

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

STATE OF FLORIDA

CASE NO.: 2012-CF-000129
DIVISION 50: Judge Matthew M. Foxman

v.

WILLIAM CARSON MERRILL,

Defendant.

**FINAL ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION
RELIEF**

THIS MATTER came before the Court for consideration of the Defendant's Motion for Postconviction Relief filed by counsel on July 2, 2015, pursuant to Florida Rule of Criminal Procedure 3.850. The Court, having reviewed the motion, the State's Response, Defendant's Reply, the court file, and arguments presented at an evidentiary hearing, and being fully advised in the premises, hereby finds as follows:

Procedural History

On February 21, 2012, Defendant accidentally shot and killed his wife. On March 2, 2012, Defendant was charged by Information with one count of manslaughter with a firearm and one count of felon in possession of a firearm, in violation of sections 775.087, 782.07(1), and 790.23(1), (2), Florida Statutes (2012). Defendant entered an open plea of no contest to the charge of manslaughter with a firearm, a first degree felony, on October 1, 2012. The State dismissed the second count by *nolle prosequi*. On October 29, 2012, the Court sentenced Defendant to twenty-five years in prison. Defendant filed a Motion for Reduction/Modification of Sentence, which was denied by the Court on November 20, 2012. Defendant was represented

by Assistant Public Defender James Valerino, until Assistant Regional Conflict Counsel Brett C. Kocijan was appointed on June 7, 2012.

Defendant appealed to the Fifth District Court of Appeal, case number 5D13-1150, requesting review of the sentence imposed by the trial court, the failure for a valid factual basis for the plea, the voluntariness of the plea, and any other errors in the case. Defendant's judgment and sentence were *per curiam* affirmed, with Mandate issued on October 10, 2014.

On July 2, 2015, Defendant timely filed the present Motion for Postconviction Relief, requesting that the Court vacate his judgment, conviction, and sentence. The State filed a Response on October 6, 2015. Defendant moved for leave to file a reply on October 7, 2015, and filed a reply on December 2, 2015.

In the present motion, Defendant alleges seven grounds, all premised on allegations of ineffective assistance of counsel. By an interim order entered on January 22, 2016, the Court summarily denied Grounds Two, Four, Five, and Six. Parts of Ground One and Ground Three were set for an evidentiary hearing. The Court reserved ruling on Ground Seven, a cumulative argument. The Court incorporates the Interim Order herein.

An evidentiary hearing was held on March 21 and 30, 2016. Rachael Bushey, Esq. represented Defendant, and Chris Miller, Assistant State Attorney, represented the State. Defendant called himself as a witness, as well as Detective Elizabeth Conrad, Commander Chris Sepe, Detective Mark Moy, and Assistant State Attorney Rich Brendel. The State called Defendant's former counsel Mr. Kocijan as a witness, and the Court made a finding at the hearing that Defendant had waived the attorney-client privilege by virtue of filing the claim of ineffective assistance of counsel. The State introduced as Exhibit 1 a notebook with various letters between Mr. Kocijan and Defendant and Mr. Kocijan's notes from jail visits.

Legal Analysis

To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate (1) that counsel's performance fell below that of reasonably competent counsel, and (2) that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). When considering claims for ineffective assistance of counsel, courts must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* To show prejudice, the *Strickland* standard requires, "a demonstration that the result of the proceeding has been rendered unreliable, and our confidence in the outcome of a proceeding has been undermined by counsel's deficiency." *Thompson v. State*, 990 So. 2d 482, 490 (Fla. 2008).

When dealing with a negotiated plea agreement, the *Strickland* standard still applies: counsel's advice must be within the range of competence of criminal attorneys, and there must be a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty or no contest and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Stano v. State*, 520 So. 2d 278, 280 n. 2 (Fla. 1988).

A defendant must prove both prongs of the analysis and overcome the strong presumption that counsel's conduct was not deficient. *Strickland*, 466 U.S. at 689-90. Because defendants must satisfy both prongs of the *Strickland* standard, when a defendant fails to satisfy

one prong, it is not necessary to determine whether he or she has satisfied the other prong. *Stewart v. State*, 801 So. 2d 59, 65 (Fla. 2001).

