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IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE EASTERLY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SECOND DISTRICT COURT OF APPEALS

APPENDIX
PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

GEORGE EASTERLY
Pro Se
715 Sunset Ave.
Auburndale FL 33823
Phone: (863) 582-5522

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

GEORGE EASTERLY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D16-4606

Opinion filed March 16, 2018.

Appeal from the Circuit Court for Collier County; Frederick R. Hardt, Judge.

Mary Elizabeth Fitzgibbons, Orlando, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Wendy Buffington, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

KELLY, LUCAS, and BADALAMENTI, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

May 24, 2018

CASE NO.: 2D16-4606
L.T. No.: 09-CF-000260A

GEORGE EASTERLY	v.	STATE OF FLORIDA
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing, rehearing en banc, certification, and/or written opinion is denied.

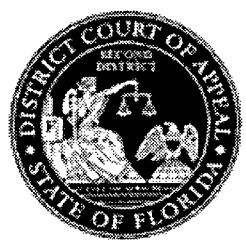
I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Wendy Buffington, A.A.G. Mary E. Fitzgibbons, Esq. Dwight Brock, Clerk

ls

Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk



IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA,

Plaintiff,

vs. Case No. 09-CF-260A

GEORGE EASTERLY,

Defendant.

_____/

FINAL ORDER DENYING DEFENDANT'S RULE 3.850 MOTION FOR POSTCONVICTION RELIEF AND DISCHARGING COURT APPOINTED COUNSEL

THIS CAUSE comes before the Court on the Defendant's pro se, timely "Motion to Vacate Sentence," filed on May 14, 2014, pursuant to Fla. R. Crim. P. 3.850. Having reviewed the motions, the State's response, Defendant's reply, the case file, applicable case law, and having conducted an evidentiary hearing on November 23, 2015, the Court finds as follows:

1. On October 10, 2011, Defendant plead nolo contendere to ten counts of Possession of Child Pornography. This plea was in response to an original charge of forty-one counts of possession of child pornography. On the same day, Defendant was sentenced to a term of 36.4 months in state prison followed by three years of sex offender probation on count nine followed by four years of probation on count ten. (Attached hereto is a copy of State's Exhibit D, E, F, and G). Defendant subsequently violated the terms of his probation. On October 20, 2013, Defendant was found in violation of probation and was sentenced to five years imprisonment on Counts 9 and 10, which were to be served concurrent to each other. (Attached hereto is a copy of State's Exhibit J).

2. The record reflects that Defendant originally filed a pro se rule 3.850 motion for postconviction relief on September 30, 2013. In this initial motion, Defendant raised three enumerated grounds for relief alleging ineffective assistance of counsel by his attorney, Shannon McFee. On January 24, 2014, Defendant motioned to dismiss the original motion for

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postconviction relief which was then granted by the Court. On March 20, 2014 and May 14, 2014, Defendant filed two amended motions for postconviction relief, the latter raising eight grounds for relief. On December 31, 2014, Defendant amended Ground 6 after it had been struck down by the Court as legally insufficient. Four of Defendants grounds (1, 2, 3, and 6) were set for evidentiary hearing by an Order rendered March 19, 2015.

3. An evidentiary hearing was conducted on November 23, 2015, at which the Court heard argument and testimony as to Grounds 1, 2, 3, and 6:

a) Trial counsel was ineffective for failing to advise him of a viable defense based on the opinions of two experts, Tami Loehrs and Dr. Alan Rosenbloom (**Ground 1**);

b) Trial counsel was ineffective for failing to advise Defendant as to each element of each crime charged (**Ground 2**);

c) Trial counsel was ineffective for coercing Defendant to enter a plea by using false information that Dr. Rosenbloom recommended that Defendant accept the plea offer (**Ground 3**); and

d) Trial counsel provided ineffective assistance of counsel for failing to address or raise the issue of the unsigned probable cause affidavit for a search warrant (**Amended Ground 6**).

