

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT  
IN AND FOR FLAGLER COUNTY, FLORIDA

STATE OF FLORIDA,

v.

Case No. 2013 CF 000510

JAMES MATHEW MCDEVITT,  
Defendant

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AMENDED MOTION FOR POSTCONVICTION RELIEF PURSUANT TO RULE 3.850

COMES NOW, Defendant, by and through undersigned counsel, pursuant to Rule 3.850, Fla. R. Crim. P., and pursuant to this Court's Order Dismissing Defendant's Motion for Postconviction Relief and Granting Leave to Amend, and moves the instant judgment and sentence be vacated.

MOTION PROPERLY FILED

This motion is properly filed under Rule 3.850(a) and (b), Fla. R. Crim. P., and is filed less than 2 years after the judgment and sentence became final.

REQUIREMENTS OF RULE 3.850( c) SATISFIED

This motion is under oath as required by Rule 3.850( c), Fla. Rule Crim. P. In compliance with Rule 3.850( c)(1)-(4), the Defendant states as follows:

(1) The Defendant is attacking the judgment and sentence of this Court entered on May 29, 2015.

(2) The judgment and sentence were the result of a open plea

of guilty/no contest.

(3) There was no appeal of judgment or sentence.

(4) There have been no prior motions for post conviction relief in this case.

Pursuant to Rule 3.850( c)(6), the Defendant states that he seeks an order of this Court vacating judgments and sentences as these are in violation of the Constitution of the United States and the Constitution of the State of Florida, and that his plea was involuntary.

#### CLAIMS FOR RELIEF WITH SUPPORTING FACTS

The Defendant is currently serving a 40 year sentence in the department of corrections. The Defendant received ineffective assistance of trial counsel in violation of the United States and Florida constitutions. Trial counsel's performance was deficient and this deficient performance prejudiced the Defendant. See, Alcorn v. State, 121 So.3d 419, 425 (Fla.2013). See generally, Strickland v. Washington, 466 U.S. 668 (1984). He raises the following claims of ineffective assistance of counsel:

I. Trial counsel (Kenneth Hamburg) was ineffective for failing to adequately explain the State's initial plea offer and failing to inform the Defendant of the maximum penalty he faced. At an early stage of the proceedings, the State made an offer of 10 years incarceration. Trial counsel informed the Defendant of this offer, but failed to advise the Defendant to accept this offer as being in

his best interests. Trial counsel also failed to advise the Defendant that he could face a maximum penalty of life in prison if he were found guilty. Trial counsel failed to review discovery as requested so that Defendant could make an informed decision on this plea offer. Counsel failed to inform Defendant how much probation he would have to serve for this plea offer. Because of these failures by trial counsel, Defendant suffered prejudice. Had the Defendant been properly and adequately advised by trial counsel, the Defendant would have accepted the State's plea offer of ten years. See, Alcorn, 121 So.3d at 432 ("In the plea context, a defendant establishes *Strickland* prejudice when he shows, among other things, a reasonable probability, defined as a probability sufficient to undermine confidence in the outcome, that he would have accepted the offer had counsel performed effectively (i.e., had given the correct advice).") Furthermore, it is reasonable to conclude that the State would have abided by its offer if timely accepted, and that the Court would have accepted this agreed settlement. Id. at 433. Unfortunately, since the plea was not accepted by the Defendant, based on counsel's improper advice, the plea was subsequently withdrawn. As a result, Defendant was ultimately sentenced to 40 years incarceration - which was clearly more severe than the ten year plea offer. For these reasons the Defendant is clearly entitled to relief on this claim. Id. See also, Pennington v. State, 34 So.3d 151 (Fla. 1<sup>st</sup> DCA 2010).

II. At a subsequent stage of the proceedings, trial counsel (Michael Lambert - different counsel from claim I above) was ineffective because he failed to properly and adequately advise Defendant of the maximum consequences of an open plea to the Court. Before Defendant entered an open plea to the Court (after the previous 10 year offer had been withdrawn) trial counsel erroneously advised Defendant that he would face a maximum of only 12-15 years prison if he entered an open plea to the Court. Trial counsel erroneously advised Defendant that the Court would be lenient based upon Defendant's age. The Defendant suffered prejudice because as a result of this misadvice he entered an open plea and was sentenced to 40 years prison. Had counsel adequately advised Defendant that he could face a sentence well in excess of 12-15 years (and the statutory maximum), Defendant would not have entered an open plea. Instead, the Defendant would have - at this later stage in the proceedings - requested a jury trial. Courts have held that allegations concerning misadvice about how much time a defendant could serve in prison "**automatically** constitute a sufficient claim of ineffective assistance of counsel". Childers v. State, 782 So.2d 513, 517 (Fla. 1<sup>st</sup> DCA 2001) (emphasis added). After he was sentenced, Defendant requested counsel to file a motion to withdraw his plea and a modification of sentence, but counsel failed to do so. The Defendant submits he suffered prejudice due to this failure because there was a reasonable

probably that these motions would have been granted if filed and properly argued. He is therefore entitled to relief.

III. Trial counsel (same counsel as in Claim II above) failed to advise Defendant of a potential conflict of interest between trial counsel and the sentencing Court. This potential conflict was published in The Daytona Beach News-Journal on November 17, 2013, wherein an attorney alleged animosity on behalf of the sentencing judge towards trial counsel. There was prejudice because if Defendant had been aware of this matter, he would not have entered an open plea to the sentencing Court. If he had been adequately advised of this conflict he would have asked trial counsel to seek a different judge or otherwise explore the potential conflict.

IV. Trial counsel failed to adequately review discovery and depositions with Defendant, including potential defenses, such as mental capacity (the Defendant has a well-documented learning disability), and victim's drug/alcohol use and other matters effecting her veracity and reliability as a witness. Because of this inadequate review, the Defendant was unable to make an informed and voluntary decision as to plea to the Court or go to trial. Due to this failure, the Defendant's plea to the Court was involuntary. He suffered prejudice because had he been adequately informed of these potential defenses, and if there had been an adequate and proper review of discovery, he would not have waived his right to a trial by entering an open plea to the court.

WHEREFORE, for the reasons argued above, the Defendant respectfully moves this Court for an EVIDENTIARY HEARING on all claims and an Order VACATING his conviction and sentence in the above-styled case.

Respectfully submitted,

/s/ Daniel P. Hyndman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been served by electronic mail to Office of the State Attorney at [eserviceflagler@sao7.org](mailto:eserviceflagler@sao7.org) on August 21, 2017.

/s/ Daniel P. Hyndman

Counsel for Appellant

UNNOTARIZED OATH AND CERTIFICATION

I, JAMES MATHEW MCDEVITT, the Defendant, swear and certify as follows: I have read this motion (or it has been read to me) and I understand its content. This motion is filed in good faith and with reasonable belief that it is timely filed, has potential merit, and does not duplicate any previous motions that have been disposed of by the Court. The facts contained in the motion are true and correct. Furthermore, I understand English.

  
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JAMES MATHEW MCDEVITT