

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

Case No. 2D17-2456

Appendix A
1 Page(s)

IN THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

 ORIGINAL

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: CF12-000539-XX

BRIAN WHITAKER,

Defendant.

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

The above captioned matter came before the Court on January 27, 2017 upon Defendant's *Amended Motion for Postconviction Relief*, filed on May 25, 2016; the Court's *Order to Show Cause*, issued on June 2, 2016; the *State's Response to the Court's Order to Show Cause*, filed on August 31, 2016; and the Court's *Order on Defendant's Amended Motion for Postconviction Relief and Order Granting Evidentiary Hearing and Order Setting Status Conference*, issued on September 8, 2016. Defendant raised 13 claims of error. Claims 1-5, 7-10 and 13 have already been denied. Claims 6, 11, and 12 were set for an evidentiary hearing. At the hearing the State was represented by Joseph Spataro and the Defendant was represented by Carl McPhail.

As stated by the Florida Supreme Court in Spencer v. State, 842 So. 2d 52 (Fla. 2003):

In order to prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate that (1) counsel's performance was deficient and (2) there is a reasonable probability that the outcome of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 668, 687, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. See *id.* at 694. In reviewing counsel's performance, the court must be highly deferential to counsel, and in assessing the performance, every effort must "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.* at 689; see also Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993). As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687; see also Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995). For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. See Strickland, 466 U.S. at 695; see also Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687.

At the evidentiary hearing Jeffrey Shama and the Defendant appeared as witnesses and the Court heard arguments from the parties. The Court also allowed the parties to submit written argument as to

Appendix B
3 Page(s)

claim 12. The State's response was filed on February 9, 2017, and the Defendant's response was filed on February 19, 2017.

Factual Findings

Jeffrey Shama testified that he was employed by the Office of Criminal Conflict and Civil Regional Counsel when he was assigned this case. He visited the Defendant in jail 2-3 times and brought along a laptop and CDs with the evidence contained thereon. There was an earlier ruling that the evidence could not be printed due to the redaction that was needed and the volume of the documents. The Defendant was allowed to click through the documents on the laptop but was not happy about doing so. Defendant wanted a paper copy of the evidence so that he could look through it at his leisure. Counsel was not looking over the Defendant's shoulder as he was reviewing the evidence so counsel could not state with specificity what documents the Defendant actually viewed. Defendant and counsel discussed the bank records and what they showed but they did not go individually through each check. Defendant and counsel agreed that the documents spoke for themselves. The strategy was to argue that none of the checks show a scheme to defraud and that the Defendant was a poor business person in over his head but that there was no criminal intent. Defendant's testimony at trial was consistent with their strategy.

Mr. Shama testified that the Defendant's girlfriend did try to get in touch with him about thumb drives and hard drives but that the two of them never made contact. Counsel did not have her address so he could not subpoena the drives. Also, Defendant wanted his counsel to speak to the girlfriend in person, but did not want her subpoenaed.

Defendant testified that he met with Mr. Shama twice at the jail. He was not given enough time to review the evidence and he was forced to speak with his attorney through a phone at the jail. When his girlfriend tried to contact Mr. Shama, Mr. Shama told her to stop bothering him. Defendant never told the Court that he was unprepared for trial.

Legal Findings

In claim 6, Defendant argues that trial counsel failed to review the RST Funding, LLC, BAT Properties documents and the MidFlorida account with the Defendant. The testimony of Mr. Shama refutes this claim. Mr. Shama testified that he brought a laptop and the evidence to the jail for the Defendant to review. The Defendant was given all the time he wanted during those visits to review the evidence. Defendant and trial counsel discussed the records and what they showed. Additionally, the records would not have changed the facts of the case or the strategy that Defendant and counsel decided to pursue at trial.

In claim 11, Defendant argued that trial counsel was ineffective for failing to obtain hard drives

and thumb drives from Defendant's girlfriend. Mr. Shama testified that he repeatedly tried to get in contact with Ms. Barling but that they never made contact. Mr. Shama testified that the Defendant did not want her subpoenaed but that he wanted counsel to speak with her personally. Counsel testified that he did not know what was supposed to be on the drives as the content was never discussed.

In claim 12, Defendant argues that trial counsel was ineffective for failing to seek a curative instruction when the State seemed to suggest that the Defendant stole \$155,000. In its response, the State argues that all parties agreed that \$155,000 was given to the Defendant and at no point was the State making an improper suggestion regarding the check but was merely trying to clarify the issue. The Defendant's response does not address claim 12.