Defendant was present and represented by counsel at the evidentiary hearing. Defendant testified on his own behalf. The Court also heard testimony from Defendant's former trial counsel, Shannon McFee. Additionally, the Court heard testimonies from Tami Loehrs and Dr. Alan Rosenbloom, the two expert witnesses hired by trial counsel.

4. To prevail on a claim of ineffective assistance of counsel, Defendant must demonstrate: (1) that counsel's performance was deficient, and (2) that the deficient performance unjustly prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williamson v. Dugger*, 651 So. 2d 84 (Fla. 1994). With regard to the first element, counsel's deficiency must be proven by Defendant to have been "so serious that counsel was not functioning as the 'counsel' guaranteed

[to] the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Concerning the second element, the Defendant must show that with "prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 669.

5. In reviewing claims of ineffective assistance of counsel, the Court must apply a strong presumption that counsel's conduct falls within the range of reasonable professional assistance and must avoid the distorting effects of hindsight. The standard is reasonably effective counsel, not perfect or error-free counsel. *Coleman v. State*, 718 So. 2d 827 (Fla. 4th DCA 1998); *Schofield v. State*, 681 So. 2d 736 (Fla. 2d DCA 1996). It is further noted that, in general, tactical or strategic decisions of trial counsel do not constitute ineffective assistance of counsel. *Gonzales v. State*, 691 So. 2d 602 (Fla. 4th DCA 1997). As to a claim of ineffective assistance of counsel arising out of the plea process, in order to satisfy the "prejudice" requirement, a defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have entered a plea and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). "[I]n determining whether a reasonable probability exists that the defendant would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial." *Grosvenor v. State*, 874 So. 2d 1176, 1181-82 (Fla. 2004).

6. In **Ground 1**, Defendant asserts that trial counsel provided ineffective assistance by failing to advise him as to a viable defense. Specifically, Defendant claims that trial counsel was ineffective by failing to inform him that in their respective depositions, (a) expert witness Dr. Arlan Rosenbloom stated that with medical certainty, he could not conclude that the images could not be

construed as child pornography; and (b) expert witness Tami Loehrs stated after thoroughly investigating Defendant's hard drive, she could not discover any evidence conclusively determining Defendant's possession of child pornography. In his motion, Defendant claims that reports of these two experts were not provided to him, even after multiple requests. Furthermore, Defendant claims that had they been provided, he would not have plead but rather would have proceeded to trial.

At the evidentiary hearing, Defendant testified that his trial counsel never shared the contents of the expert witnesses' reports and that he only discussed the expert witnesses with him just prior to Defendant accepting the plea deal. Defendant also testified that he first saw and read the full reports in 2012 while on probation. In response, attorney McFee testified at the evidentiary hearing that he provided Defendant with all of the discovery gathered, but never left material in the jail with Defendant for security purposes. Attorney McFee further testified that no requests for reports would have gone unanswered. As such, the Court finds attorney McFee's testimony credible and his performance neither deficient nor prejudiced under *Strickland* as alleged by Defendant in the claims asserted in **Ground 1**.

7. In **Ground 2**, Defendant asserts that trial counsel provided ineffective assistance by failing to advise him as to each specific element of the crime charged. Specifically, Defendant claims that trial counsel was ineffective by failing to clarify the language of §827.071(5)(a) Fla. Stat. (2008) which reads, in part: "[i]t is unlawful for any person to knowingly possess, control, or intentionally view [an] image, which, in whole or in part, he or she knows to include any sexual conduct by a child." Defendant states that had he meaningfully understood that the statute's language specified (a) knowingly and (b) child, along with Dr. Rosenbloom's testimony that he could not, with medical certainty, conclude that the females depicted in the images were

actual children, he would not have entered a plea to the charges but rather would have gone to trial.

