IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA, CASE NO. 2015-CF-1381-A

v.

MATTHEW APPERSON,

Defendant.
_____/

ORDER VACATING DEFENDANT'S JUDGMENT AND SENTENCE AND GRANTING DEFENDANT A NEW TRIAL

THIS CAUSE comes before the Court on Defendant's "Motion for Rehearing on Order Denying Grounds 1(A), (3A), and 3(B) of Defendant's Amended Motion for Postconviction Relief after Evidentiary Hearing," filed on August 17, 2021, and "Amended Motion for Post-Conviction Relief," filed pursuant to Fla. R. Crim. P. 3.850 on November 17, 2020.[1] Having conducted multiple hearings and upon due consideration, the Court finds the following:

PROCEDURAL BACKGROUND

The record reflects that Defendant was convicted after a jury trial of Attempted Second Degree Murder with a Firearm (Count 1), Shooting Into an Occupied Vehicle (Count 2), and Aggravated Assault with a Firearm, Reclassified (Count 3). On October 17, 2016, Defendant was sentenced to twenty (20) years imprisonment with a twenty (20) year minimum mandatory for discharging a firearm on Count 1, fifteen (15) years on Count 2, and fifteen (15) years with a three (3) year minimum mandatory for use of a firearm on Count 3. All counts were imposed to

[1] Defendant originally filed his motion on September 24, 2020. By order rendered October 8, 2020, this Court dismissed Ground 2 as facially insufficient with leave to amend. Defendant subsequently filed his amended motion.

run concurrently. Defendant appealed and the Fifth District Court of Appeal per curiam affirmed. Apperson v. State, 252 So. 3d 387 (Fla. 5th DCA 2018).

The history of Defendant's post-conviction relief efforts is admittedly circuitous. Just as the prosecutor and trial counsel are talented and experienced attorneys, post-conviction counsel is skillful. The legal arguments have been persuasive from both sides and this analysis involves well-reasoned, but opposing, positions. By order rendered April 8, 2021, this Court denied Grounds 1-4 of Defendant's motion and set a status hearing for an evidentiary resentencing hearing on Grounds 5 and 6. On April 20, 2021, Defendant filed a motion for rehearing. By order rendered May 20, 2021, this Court granted rehearing and ordered an evidentiary hearing as to Grounds 1(A), 3(A) and 3(B). An evidentiary hearing was held on July 20, 2021, at which Defendant was present and represented by counsel. At the hearing, trial counsel, Attorney Michael LaFay, testified. By order rendered August 2, 2021, this Court denied Grounds 1(A), 3(A) and 3(B) and set a status hearing on Grounds 5 and 6. On August 17, 2021, Defendant filed a second motion for rehearing. By order rendered September 22, 2021, this Court granted rehearing as to Grounds 1(A) and 3(A).

ANALYSIS

In order to prevail on a claim of ineffective assistance of counsel, Defendant has the burden of demonstrating that (1) counsel's performance was deficient, and (2) there is a substantial likelihood that the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Williamson v. Dugger, 651 So. 2d 84 (Fla. 1994); Knight v. State, 394 So. 2d 997 (Fla. 1981). "The Strickland prejudice prong requires the defendant to show that 'there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different,' where '[a] reasonable probability is a probability

sufficient to undermine confidence in the outcome.'" Allen v. State, 261 So. 3d 1255, 1269 (Fla. 2019) (quoting Strickland, 466 U.S. at 694); see also, Dennis v. State, 109 So. 3d 680, 690 (Fla. 2012).

GROUND 1(A) – FAILURE TO OBJECT TO JURY INSTRUCTION

In Ground 1(A), Defendant asserts that trial counsel was ineffective for failing to object to the inclusion in the jury instructions of the language "not otherwise engaged in criminal activity," because it was confusing and misleading. Defendant asserts that this language was confusing because other than the shooting that formed the basis of the charges in this case, there was no evidence that Defendant was engaged in any other criminal activity. In support of this claim, Defendant relied upon Novak v. State, 974 So. 2d 520 (Fla. 4th DCA 2008), to assert that the instruction was improper.

At the hearing, Attorney LaFay testified that he had read Novak at the time of Defendant's trial; however, because there was no issue of Defendant being otherwise engaged in criminal activity, he did not think to object to the inclusion of the language. Attorney LaFay further testified that had he thought of it, he would have requested that the language be removed from the jury instruction and, importantly, that the Court would have been required to strike it.