The Court finds that the Defendant has failed to show deficient performance on the part of trial counsel and prejudice cannot be established.

Based on all of the above, it is **ORDERED AND ADJUDGED** that Defendant's *Motion for Postconviction Relief* is **DENIED in toto**. Defendant has thirty (30) days from the date of this Order within which to appeal this Order to the Second District Court of Appeal.

DONE AND ORDERED in Bartow, Polk County, Florida this 7th day of March, 2017.



WAYNE M. DURDEN, Circuit Judge

cc:

- Carl McPhail, Esq., Attorney for Defendant, 390 N. Orange Ave., Ste. 2300, Orlando, FL 32801
- Joseph Spataro, Office of Statewide Prosecution, Concourse Center 4, 3507 Frontage Rd., Ste. 200, Tampa, FL 33607

I CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of Polk County, Florida, and that I have furnished copies of this order and its attachments to the above-listed on this 8th day of March, 2017.

CLERK OF THE CIRCUIT COURT

By: 
Deputy Clerk

IN THE CIRCUIT COURT
OF THE NINTH JUDICAL CIRCUIT COURT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

BRIAN WHITAKER,

Defendant.



CASE NO.: CF12-000539-XX

ORDER DENYING DEFENDANT'S AMENDED MOTION FOR REHEARING

THIS MATTER came before the Court upon Defendant's Amended Motion for Rehearing, filed on August 31, 2017. The Defendant filed an Amended Motion for Postconviction Relief on May 25, 2016. The Court issued an Order to Show Cause on June 2, 2016. The State filed its Response on August 31, 2016. The Court issued an Order denying claims 1-5, 7-10, and 13, and set claims 6, 11, and 12 for an evidentiary hearing. The Court denied the Defendant's Motion after an evidentiary hearing and issued a final order on March 7, 2017. Throughout the entire postconviction proceeding, the Defendant was represented by counsel. Defendant now files this Amended motion for Rehearing as to claims 1-5, 7-10 and 13. After review of the Motion, case file and applicable law, the Court finds as follows:

In claim 1, Defendant argued that trial counsel was ineffective for failing to argue a sufficient motion for judgment of acquittal. The State responded, and the Court agrees, that trial counsel was not deficient in his argument as to intent. The State pointed out that trial counsel's strategy throughout trial was to argue lack of intent to defraud and that based upon the evidence presented, no other strategy was available. The State also argued that even if trial counsel's argument was deficient, a directed verdict could not be granted when there was conflicting evidence. The State cited to the Transcript at p.557-559; 605-606, which the Court has attached. The Court finds that the Defendant was not deficient and that prejudice has not been established.

In Claim 2, Defendant argued that trial counsel was ineffective for failing to argue a Motion for Judgment of Acquittal based upon circumstantial evidence. The State argued, and the Court agrees, that the case was not wholly circumstantial and that direct evidence was used to show that the Defendant claimed to have a credit line that he did not actually have. Transcript at 259; 314-317; 605-606. The Court finds that deficient performance or prejudice has not been established.

In claim 3, Defendant argued that trial counsel was ineffective for failing to timely file a Motion for New Trial based on the weight of the evidence. The State responded, and the Court agrees, that the

Appendix C
3 Page(s)

State presented sufficient evidence as to a scheme to defraud and that a motion for new trial would not have been granted. The State presented the testimony of David Bonner, Ralph Howe, and Joseph Hoover who testified that the Defendant spoke about his expertise regarding short sales and the victims ultimately invested money that was never spent on properties. Transcript at 232-239; 243-249; 256-258; 299-304; 322; 344-356. Mr. Travieso testified that the Defendant pitched his expertise and how the investors would profit (Transcript at 195-196), that the Defendant never made a purchase (Transcript at 199-200; 208), and testified regarding the Defendant's spending habits (Transcript at 201-204; 207-208). Denny Santana testified that Defendant spent money on his office (Transcript at 416-417) and that he created a fraudulent document for the Defendant (Transcript at 420-424).

In claim 4, Defendant argued that trial counsel was ineffective for failing to file a Motion to sever the incidents involving Mr. Hoover. The State argues, and the Court agrees, that the Defendant's conduct in defrauding Mr. Hoover was part of the same ongoing scheme as the conduct defrauding Mr. Bonner and Mr. Howe. The State cites to several areas of evidence to justify denying this claim (Transcript at 297; 311-313; 338-340; 586-587; 592; 595).

