No._____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

ALBERT ENRIQUE NARVAEZ,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

_____

On Petition for a Writ of Certiorari to the
District Court of Appeal for the
Fourth District of Florida

APPENDIX

ROBERT DAVID MALOVE
The Law Office of
Robert David Malove, P.A.
200 S.E. 9th Street
Fort Lauderdale, FL 33316
(954) 861-0384
Counsel of Record
Attorney for Petitioner
Member of the Supreme Court Bar

INDEX OF APPENDICES

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ALBERT ENRIQUE NARVAEZ,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2023-1089

[January 4, 2024]

Appeal of order denying rule 3.850 motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; George Odom, Judge; L.T. Case No. 18011191CF10A.

Robert David Malove of The Law Office of Robert David Malove, P.A., Fort Lauderdale, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Alexandra A. Folley, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

KLINGENSMITH, C.J., MAY and ARTAU, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

APPENDIX A

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. **18011191CF10A** DIVISION: **FV** JUDGE: **Odom - FV, George, Jr. (FV)**

State of Florida

Plaintiff(s) / Petitioner(s)

v.

Narvaez, Albert Enrique

Defendant(s) / Respondent(s)

_____/

FINAL ORDER DENYING DEFENDANT'S MOTION TO VACATE, SET-ASIDE, OR CORRECT SENTENCE

THIS CAUSE came before the Court upon the Defendant's Motion to Vacate, Set-Aside, or Correct Sentence filed with the Court on September 19, 2022. Pursuant to Court Order, the State filed a response on December 27, 2022. The defense filed a motion for leave to respond on December 30, 2022 to the state's response. The Court granted leave to the Defense on January 4, 2023. The Defendant's response to the State's response was filed on January 4, 2023. The Court granted an evidentiary hearing on Defendant's post-conviction motion in compliance with F.R. Crim. P. 3.850(f)(8). The State filed a Motion for leave to file a corrected response on April 5, 2023. The Court, upon agreement of the parties on the record, granted said limited relief on April 5, 2023.The Court having examined all motions, the state's response, the Court file, applicable law, and being otherwise fully advised in the premises, finds as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The State of Florida filed an information against the Defendant on July 26, 2017. The case number for said case was 17007403CF10A.
2. The charges were counts I – Attempted Murder in the First Degree, II – Aggravated Assault (Deadly Weapon), (the weapon was a firearm), III – False Imprisonment, IV – Battery (Domestic).
3. Attorney Ramona L. Tolley Esq. filed a notice of appearance on behalf of the Defendant on

APPENDIX B

April 11, 2018. Fla. R. Gen. Prac. Jud. Admin. 2.505(e)(2). The Court executed an order granting substitution of counsel on April 17, 2018. Fla. R. Gen. Prac. Jud. Admin. 2.505(e)(3).

4. Calendar call was noticed for Augusts 30, 2018 in court on June 21, 2018. The Court also set the matter on the trial docket for September 4, 2018. All relevant parties were present in court.
5. On August 30, 2018 all relevant parties were present.
6. The Assistant State Attorney, hereafter "ASA Newman" was not ready for trial due to victim unavailability. This fact is undisputed.
7. The Court did not ask any questions on the record as to pretrial negotiations, offers and or the defendant's sentencing exposures. In addition, the record is silent on the plea agreement and the terms of the negotiations.
8. However, the following is undisputed by the lawyers. The State relayed a plea offer to defense counsel. In exchange for the Defendant's plea on Augusts 30, 2018. The state offered one sole count of felony battery with a sentence of three hundred and sixty-four days (364) in the Broward County Jail.
9. Notably, the matter wasn't resolved on August 30, 2018 by trial or plea. The Court granted the state's continuance and reset the matter on the trial docket for September 24, 2018 at 10:30 A.M. The in-court proceedings concluded for the day.
10. On September 12, 2018 the State announced a nolle prose on all counts I-IV The court executed a disposition on the same day. There is no record of any party moving to set this matter down on the docket. The Court was not provided any transcripts of the proceedings for September 12, 2018.
11. Notwithstanding ASA Newman filed a new information with the exact same counts as listed in case number 17007403CF10A on September 12, 2018. The Clerk issued a new case number 18011191cf10a. Defense counsel filed her notice of appearance on September 18, 2018. Fla. R. Gen. Prac. Jud. Admin. 2.505(e)(2). The latter is the case number under which the defendant seeks relief. The state filed an amended information on December 20, 2018. The following counts were I - Attempted Murder in the First Degree, II - Aggravated Assault

(Deadly Weapon), III – False Imprisonment, IV – Discharge a Firearm from a Vehicle, and V – Battery (Domestic). The matter proceeding in a trial posture.

