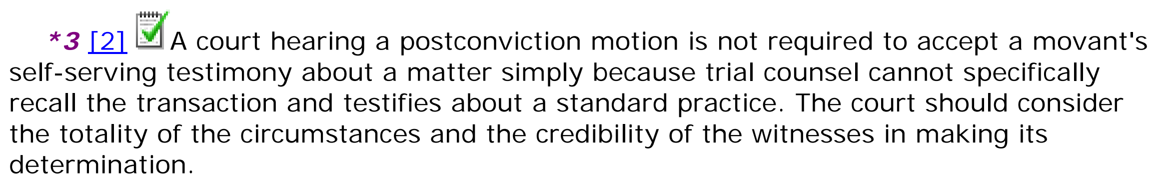
Counsel testified that, at a June 7, 2005 meeting at the jail, appellant indicated that he wanted a good plea offer or a speedy trial. An email chain introduced into evidence by the State—and corroborated by testimony from the prosecutor and defense counsel—showed that on June 14, 2005, counsel asked the prosecutor for a plea offer soon after that meeting. On June 23, 2005, the prosecutor offered twenty years in prison because appellant had prior convictions for aggravated assault and robbery, because he had served ten years in prison on his prior sale of cocaine conviction, and because appellant qualified as a habitual felony offender (HFO).

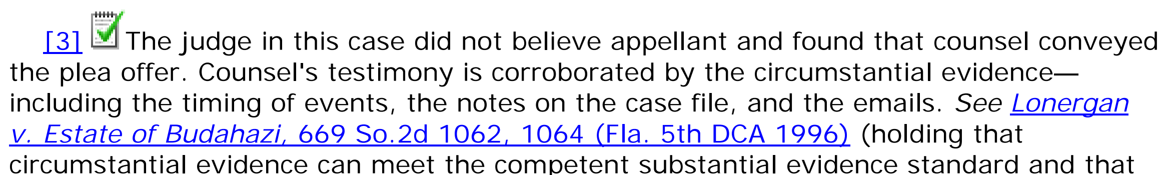
On June 24, 2005, counsel wrote back pointing out that appellant did not qualify as an HFO because he was released from prison to a supervision program more than five years before the instant offense. § 775.084(1)(a), Fla. Stat. (2003). This legal determination later proved to be wrong, but in the email, the prosecutor agreed that appellant did not commit his offense within the five-year time frame and offered a twelve-year non-HFO sentence.

The next note on the case file reflects that on July 2, 2005, counsel spoke with appellant on the phone, and he demanded a speedy trial. The State's written twelve-year plea offer was set to expire on July 6, 2005. Counsel did not have a specific recollection but was positive that she conveyed the offer in the July 2, 2005 phone meeting because she would not have demanded a speedy trial and was reluctant to try this case where the State had a videotape of appellant selling the crack cocaine to the undercover officer.

On July 26, 2005, counsel complied with appellant's request and demanded a speedy trial. Counsel testified that, on July 28, 2005, she again met with appellant at the jail and made a note on the file to "talk to state again." She also testified that she always works on getting a better plea offer up until trial and was sure that she conveyed the offer before demanding a speedy trial which was appellant's desire in this case, not hers.

Some appellate decisions suggest that counsel's testimony about a standard practice, where counsel lacks a specific recollection of the event, cannot be competent substantial evidence to support a trial court's factual finding and to refute a postconviction movant's testimony to the contrary. *Polite v. State,* 990 So.2d 1242, 1244 (Fla. 3d DCA 2008); *Labady v. State,* 783 So.2d 275, 276 (Fla. 3d DCA 2001). This court has disagreed that an absolute rule applies whenever an attorney cannot specifically recall a matter relevant to a postconviction claim. *Gusow v. State,* 6 So.3d 699, 702 n. 4 (Fla. 4th DCA 2009) (disagreeing with this aspect of *Polite* and explaining that: "We believe that under these circumstances the trial court is entitled to disbelieve the defendant's testimony").

***3** [2]  A court hearing a postconviction motion is not required to accept a movant's self-serving testimony about a matter simply because trial counsel cannot specifically recall the transaction and testifies about a standard practice. The court should consider the totality of the circumstances and the credibility of the witnesses in making its determination.