In claim 5, Defendant argued that trial counsel was ineffective for failing to investigate the bank records to find evidence of legitimate transactions. The State argued, and the Court agrees, that the transactions made by Defendant were not legitimate and that the bank records are damaging. Transcript at 302; 603-605.

In claim 7, Defendant argued that trial counsel was ineffective for failing to prepare and introduce bank records at trial. The State responded, and the Court agrees, that the cabinet transaction was presented at trial. However, the purpose of the investment money was to buy short sale homes. Because no homes were purchased, there were no legitimate expenditures. Transcript at 513-516; 537-538. Trial counsel could not have done anything with the bank records that would have gone beyond the Defendant's testimony.

In claims 8 and 9, Defendant argued that Liang Liu should have been called as a witness. Mr. Liu would have testified regarding the cabinet transaction. The State argues, and the Court agrees, that Mr. Liu's testimony would have been cumulative in nature. The Court finds that the Defendant has failed to show deficient performance or prejudice.

In claim 10, Defendant argued that trial counsel was ineffective for failing to effectively cross examine Gayle Hoffman concerning legitimate business transactions. The State argued, and the Court agrees, that Ms. Hoffman did not provide an opinion as to the transactions and therefore could not be impeached. Defendant has failed to show deficient performance or prejudice.

In claim 13, Defendant argued that the cumulative effect of trial counsel's errors prejudiced the Defendant. Based on the finding above and in the final order entered on March 7, 2017, the Court disagrees.

Based on the above, it is **ORDERED AND ADJUDGED** that Defendant's Motion is **DENIED**.

May **DONE AND ORDERED** in Bartow, Polk County, Florida this 16th day of


WAYNE M. DURDEN, Circuit Judge

cc:

-- Tanya M. Dugree, Esq., Attorney for Defendant, 3414 W. Bay to Bay Blvd., Ste. 300, Tampa, FL 33629

-- Joseph Spataro, Esq., Office of Statewide Prosecution, Concourse Center 4, 3507 Frontage Rd., Ste. 200, Tampa, FL 33607

WMD/abw

I hereby certify that copy
of the foregoing order was
mailed to defendant this

5-17-17


Deputy Clerk

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: CF12-000539-XX

BRIAN WHITAKER,

Defendant.

 ORIGINAL

ORDER ON DEFENDANT'S AMENDED MOTION FOR POSTCONVICTION RELIEF
and
ORDER GRANTING EVIDENTIARY HEARING
and
ORDER SETTING STATUS CONFERENCE

THIS MATTER came before the Court upon Defendant's *Amended Motion for Postconviction Relief*, filed on May 25, 2016; the Court's *Order to Show Cause*, issued on June 2, 2016; and the *State's Response*, filed on August 31, 2016. After review of the Motion, Response, case files and applicable law, the Court finds as follows:

In his Motion Defendant raises thirteen (13) claims of error:

- 1.) Trial counsel was ineffective for failing to argue a sufficient motion for Judgment of Acquittal;
- 2.) Trial counsel was ineffective for failing to argue a Motion for Judgment of Acquittal based upon circumstantial evidence;
- 3.) Trial counsel was ineffective for failing to timely file a Motion for New Trial based upon the weight of the evidence;
- 4.) Trial counsel was ineffective for failing to file a Motion to Sever the incidents involving Mr. Hoover;
- 5.) Trial counsel was ineffective for failing to investigate the bank records to find evidence of legitimate transactions;
- 6.) Trial counsel was ineffective for failing to review RST Funding, LLC, BAT Properties, and MidFlorida Credit Union account records with the Defendant;
- 7.) Trial counsel was ineffective for failing to prepare and introduce bank records at trial;
- 8.) Trial counsel was ineffective for failing to investigate Liang Liu as a potential witness;
- 9.) Trial counsel was ineffective for failing to call Liang Liu as a witness;
- 10.) Trial counsel was ineffective for failing to effectively cross examine FDLE Analyst Gayle Hoffman concerning legitimate business transactions;

Appendix D
3 Page(s)

- 11.) Trial counsel was ineffective for failing to investigate evidence and facts which support the Defendant's defense such as hard drives, thumb drives, and computers containing exonerating information;
- 12.) Trial counsel was ineffective for failing to seek a curative instruction when the State seemed to suggest that the Defendant stole the money used in the business; and
- 13.) The cumulative effect of trial counsel's errors prejudiced the outcome at trial.