12. In short, the Court scheduled jury trial on January 8, 2019 for February 25, 2019. Trial commenced on February 26, 2019. The jury rendered verdicts on March 8, 2019. The jury found the Defendant guilty as charged in the information on all counts. The Court sentenced the defendant on January 15, 2020. He was adjudicated guilty on counts I-V. He was sentenced on the counts as follows: I- 25 years Florida State Prison "hereafter" FSP with credit followed by 4 years of felony probation. The defendant received a minimum mandatory of 20 years in the FSP on count I. II & III – 5 years each in the FSP with credit and IV – 15 years FSP with credit. All counts were ordered to run concurrent. There were special terms and conditions imposed. The Court executed a corrected disposition only on count V on April 27, 2022. The Defendant was convicted of misdemeanor battery and sentenced to 364 days in the county jail with credit.
13. The Defendant argues if he would've been made aware that the state could re-file the charges, if the victim would become available he would have accepted the plea bargain on August 30, 2018. He also argues he was not made aware of the statue of limitations on all counts, emphasis on count 1 which is a felony punishable by life. The state refiled within the designated statute of limitation times period and that fact is undisputed.
14. The Defendant alleges ineffective assistance of counsel. He is requesting this Court vacate his convictions and order the state to reoffer the plea extended on August 30, 2018. See *Alcorn v. State*, 121 So. 3d 419 (Fla. 2013).

The Defendant makes two arguments. One is that he was denied effective assistance of counsel guaranteed under the U.S.C.A. Const. Amend. 6. and U.S.C.A. Const. Amend. 14. A defendant has the burden of proving a claim of ineffective assistance of counsel at an evidentiary hearing on a motion for postconviction relief; however, when a defendant presents competent substantial evidence in support of an ineffective assistance claim, the burden shifts to the State to present contradictory evidence. See *Williams v. State*, 974 So. 2d 405 (Fla. 2d DCA 2007).

First, to prove an ineffective assistance of counsel claim under *Strickland*, a defendant must show: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced

the defense. U.S.C.A. Const. Amend. 6.; See also *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Here, the record is clear that Attorney Tolley's performance was deficient thus her conduct was outside the broad range of reasonableness under prevailing professional standards. See *Ch 4 RRTFB*. Defense counsel "does not recall advising the defendant in the event he rejected the state's offer and they entered a nolle prosequi. The State would not be foreclosed from re-filing the charges within the applicable time of statute of limitations; assuming the state could make the victim available for trial. (Tolley Aff. ¶6.)." See also, F.S.§§ 775.082 and 782.04(1)(a).

Defense counsel testified on April 5, 2023 that she conveyed the offer to the Defendant. She testified the Defendant asked her what would be the point of taking the plea offer? Her response was to get the case resolved. Counsel did not go over the pros and cons of rejecting the state's offer. She did not talk about the statute of limitations. She did not talk about jeopardy and what could happen on a refile. See Fla. R. Crim. P. 3.171(c). Furthermore, defense counsel did not know what the statute of limitations was on count I at the time and was unable to provide said information to the Defendant during the plea negotiations. The Court takes note that during calendar call's Defense counsels time with the Defendant is limited, in part, due to efficient docket management. There is a strong presumption that any counsel's conduct will fall within the wide range of reasonable professional assistance. Regardless, in this case defense counsels performance was deficient on August 30, 2018 during the plea negotiations.

Second, the issue is whether counsels deficient performance prejudiced the Defendant. In other words, did the defendant establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Parker v. State*, 89 So.3d 844, 855 (Fla.2011) (quoting Porter v. McCollum, 558 U.S. 30, 130 S.Ct. 447, 455–56, 175 L.Ed.2d 398 (2009)). In this case, the Court finds he did not. The Defendant must demonstrate prejudice in connection with a lost plea. The defendant must demonstrate: (1) He would have accepted the plea offer if counsel had advised him correctly; (2) the prosecutor would not have withdrawn the plea offer; (3) the Court would have accepted the plea offer; and (4) the conviction or sentence, or both, under the plea offer's terms would have been less severe than the actual judgment and sentence imposed. See *Alcorn v. State*, 121 So. 3d 419 (Fla. 2013); *George v. State*, 132 So. 3d 366 (Fla. 4th DCA 2014).

Element 4 is uncontested by the parties. Hence, I will only address elements 1, 2 and 3. The

Court does not find based on the evidence that the Defendant would have accepted the plea offer even if his lawyer would have properly advised him. The state, defense and the defendant were all aware that the reason ASA Newman made the offer was due to victim unavailability. Attorney Tolley, whom this court finds to be credible, testified that at the time the Defendant was aware of the seriousness of the crime and that he knew he could get life in prison. He was aware of all the charges filed against him. Emphasis, counsel advised her client the court could sentence him to life in prison.