In Novak, the Fourth District Court of Appeal held that "a jury charged with the 'unlawful activity' instruction might confuse the charged crimes with 'unlawful activity' that precludes the justification of self-defense unless the defendant has retreated." Id. at 522. Post-conviction counsel argued that had trial counsel objected to the inclusion of the "not otherwise engaged in criminal activity" language, the trial court would have removed it from the jury instructions based upon Novak. The jury instruction addressed in Novak provided:

> *No duty to retreat (location other than dwelling, residence, or occupied vehicle). Give if applicable.*

> If the defendant was not engaged in an unlawful activity and was attacked in any place where [he] [she] had a right to be, [he] [she] had no duty to retreat and had the right to stand [his] [her] ground and meet force with force, including deadly force, if [he] [she] reasonably believed that it was necessary to do so to prevent death or great bodily harm to [himself] [herself] [another] or to prevent the commission of a forcible felony.

In re Standard Jury Instructions in Criminal Cases (2006-3), 947 So. 2d 1159, 1161 (Fla. 2007) (italics in original). The standard jury instructions were amended in 2016. As part of the 2016 change to Instruction 3.6(f), the Court revised the instruction regarding the duty to retreat, deleting the previous language, and adding the provision, "However, the defendant had no duty to retreat if [he] [she] was not otherwise engaged in criminal activity and was in a place where [he] [she] had a right to be." Id. at 415. This is the language given to the jury in Defendant's case, and while it constitutes an accurate statement of the law, it was inapplicable and therefore potentially confusing to the jury.

As the Supreme Court has recently stated in In re Amendments to the Florida Rules of Judicial Administration, et al., 45 Fla. L. Weekly S121 (Fla., April 2, 2020), ". . . because of this Court's authorizing of the standard instructions, trial judges are sometimes reluctant to modify standard jury instructions or to give other instructions requested by a party that may be more appropriate." In this case, trial counsel did more than fail to object to a standard jury instruction; counsel prepared and sponsored the instruction. By doing so, trial counsel opened the door to the prosecutor making an argument that Defendant had a duty to retreat. It was the inclusion of that language that brought the confusion into play.

Furthermore, even though the standard jury instructions were amended after Novak, this Court finds that the amendment did not alter the language in a manner that corrected the issue addressed in Novak. In Novak, the defendant asserted that "the jury instruction imposing a 'duty to retreat' on a defendant who employs self-defense while 'engaged in unlawful activity' was

confusing under the circumstances because the defendant was not engaged in any unlawful activity other than the crimes for which he asserted the justification." Novak, 974 So. 2d at 522. The Court found that "a jury charged with the 'unlawful activity' instruction might confuse the charged crimes with 'unlawful activity' that precludes the justification of self-defense unless the defendant has retreated." Id. There is no significant difference between the jury instruction used in Novak and the jury instruction given in this case. Based upon the reasoning in Novak, this Court finds that the jury instruction given in this case was confusing and that trial counsel was ineffective for proposing the use of the instruction that negated his client's sole defense. See McCullough v. State, 46 Fla. L. Weekly D2163 (Fla. 5th DCA Oct. 1, 2021) (". . . we find that trial counsel was deficient for consenting to a jury instruction that legally negated his client's sole defense.").

GROUND 3(A) – FAILURE TO OBTAIN DEFINITIVE RULING

In Ground 3(A), Defendant asserts that trial counsel was ineffective for failing to make proper objections and obtain definitive rulings on the improper closing argument by the State regarding the duty to retreat. (T. 814).[2] Specifically, the prosecutor made the following argument to the jury during closing arguments:

> "Duty to retreat. Mr. LaFay made that argument, well, he is wrong. Because there are exceptions to the stand your ground law. There are two exceptions to the stand your ground law, *where you have a duty to retreat.* But Mr. LaFay is going to make that argument that you have a duty to retreat. The first exception is, if you are the aggressor, you have the duty to retreat. The second exception is *if you your yourself are committing a crime, and then you claim self-defense, you have a duty to retreat.*"

(TT814) (emphasis added).

[2] Relevant portions of the trial transcript were attached to this Court's April 8, 2021 order.