Ground One

In Ground One, Defendant alleges that his plea was involuntary because of his counsel's misadvice, and but for that advice, he would not have entered his plea of no contest. He cites five instances where he alleges that his counsel provided erroneous advice. In the Interim Order, the Court set the first four claims for evidentiary hearing and summarily denied Defendant's fifth claim.

First, Defendant states that, based upon his counsel's advice, he believed that he would receive a probationary sentence if he pled guilty to the charge of manslaughter. This allegation is refuted by the record and by testimony heard by the Court during the evidentiary hearing.

During the evidentiary hearing on March 21, 2016, Defendant testified on direct examination that he believed that, because there was no mandatory minimum on the manslaughter charge, he would receive a probationary sentence. He claimed that Mr. Kocijan told him that the State would remain "neutral" during sentencing, rather than recommending a certain sentence or sentencing range. Defendant further testified that the pre-sentence investigation asked him about his plans, if he were to receive probation, indicating that his sentence would be probationary.

On cross-examination, Defendant explained that Mr. Kocijan both promised and implied that he would receive probation. Defendant admitted that Mr. Kocijan provided him with two sentencing scoresheets for Defendant's two plea options, and on both scoresheets, Defendant scored a minimum of ten years in prison. Defendant believed, though, that the scoresheets were guidelines, and the Court could depart downward from the scoresheet. He claimed that he was

not aware that the State would have to waive the bottom guidelines for the Court to sentence him to less than ten years.

Mr. Kocijan testified that he has practiced as a criminal defense attorney for fifteen years. He denied that he promised a probationary sentence if Defendant pled guilty to the charge of manslaughter. He stated that probation was never offered as an option by the State, although Defendant requested it. Mr. Kocijan testified that, in his professional opinion, a probationary sentence was not a possibility because of the seriousness of the charges. Mr. Kocijan discussed with Defendant the possibility of a downward departure. The Court finds Mr. Kocijan's testimony on this issue to be credible and corroborated by the State's Exhibit 1, Tabs B, D, F, G, H, and K.

Second, Defendant alleges that counsel advised him to plea to the charges because he "would most likely be unsuccessful at trial." This allegation is refuted by Mr. Kocijan's testimony during the evidentiary hearing.

Defendant testified at the evidentiary hearing that, when speaking with Mr. Kocijan about his options, he did not rule out a trial. Mr. Kocijan testified that, from the beginning of the representation, Defendant wanted to avoid a trial by taking a plea because Defendant did not want to put his family, including in-laws, through a trial. Mr. Kocijan testified that he negotiated with the State to achieve a plea agreement. The correspondence between Defendant and Mr. Kocijan corroborates Mr. Kocijan's account; in such correspondence, only plea agreements are discussed. State's Exhibit 1, Tabs B, F, and G. The Court finds Mr. Kocijan's testimony on this issue to be credible.

Third, Defendant alleges that counsel failed to inform him about the photographs that the State obtained from his cell phone, specifically the photograph(s) introduced at Defendant's

sentencing that depicts a laser scope on a gun pointed at the victim's head. During the evidentiary hearing, Defendant testified that he asked Mr. Kocijan not to give him any discovery regarding the crime scene, including photographs of the victim. On cross-examination, Defendant admitted that he knew of incriminating photographs that were on his cell phone, including multiple photographs of him holding a firearm. *See* State's Exhibit 1, Tabs G, and I. Mr. Kocijan testified that he gave Defendant discovery, but per Defendant's request, Mr. Kocijan did not provide any discovery related to the victim, which included the aforementioned photographs that the State introduced during sentencing. *See id.* at Tabs C, E, and H. Mr. Kocijan stated that he discussed the discovery evidence with Defendant. *Id.* at Tab H.

The Court finds both Defendant's and Mr. Kocijan's testimony to be credible, and there was a misunderstanding as to what discovery Defendant requested he be provided. The Court, however, finds no deficient performance by Mr. Kocijan: he provided Defendant with all of the discovery that he understood Defendant requested and discussed that discovery with Defendant. The Court further finds that Defendant has not proven prejudice because Defendant testified that he knew about incriminating photographs that were on his cell phone, and the Court does not believe that Defendant would have insisted on going to trial had he specifically known that the State was going to use the photographs from his phone.