However, the defendant appeared mostly concerned with the availability of the victim. The Defendant hadn't had any contact with the victim. He had a condescending attitude towards the victim when discussing her with his attorney during the plea negotiations. The defendant knew the state was having problems with contacting the victim and during the plea negotiations the defendant wanted to know where was the victim. In fact, during the negotiations the Defendant was adamant that he was not going to trial without the victim. The Defendant wanted to know why should he accept the State's offer if they don't have a victim. In short through his language and actions he made it clear, he shouldn't.

Instead, ASA Newman testified the Defendant advised he would be inclined to accept the offer but only to a misdemeanor battery. Again, victim availability appeared to drive the defendant's core decision on August 30, 2018. The Court does not find the Defendant credible based on his testimony. The old ancient proverb says hindsight is 20/20. In hindsight things are obvious that were not obvious from the outset; one is able to evaluate past choices more clearly than at the time of the choice. In this case, the defendant did not meet his burden in establishing prejudice. The defendant's actions were clear he would not go to trial without a victim. Unless, ASA Newman offered him a misdemeanor battery. See *Hurt v. State*, 82 So. 3d 1090, 1091 (Fla. 4th DCA 2012). The Defendant has failed to meet his burden proving that "but for" his counsel's ineffectiveness he would have taken the plea.

Second, in Florida, trial courts and prosecutors have the discretion to withdraw a plea offer. See F.R. Crim. P. 3.172(g); *Mitchell v. State*, 197 So. 3d 1271, 1273 (Fla. 2d DCA 2016). In this case, the Defendant failed to meet his burden that the state would not have withdrawn the plea offer. Here the record is saturated with conversations that the State was willing to proceed to trial. Albeit, they were requesting a continuance on August 30, 2018. The Defendant did not show where the state would not have withdrawn their offer. In fact, the contrary appears when the Court granted the State's continuance and the state was prepared to proceed with trial preparation. Here, the Defendant makes mere general

allegations. ASA Newman testified, whom the Court finds credible. The state had an independent witness to the incident. The victim appeared fearful throughout the process and ASA Newman was diligent in trying to gain her cooperation. The defendant was present on August 30, 2018 when the Court gave the state 25 days to locate the victim and reset the trial date.

Finally, the Defendant failed to prove with a reasonable probability that the Court would have accepted the offer. See *Alcorn v. State*, 121 So. 3d 419 (Fla. 2013). The record is absent of any conversation the state and defense had with the court as to plea negotiations. Furthermore, the court exercising Its right to limit the number of continuances does not prove with any reasonable probability that It would have accepted the plea. Fla. R. Gen. Prac. Jud. Admin. 2.545(b). The trial court has authority to reject a negotiated plea between parties before it is formally accepted by the court. Here, the Defendant failed to meet his burden and prove a reasonable probability that an acceptance would have taken place. See *State v. Rojas*, 356 So. 3d 876 (Fla. 3d DCA 2023), reh'g denied (Mar. 15, 2023)

ORDERED AND ADJUDGED

A. The Defendant's Motion to Vacate, Set-Aside, or Correct Sentence is hereby **DENIED**.

B. The Judgment and sentence shall remain in full force and effect as imposed by the Court on January 15, 2020 and April 27, 2022. The status hearing scheduled for May 3, 2023 shall be deleted from the docket.

C. This is a final order and the Defendant shall have 30 (thirty) days to appeal this Court's rulings.

DONE AND ORDERED in Chambers at Broward County, Florida on 30th day of April, 2023.

18011191CF10A 04-30-2023 8:16 PM

18011191CF10A 04-30-2023 8:16 PM
Hon. George Odom
CIRCUIT COURT JUDGE
Electronically Signed by George Odom

Copies Furnished To:
Andrew Newman , E-mail : courtdocs@sao17.state.fl.us
Celia Terenzio , E-mail : CrimAppWPB@myfloridalegal.com
DIV FV , E-mail : DIVFV@17th.flcourts.org
Defendant DC#G50336 , Address : Wakulla Correctional Institution, 110 Melaleuca Drive, Crawfordville, Fl 32327
Docket Clerk , E-mail : llopez@browardclerk.org
Judge Alspector , E-mail : divfv@17th.flcourts.org

Nicole A Bloom , E-mail : wjordan@sao17.state.fl.us
Nicole A Bloom , E-mail : nbloom@sao17.state.fl.us
Public Defender 17Th Circuit , E-mail : pdcircuit17@browarddefender.org
Ramona L. Tolley , E-mail : rtolley@ramonaltolleypa.com
Ramona L. Tolley , E-mail : nsalvatierra@ramonaltolleypa.com
Robert D Malove , E-mail : e-filing@robertmalovelaw.com
Sonya Graham , E-mail : sgraham@browardclerk.org
Sonya Graham , E-mail : appealefilings@browardclerk.org
Virginia Jane Murphy , E-mail : Appeals@pd15.org
Virginia Jane Murphy , E-mail : msmith@pd15.org
Virginia Jane Murphy , E-mail : vmurphy@pd15.org