The State relies heavily on the notion that the jury instructions were amended to include the word "otherwise," to clarify to jurors that a defendant should not be considered to be "engaged in criminal activity" based on the crime(s) charged. The State believes that the addition of this word makes the concept clear and unambiguous. However, even the very experienced prosecutor in this case omits the portion of that exception that is clarified by the addition of the word "otherwise". Here, the State informed the jury that a defendant has a duty to retreat ". . . if you yourself are committing a crime . . .." If the word "otherwise" is the word that makes it perfectly clear for a jury, then its absence from the prosecutor's statement of the law is significant.

While trial counsel did object to the argument, the trial court responded by informing the jury, "[l]adies and gentlemen, I will be reading the instructions to you, the copy of the instructions I will read will be going back to the jury room with you. What I read in those instructions you see -- you will see, are the law." (T. 814). Attorney LaFay testified that he objected to the State's argument because he believed it argued facts not in evidence and that it was an incorrect statement of the law, specifically, in the context of this case. He further stated that he did not believe the trial court made a definitive ruling but that he did not wish to press the matter. He testified that it appeared that the prosecutor had abandoned the argument and he was uncertain as to what the trial court would have done. If the trial court had overruled his objection, he thought the prosecutor would have been "off to the races" on the issue.

Given this Court's finding that the "otherwise engaged in criminal activity" jury instruction was confusing, this curative instruction by the trial court did little to correct the issue of the State implying that Defendant had a duty to retreat if he was himself committing a crime. Therefore, while the strategy employed by trial counsel in letting the matter rest without obtaining a definitive ruling was well-reasoned and tactically sound, it contributed to the

probability that the jury was confused as to the applicable law.

The Court further notes the jury question: "Can the agresser (sic) stand his ground?" This question is significant because it likely would not have been asked if there were not at least one juror open to Defendant's claim of self-defense. The phrase "stand his ground" is only found once in the subject jury instructions, and that is in the very sentence that this Court has found to be improper: "If Matthew Apperson was not otherwise engaged in criminal activity and was in a place he had a right to be, then he had no duty to retreat and had the right to stand his ground." The jury's question indicates there was actual express confusion as to whether the charged crimes, which can only be characterized as aggressive behavior, constituted criminal activity that precluded Defendant's right to stand his ground. There is a reasonable probability that had that instruction been clarified, at least one juror would have reached a different result. Likewise, there is a reasonable probability that had the instruction been properly omitted, the juror or jurors who were open to Defendant's claim of self-defense would not have been confused as to whether the charged crimes constituted criminal activity and would have therefore reached a different result.

Based upon the forgoing, this Court finds that Defendant has established that trial counsel, though exceptional at his craft, was deficient in this instance, and further that Defendant has established a probability sufficient to undermine this Court's confidence in the outcome. Therefore, this Court finds that the Defendant is entitled to a new trial.

Regarding Grounds 5 and 6, this Court's ruling that Defendant is entitled to a new trial renders those issues moot.

Accordingly, it is

ORDERED AND ADJUDGED:

1. Defendant's Amended Motion for Post-Conviction Relief is hereby GRANTED. The Judgments entered on October 17, 2016, are vacated. The sentences imposed on October 17, 2016, are set aside.
2. Defendant shall remain in the custody of the Seminole County Sheriff until a bond hearing can be held. Counsel is directed to schedule such hearing without delay.
3. The matter shall be set for docket sounding on the 8th day of December, 2021 at 9:00 a.m. in Courtroom 5D.
4. The parties have the right to appeal this order as provided by law.

DONE AND ORDERED in chambers at Sanford, Seminole County, Florida, this 8 day of November, 2021.

HONORABLE MELANIE CHASE
Circuit Judge

I hereby certify that copies of the foregoing have been furnished by mail this _____ day of November, 2021 to:

Office of the State Attorney
101 Eslinger Way
Sanford, FL 32773
SemFelony@sa18.org

William R. Ponall, Esq.
253 N. Orlando Ave., Suite 201
Maitland, FL 32751
bponall@PonallLaw.com

Florida Department of Corrections
501 South Calhoun St.
Tallahassee, FL 32399

GRANT MALOY, Clerk of Courts

By: _____
DEPUTY CLERK