At the evidentiary hearing, Defendant testified that the statute's language was communicated to him by attorney McFee. However, Defendant contended that his counsel failed to explain the specific elements required to be guilty of possession of child pornography. Attorney McFee testified that the elements of the crime were discussed in detail during their first meeting in order to best build Defendant's case. Based on the testimony presented, the Court finds that Defendant understood the knowledge and possession elements of the charges and therefore, counsel's performance is neither deficient nor prejudicial under *Strickland* as alleged by Defendant.

8. In **Ground 3**, Defendant asserts that trial counsel provided ineffective assistance for coercing Defendant to enter a plea by using false information. Specifically, Defendant claims that trial counsel informed him that expert witness, Dr. Rosenbloom, recommended that Defendant should accept the plea offer. Defendant states that but for his counsel's alleged deception, he would not have entered a plea but rather would have proceeded to trial.

At the evidentiary hearing, Defendant reiterated this testimony, adding that his counsel advised that Dr. Rosenbloom specifically recommended that the Defendant take the plea. Dr. Rosenbloom testified at the evidentiary hearing and denied that he made such a recommendation. Additionally, attorney McFee testified that he did share Dr. Rosenbloom's report with Defendant, however, he never discusses plea offers with experts because he doesn't care what the experts think about a particular offer. Based on Dr. Rosenbloom's and attorney McFee's credible testimony at the evidentiary hearing, the Court finds that Defendant's claim is meritless. The Court finds counsel's service to Defendant to have been neither deficient nor prejudicial under *Strickland* as alleged by Defendant under **Ground 3**.

9. In **Ground 4**, Defendant asserts that trial counsel provided ineffective assistance for failing to properly investigate exculpatory and impeaching evidence related to a phone conversation. Specifically, Defendant alleges that he informed counsel to request a "true transcript" of the phone conversation between his son George Easterly, Jr. (George Jr.) and Detective Scott Rapisarda which led to the Detective's probable cause affidavit and subsequent search warrant. Defendant believes the transcript provided in discovery had been altered. Despite Defendant's request, counsel supposedly failed to obtain this information.

However, in Defendant's instant motion, he fails to detail what portions of the conversation were allegedly redacted and how that would exculpate him or allow his son to be impeached. Additionally, Defendant would have been aware at the time of entering the plea whether or not counsel had requested or received the "true transcript". A defendant cannot raise issues in a Rule 3.850 postconviction motion that were known to him at the time of the plea. *See Gidney v. State*, 925 So. 2d 1076 (Fla. 4th DCA 2006). Therefore, the Court finds Defendant's **Ground 4** claim as legally insufficiant.

10. In **Ground 5**, Defendant asserts that trial counsel provided ineffective assistance for failing to advise Defendant that his convictions as to Counts 2, 4, 5, 6, 8, 9, and 10 allegedly violate the Double Jeopardy Clause. Specifically, Defendant claims that because the same female is depicted in multiple photographs associated with multiple counts to which he pled, his counts should be reduced following the reasoning established in *Stowe v. State*, 66 So. 3d 1015 (Fla. 3d DCA 2011).

However, the defendant in *Stowe* argued the exact opposite: multiple counts stemming from different performers in the same video. Concerning what constitutes when a single count of possession of child pornography occurs, the Florida statute reads, "a photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation."

§827.071(5)(a) Fla. Stat. (2016). The statute distinguishes counts not by individual performer but by each individual presentation, which aligns with the Court's reasoning in *Stowe*. As explained in *Stowe*, the Legislature intended to recognize separate crimes for each proscribed article possessed. *Stowe v. State*, 66 So. 3d 1015 (Fla. 3d DCA 2011); *Crosby v. State*, 757 So. 2d 584 (Fla. 2d DCA 2000). Thus, Defendant's convictions depicting the same female in multiple photographs did not violate the Double Jeopardy Clause. Because counsel cannot be ineffective for failing to raise a meritless issue, this ground is legally insufficient. *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999).