Fourth, Defendant alleges that counsel failed to go over the elements of either of his charges. The Court finds that testimony by Mr. Kocijan during the evidentiary hearing refutes this allegation. On cross-examination, Defendant admitted that he and Mr. Kocijan discussed the charges. Mr. Kocijan testified that it is his standard practice to review discovery with Defendant and go through each element. Mr. Kocijan testified that this conversation took place on

September 13, 2012 during a meeting at the jail. State's Exhibit 1, Tab H. The Court finds Mr. Kocijan's testimony to be credible on this issue.

In conclusion, the Court finds that Defendant's allegations in Ground One are refuted by the record and testimony presented during the evidentiary hearing. Defendant has failed to show either deficient performance by Mr. Kocijan or prejudice, and Ground One is denied.

Ground Three

In Ground Three, Defendant alleges that he received ineffective assistance of counsel for counsel's failure to file a motion to suppress evidence discovered on Defendant's phone, including photographs. Defendant alleges that the phone was taken without his consent, despite his written consent to a search of his home for any evidence that has a bearing on the investigation. Defendant does not challenge the voluntariness of his consent, only the scope of the search.

The scope of a consent search is determined by "reasonableness": "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991). As the Supreme Court of the United States found, "the scope of a search is generally defined by its express object." *Id.* at 251 (discussing narcotics as the object of the search and consent to search a vehicle included a paper bag that could contain narcotics); *see also, State v. McCutcheon*, 932 So. 2d 225 (Fla. 2005). "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." *U.S. v. Ross*, 456 U.S. 798, 820-21, fn27 (1982). The scope of consent "must be considered in light of the consenting person's expectation of privacy." *Davis*

v. State, 594 So. 2d 264, 266 (Fla. 1992). The inquiry into whether a search exceeded the scope of the consent is a factual one to be determined by a totality of the circumstances. *Id.*

On the morning of the shooting, February 12, 2012, Defendant signed a written consent form that states: “I know that any evidence found in connection with and having bearing on the above investigation [Case #12010-12] can be used against me in a Court of law....” See Appendix A to Defendant’s Motion for Postconviction Relief. The express object of the search of Defendant’s residence, “curtilage, outbuildings and vehicles” is evidence relating to the death of the victim. The consent form does not describe any particular items to be searched for or seized.

At the evidentiary hearing on March 21, 2016, Defendant testified that he consented to the search of his home because he believed that the search was only to recover and remove all firearms. He provided law enforcement with keys to gun safes and identified where the firearms could be found. He stated that he did not believe that he consented to law enforcement seizing his phone, and if he were asked, he would have denied consent to search his cell phone.

Detective Conrad testified that motive and prior conflicts between the parties is relevant in a homicide investigation, especially in a domestic situation where one partner kills another. She also stated that a cell phone may contain evidence of motive and prior conflicts between domestic partners. Commander Sepe testified that evidence relevant to a domestic homicide may be contained in a cell phone.

Detective Mark Moy testified that he obtained consent from Defendant to search the residence and vehicles, and Defendant was cooperative in allowing law enforcement to search his home. Although Detective Moy did not specifically recall what he said to Defendant on the day of the shooting, he recalled that he explained what the consent was for – investigation into a

homicide – and that law enforcement would be searching for potential evidence. Detective Moy testified that he did not discuss cell phones with Defendant in the context of the search; however, Detective Moy stated that a cell phone is a good place to discovery evidence relating to motive.

Based upon the credible testimony by Detectives Conrad and Moy and Commander Sepe, and after an examination of the totality of the circumstances, the Court finds that Defendant gave consent to search his home for any and all evidence related to the homicide investigation, and his consent included a search of Defendant's cell phone. A reasonable person would know that consent to search for evidence relevant to investigation of a domestic homicide would include information contained in a cell phone.

