IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC11-1322

TOMMY LEE ALCORN,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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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 "A" will be used to denote the appendix. The symbol “IB” will be used to denote the Initial Brief on Jurisdiction and it may be followed by the appropriate page number for that document.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's Statement of the Case and Facts as set forth in his brief on jurisdiction for purposes of this Court's decision on whether to accept or decline jurisdiction except for any minor additions, corrections or clarifications herein and in the argument that follows:

1. According to the opinion, the trial court only held an evidentiary hearing on one claim. (A *1) But that claim had two subparts: (1) that he was not advised of the plea offer by counsel and (2) he was not advised

of the maximum sentence he faced at the time of the plea offer. (A *1)

2. Counsel testified at the hearing that she did not have a specific recollection but was “positive” that she conveyed the plea offer based, among other things, on the fact that she would not otherwise have demanded a speedy trial as she was reluctant to try the case. (A *2)

SUMMARY OF THE ARGUMENT

This Court should decline to accept jurisdiction to review the instant case because the opinion of the Court of Appeal of the State of Florida, Fourth District, does not expressly conflict with that of another district court of appeal on the same point of law.

ARGUMENT

THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION TO REVIEW THE DECISION IN THE INSTANT CASE AS THE DECISION DOES NOT CONFLICT WITH THAT OF ANY OF THE OTHER DISTRICT COURTS OF APPEAL IN ANY SIGNIFICANT WAY. (Restated).

Issue One

Petitioner seeks review of two different claims of ineffective assistance of counsel (1) that he was not advised of the maximum sentence he faced at the time of the plea offer and

(2) that he was not advised of the plea offer. The Fourth District certified express and direct conflict with regard to claim (1) but did not do the same with respect to claim (2). (A)

With regard to claim (1), it is well settled that in order to establish conflict jurisdiction, the decision sought to be reviewed must expressly and directly create conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. Article 5, Section 3(b)(3), Fla. Const.. Thus, Article 5, Section 3(b)(3), and Rule 9.030(a)(2)(iv), Florida Rules of Appellate Procedure, provide the Florida Supreme Court with discretionary jurisdiction over a decision which conflicts with one of its own decisions or with a decision of another district court of appeal on the same question of law. Fla. Const.; Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

Petitioner asserts that this Court should accept jurisdiction of this case because the opinion of the District Court of Appeal of the State of Florida, Fourth District, (hereinafter "Fourth District") in Alcorn v. State, __ So. 3d __, 2011 WL 2200625 (Fla. 4th DCA Jun 8, 2011), has been certified by the district court to be in express and direct conflict with the decisions of another district court of appeal on the same point of law: Lewis v. State, 751 So. 2d 715 (Fla.

5th DCA 2000) and Revell v. State, 989 So. 2d 751 (Fla. 2d DCA 2008). Admittedly, this Court can exercise jurisdiction over decisions so certified by the district courts. Rule 9.030(a)(2)(iv), Fla. R. Crim. P. However, this Court does not have to exercise this jurisdiction since it is discretionary.

Petitioner states that this case "presents an important issue of law which this Court should resolve:" how to determine when a movant is prejudiced by not being accurately advised of the maximum penalty he faces at the time of a plea offer. (IB 7) The State questions whether this issue of law is as important as Petitioner believes. "Shepardizing" the relevant cases, Lewis, Revell, and Alcorn reveals a low number of cases affected; between twenty and thirty cases citing the above mentioned four cases in the last ten or so years, it appears. Respondent would suggest this Court not exercise jurisdiction.

Issue Two

As for issue (2), conflict jurisdiction is properly invoked only when the district court announces a rule of law which conflicts with another court's pronouncement, or when the district court applies a rule of law to produce a different result in a case which involves substantially the same facts of another case. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). "Obviously two cases can not be in conflict if they can be

validly distinguished." Morningstar v. State, 405 So. 2d 778, 783 (Fla. 4th DCA 1981), Anstead J. concurring; affirmed, 428 So. 2d 220 (Fla. 1982). See also, Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983).

Here, Petitioner failed to sufficiently explain how Polite v. State, 990 So. 2d 1242 (Fla. 3d DCA 2008), and Labady v. State, 783 So. 2d 275 (Fla. 3d DCA 2001), are in conflict with the instant case. In fact, it was readily apparent that the Fourth District did not certify conflict with the two cases mentioned by Petitioner because they were distinguishable on their facts. For example, in Labady, 783 So. 2d 275 (Fla. 3d DCA 2001), defendant's trial counsel testified that while he normally informed his clients about possible immigration consequences of a plea, he did not recall whether he discussed the matter with defendant. The Third District stated, “The court's deduction is, at best, an assumption that the trial attorney did in fact advise his client in this instance that he may face deportation proceedings. We find that an assumption is not enough to comply with the mandate of Rule 3.172(c)(8).” Id., at 276.

In the instant case, Buchhi was “positive” and “certain” that she conveyed the plea offer to Appellant based not only on her general practice but also the circumstances, including the

timing of events, the notes on the case file, and emails with the prosecutor. (A *2) In contrast, the attorney in Labady did not actually declare his belief that he had, in fact, advised the defendant of the immigration consequences of his plea; he simply stated that he normally did so but did not recall whether, in this case, he had in fact advised Labady.

Polite is similarly distinguishable on its facts. Trial counsel did not specifically remember advising Polite of the statutory maximum but stated it was his "standard practice" to advise all his clients of such details. Polite, 900 So. 2d at 1243. The appellate court found that the defendant was entitled to relief given that testimony. However, there was no mention in Polite, as there was here, that defense counsel's belief they conveyed the offer was supported by corroborating evidence that they did convey it. Clearly, Polite is distinguishable.

Again, there is no significant conflict either with Lewis and Revell, or Polite and Labady. This Court should decline to exercise jurisidiction over either issue.

CONCLUSION

In conclusion, the State respectfully requests this Court DECLINE to accept jurisdiction to review the instant case.

Respectfully submitted,

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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 on August ___, 2010.

_____
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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Appendix to Respondent's Brief on Jurisdiction" 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 August ___, 2010.

_____

Of Counsel

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.

Fla.App. 4 Dist.,2011.
Alcorn v. State
--- So.3d ----, 2011 WL 2200625 (Fla.App. 4 Dist.), 36 Fla. L. Weekly D1220