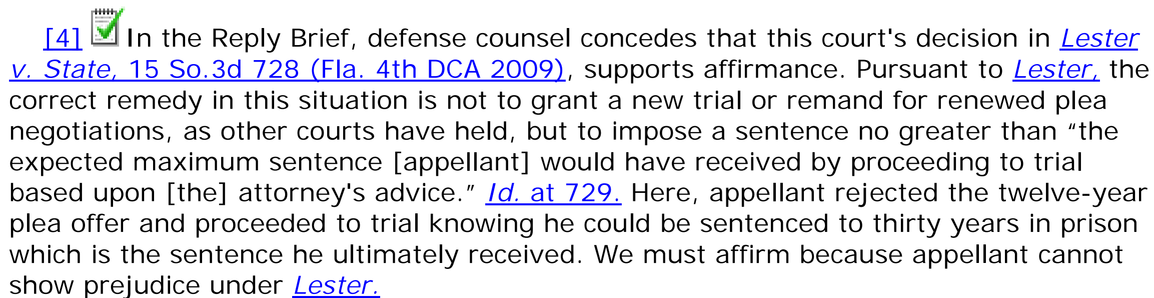
[3]  The judge in this case did not believe appellant and found that counsel conveyed the plea offer. Counsel's testimony is corroborated by the circumstantial evidence—including the timing of events, the notes on the case file, and the emails. *See Lonergan v. Estate of Budahazi,* 669 So.2d 1062, 1064 (Fla. 5th DCA 1996) (holding that circumstantial evidence can meet the competent substantial evidence standard and that

direct evidence is not required). The trial court's factual finding that the offer was conveyed and rejected is supported by competent substantial evidence. We defer to the trial court's superior vantage point in determining the credibility of the witnesses and in weighing the evidence.

Failure to Advise of the Correct Statutory Maximum at the Time of the Plea Offer

The testimony at the evidentiary hearing was undisputed that neither defense counsel, nor the prosecutor, was aware before trial that appellant qualified as an HFO. They were aware of the possibility, as was appellant, but had erroneously concluded before trial that he did not qualify. *See* § 775.084(1)(a)2.b., Fla. Stat. (2003) (providing that the HFO designation applies where the offense to be sentenced was committed within five years of release from a post-prison supervision program).

Appellant was not advised before trial that as an HFO he could be sentenced to life in prison for the first-degree felony charged in Count I. § 775.084(4)(a)1., Fla. Stat. (2003). The state filed a notice of intent to seek enhanced sentencing after trial. Counsel then researched the issue and learned that appellant qualified for the enhanced penalty. Nevertheless, because he initially faced a first-degree felony charge, appellant was aware, when he rejected the twelve-year plea offer, that he could receive up to thirty years in prison.



[4] In the Reply Brief, defense counsel concedes that this court's decision in *Lester v. State,* 15 So.3d 728 (Fla. 4th DCA 2009), supports affirmance. Pursuant to *Lester,* the correct remedy in this situation is not to grant a new trial or remand for renewed plea negotiations, as other courts have held, but to impose a sentence no greater than "the expected maximum sentence [appellant] would have received by proceeding to trial based upon [the] attorney's advice." *Id.* at 729. Here, appellant rejected the twelve-year plea offer and proceeded to trial knowing he could be sentenced to thirty years in prison which is the sentence he ultimately received. We must affirm because appellant cannot show prejudice under *Lester.*

We certify that this decision, and the decision in *Lester,* expressly conflict with *Lewis v. State,* 751 So.2d 715 (Fla. 5th DCA 2000), and ***Revell v. State*, 989 So.2d 751 (Fla. 2d DCA 2008)**, as to the proper remedy that applies when an attorney fails to correctly advise a defendant at the time of a plea offer regarding the statutory maximum sentence. *See also* *Pennington v. State,* 34 So.3d 151, 154–55 (Fla. 1st DCA 2010) (remanding for the trial court to determine, under a correct legal framework, whether a reasonable probability existed that defendant would have accepted the plea if he had known of the correct maximum penalty he faced).

****4*** *Affirmed. Express conflict certified.*

GROSS, C.J., STEVENSON and CONNER, JJ., concur.

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