As to claim 1 the State argues that the Defendant has failed to establish prejudice in that a directed verdict would not have been granted due to the conflicting evidence. The State points out that the direct and circumstantial evidence presented by the State during its case-in-chief tends "to prove the issues."

As to claim 2 the State argues that direct evidence was presented during the trial which would negate the Defendant's claim that the case was purely circumstantial.

For claim 3 the State argues that the case was unequivocal as to each element. The State lists the key elements as testified to by the witnesses that show evidence of a scheme to defraud. Therefore, trial counsel was not deficient in his performance for failing to file a Motion for New Trial and prejudice cannot be established.

As to claim 4 the State argues that trial counsel was not deficient for failing to sever the incidents involving Mr. Hoover and prejudice cannot be established. The State points out that what Defendant considers a separate, unrelated transaction, the jury determined to be part of an ongoing scheme to defraud. In this case the Defendant's conduct in defrauding Mr. Hoover was part of the same ongoing scheme.

In claim 5 Defendant argues that trial counsel was ineffective for failing to investigate bank records to find evidence of legitimate transactions. The State argues that there were no legitimate transactions and that trial counsel was successful in failing to have Exhibit 22, listing various withdrawals made by Defendant, entered into evidence as it would be evidence damaging to the Defendant.

In claim 7 Defendant argues that trial counsel was ineffective for failing to prepare and introduce bank records at trial. The State argues that the Defendant's expenditure on cabinets was not a legitimate expense and therefore such evidence would not have changed the outcome at trial. The State also points out there was testimony concerning the expenditure at trial.

As to claims 8 and 9 the State argues that Mr. Liu's testimony would have been cumulative to what was admitted in the bank records and the testimony of Denny Santana.

In claim 10 Defendant argues that trial counsel was ineffective for failing to effectively cross examine Ms. Hoffman concerning legitimate business transactions. The State argues that Ms. Hoffman merely reviewed the transactions and organized them in a way the jury could understand. At no point did Ms. Hoffman testify concerning the legitimacy of the transactions.

As to claim 12, the State was unsure how to respond. The Defendant alleged that Mr. Howe testified that the \$155,000 check was cancelled and was not intended for the RST Funding account. However, this was never made clear and it seemed that the State was implying that the Defendant stole the money.

As to claim 13, the Court does not find that the cumulative effect of counsel's alleged errors prejudiced the outcome of the trial based on the rulings above.

As to claims 1-5 and 7-10, after review of the State's response, attached and incorporated herein, the Court agrees. The Court finds that claims 6, 11, and 12 require an evidentiary hearing.

Accordingly, it is **ORDERED AND ADJUDGED** that:

- 1) An evidentiary hearing is granted as to claims 6, 11, and 12. A status conference will be held on October 28, 2016, at 8:30 a.m. in 9B before the Honorable Wayne M. Durden.
- 2) Defendant's claims 1-5, 7-10 and 13 are DENIED.
- 3) The court retains jurisdiction until a Final Order has been entered.
- 4) Defendant may not appeal until such time as a Final Order has been rendered.

DONE AND ORDERED in Bartow, Polk County, Florida this 5th day of September, 2016.


WAYNE M. DURDEN, Circuit Judge

cc:

-- Carl McPhail, Esq., Attorney for Defendant, 390 N. Orange Ave., Ste. 2300, Orlando, FL 32801

-- Joseph Spataro, Esq, Assistant Statewide Prosecutor, Concourse Center 4, 3507 Frontage Rd., Ste. 200, Tampa, FL 33607

WMD/abw

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

June 26, 2019

CASE NO.: 2D17-2456

L.T. No.: CF12-000539

BRIAN WHITAKER

v.

STATE OF FLORIDA

Appellant / Petitioner(s),

Appellee / Respondent(s).

BY ORDER OF THE COURT:

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

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

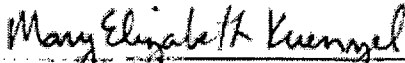
Served:

Attorney General, Tampa
Stacy Butterfield, Clerk

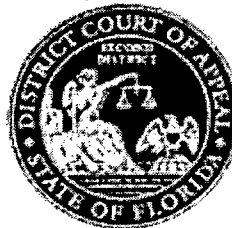
Jonathan S. Tannen, A.A.G.

Brian Whitaker

mep



Mary Elizabeth Kuenzel
Clerk



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