The Court finds that *Smallwood v. State*, cited by Defendant during the hearing, is inapplicable to a consent search. In that case, the issue was whether the Fourth Amendment allows a law enforcement officer to search through information contained within a cell phone that is on an arrestee's person at the time of a valid arrest. *Smallwood v. State*, 113 So. 3d 724 (Fla. 2013). There, the Court found that law enforcement would require a search warrant before searching the contents and data of an arrestee's phone. *Id.* Unlike a search incident to a lawful arrest where the scope is limited to disarming an arrestee and preventing the destruction of evidence, the scope of a search pursuant to consent is limited only by the extent of the consent given by the suspect. *Compare Chimel v. California*, 395 U.S. 752, 762-63 (1969), *with Jimeno*, 500 U.S. at 251.

Even if the *Smallwood* rule is applicable to a consent search, the Court follows precedent set by the First District Court of Appeal, and finds a good faith exception to the exclusionary rule because at the time of the search of Defendant's cell phone in 2012, law enforcement's actions

were legal. *State v. Carpenter*, 158 So. 3d 693 (Fla. 1st DCA 2015), *rev. granted*, No. SC15-1830 (Fla. Nov. 19, 2015).

As for the motion to suppress, Defendant testified that he requested that Mr. Kocijan file a motion to suppress his cell phone and all evidence contained on the cell phone. On cross-examination, Defendant admitted his written correspondence with Mr. Kocijan failed to mention a motion to suppress his cell phone. *See State's Exhibit 1, Tabs B, F, and G.*

Mr. Kocijan testified that he did not research a motion to suppress the cell phone because Defendant had been adamant from the beginning of the representation that he wanted to take a plea, rather than proceed to trial. Further, had Defendant mentioned a motion to suppress, Mr. Kocijan stated that he would have noted that in his notes from the in-person meetings with Defendant, and a review of his case did not reveal any such notation. *See State's Exhibit 1, Tabs C, I, J, and K.* The Court finds Mr. Kocijan's testimony regarding this issue to be credible.

In conclusion, the Court finds that Defendant did not ask Mr. Kocijan to file a motion to suppress his cell phone or photographs contained in that cell phone, and Mr. Kocijan was not deficient in failing to file a motion to suppress. The Court finds that a motion to suppress the cell phone evidence would have been denied by the Court because law enforcement did not exceed the scope of Defendant's consent. Further, the Court finds that Defendant has not demonstrated prejudice to a reasonable probability that, if Mr. Kocijan had filed a motion to suppress, he would have insisted on going to trial. Ground Three is denied.

Ground Seven

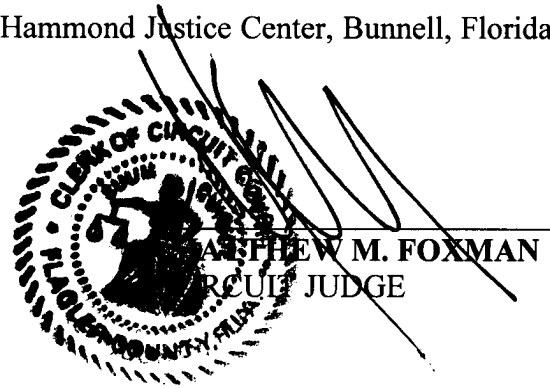
In Ground Seven, Defendant alleges that the errors by defense counsel combined to be considered as "cumulative error," and counsel's performance, when reviewed as a whole, resulted in a fundamentally unfair trial. Defendant has failed to demonstrate multiple counsel

errors. *Mendoza v. State*, 87 So. 3d 644, 657 (Fla. 2011); *see also*, *Hurst v. State*, 18 So. 3d 975, 1015 (Fla. 2009) (where the alleged errors are individually either procedurally barred or without merit, the claim of cumulative error also fails). Therefore, Ground Seven is denied.

Therefore, it is **ORDERED AND ADJUDGED** that Defendant's Motion for Postconviction Relief is **DENIED**.

The defendant has the right to appeal this order within 30 days of its rendition.

DONE and ORDERED in Chambers, Kim C. Hammond Justice Center, Bunnell, Florida
this 7th day of April, 2016.



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