11. In **Ground 6**, Defendant asserts that trial counsel provided ineffective assistance for failing to address or raise the issue of the unsigned probable cause affidavit for the search warrant to investigate and remove evidence from Defendant's home. Additionally, Defendant claims that trial counsel failed to file a motion to dismiss or suppress the search warrant/probable cause affidavit due to its alleged fabricated contents and the fact that it was unsigned. During the evidentiary hearing, the Court noted that the record contains a signed probable cause affidavit, and therefore the record does not support Defendant's argument. Attorney McFee also testified that he investigated the issue of the blank affidavit and discussed it with Defendant. Attorney McFee informed Defendant that often times the affidavit sent with the search warrant is unsigned but then ultimately the Clerk's office has the actual affidavit on record for the file.

Additionally, Defendant argues in the probable cause affidavit affiant Detective Scott Rapisarda relied on falsified statements from George Jr. The probable cause affidavit states that George Jr. came across child pornographic image files in the "My Documents" folder on Defendant's computer, a folder readily accessible to the user without additional software. However, Defendant states that expert witness Tami Loehrs, a computer forensics expert, found

in her forensic examination of the computer that all potentially child pornographic image files were stored in unallocated space inaccessible to a user without additional software.

At the evidentiary hearing, Tami Loehrs testified that the data she discovered containing images of potential child pornography were temporary internet files cached automatically onto unallocated space on the Defendant's hard-drive. Ms. Loehrs also testified that she found no evidence that anyone had knowingly accessed these images. Finally, Ms. Loehrs stated that some images had embedded URLs directing the viewer to the website they originated from. All of these websites had readily available compliance statements informing visitors that none of their pornographic content involve minors.

Defendant argues that Loehrs' testimony proves that George Jr. falsified information to Detective Rapisarda by claiming that image files containing child pornography were located on the Defendant's "My Documents" folder. Defendant claims that, due to this discrepancy, his trial counsel should have filed a motion to dismiss the case, or at least suppress the search warrant evidence. At the evidentiary hearing, attorney McFee testified that he did in fact review the Ms. Loehr's report with the Defendant and he though her report was helpful. However, attorney McFee stated that the depositions of George Jr. and other family members was harmful to Defendant's case and it outweighed the benefit of using her.

Defendant was on notice of Tami Loehrs' report and the probable cause affidavit at the time he pled nolo contendere. A defendant cannot raise issues in a Rule 3.850 postconviction motion that were known to him at the time of the plea. *See Gidney v. State*, 925 So. 2d 1076, 1077-78 (Fla. 4th DCA 2006). The Court finds that counsel's performance was neither deficient nor prejudiced under *Strickland* as alleged by Defendant in the claims asserted in **Ground 6**.

Accordingly, it is

ORDERED AND ADJUDGED that all grounds in Defendant's rule 3.850 motion and amended motion for postconviction relief are DENIED. .

Court-appointed counsel has fulfilled his obligation of representing Defendant for purposes of the evidentiary hearing and is hereby discharged immediately and relieved of any further responsibility, and counsel is ***not*** appointed for the purpose of representing Defendant as to any postconviction appeal or any further postconviction matters. Postconviction appeals are distinct from direct appeals and, as such, the requirements of Florida Rule of Criminal Procedure 3.111(e) do not apply. Defendant has no automatic right to counsel to assist in pursuing a postconviction appeal and must proceed pro se unless he retains private counsel or can demonstrate that due process requires the appointment pursuant to *Graham v. State*, 372 So. 2d 1363 (Fla. 1979).

Defendant may file a notice of appeal within thirty (30) days of the date this order is rendered.

DONE AND ORDERED in Chambers at Naples, Collier County, Florida, this 27 day of September, 2016.

Frederick R. Hardt
Circuit Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: Blake Adams, Esq., Office of the Public Defender, 3315 E. Tamiami Trail, Suite 510, Naples, Florida 34112; Post Conviction Relief Unit, Office of the State Attorney, P.O. Box 399, Ft. Myers, Florida, 33902, this 28th day of September, 2016.

DWIGHT E. BROCK
Clerk of Court

By: _____
Deputy Clerk

Court Administration (XII)

Additional material from this filing is available in the Clerk's Office.