IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2011

BROCK R. SHADE,

Appellant,

v. Case No. 5D10-4435

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed April 29, 2011

3.850 Appeal from the Circuit Court
for Hernando County,
Jack Springstead, Judge.

Brock R. Shade, Bristol, pro se.

Pamela Jo Bondi, Attorney General, Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

Brock Shade appeals an order summarily denying his postconviction claims filed pursuant to Florida Rule of Criminal Procedure 3.850. Shade's postconviction motion asserted seven grounds of ineffective assistance of counsel. The trial court correctly denied grounds four, five, and six, and we affirm without elaboration. However, it erred in denying Shade's remaining claims.

In exchange for a significantly reduced sentence, Shade resolved his seven cases involving multiple drug-related charges by pleading guilty in six cases and nolo

contendere in the other. As part of his nolo plea, Shade specifically reserved the right to appeal the trial court's Williams[1] rule decision. On direct appeal, appellate counsel filed an Anders[2] brief addressing both the merits of the decision and the fact it was not dispositive or preserved. This court issued a *per curiam* affirmance. Shade v. State, 7 So. 3d 1117 (Fla. 5th DCA 2009).

Claims one, two and three of Shade's rule 3.850 motion are interrelated and alleged that counsel was ineffective for misadvising him that the Williams ruling was dispositive and properly preserved for appeal. Shade asserts he would not have entered the plea agreement had he known the Williams ruling was not properly preserved. The trial court denied the claims because there was no record evidence indicating the Williams ruling was dispositive or that Shade's plea was contingent upon it being dispositive. Rather, "counsel for Defendant merely took the steps to ensure that Defendant's right to appeal the Court's Williams rule issue was properly preserved."

The problem with the trial court's conclusion is that a Williams rule decision can only be preserved for appellate review if it is dispositive. Failure to preserve an issue for appeal may constitute ineffective assistance of counsel, so long as the requirements of Strickland v. Washington, 466 U.S. 668 (1984), are met. See Merkison v. State, 1 So. 3d 279, 281 (Fla. 1st DCA 2009). A claim that a defendant was induced to enter a plea upon counsel's erroneous advice that an issue was preserved for appeal is facially sufficient. See Hawley v. State, 822 So. 2d 552 (Fla. 1st DCA 2002). "[T]he voluntariness of a plea can be undercut if the decision to plead is influenced by

[1] Williams v. State, 110 So. 2d 654 (Fla. 1959).

[2] Anders v. California, 386 U.S. 738 (1967).

erroneous advice regarding the defendant's appellate rights." Helms v. State, 573 So. 2d 116, 116 (Fla. 2d DCA 1991).

In this case, Shade's claim was facially sufficient because he alleged that he would not have entered the plea agreement had he known the Williams ruling was not properly preserved. The trial court's attachments to its order do not conclusively refute this claim. Rather, they reflect that Shade entered the plea under the belief that he could appeal the Williams ruling, he hesitated before entering the plea, and he was assured at least six times that the Williams ruling was preserved for appeal. Shade's understanding regarding the dispositiveness is best resolved in an evidentiary hearing. Id.

We also note that this court's prior "per curiam affirmance without opinion on direct appeal does not establish whether the specific issue was or was not preserved for appeal." Tidwell v. State, 844 So. 2d 701, 702 -03 (Fla. 1st DCA 2003), *citing* Daniels v. State, 806 So. 2d 563, 564 (Fla. 4th DCA 2002). "In such a case, a per curiam affirmance might just as well have been based on the conclusion that the issue was not preserved, as on the conclusion that the issue, though properly preserved, lacked merit." Id. at 703.

Accordingly, we reverse and remand for an evidentiary hearing to determine the parties' understanding regarding the dispositiveness of the Williams ruling and whether Shade would have accepted the plea without this issue being preserved.

We also find the trial court erred in denying Shade's seventh claim as conclusory. When an initial rule 3.850 motion is determined to be insufficient, the trial court abuses its discretion when it fails to allow the defendant one opportunity to amend the motion.

See Spera v. State, 971 So. 2d 754 (Fla. 2007). We therefore reverse the portion of the trial court's order denying claim seven, and direct the trial court to strike the claim with leave to amend so long as Shade can do so in good faith.

AFFIRMED in part; REVERSED in part; REMANDED.

ORFINGER, COHEN and JACOBUS, JJ., concur.