

**IN THE CIRCUIT COURT OF THE FOURTH
JUDICIAL CIRCUIT, IN AND FOR DUVAL
COUNTY, FLORIDA**

CASE NO. : 162009CF000698AXXX

DIVISION : CR C

STATE OF FLORIDA

v.

**THEODORE J. PAYNE,
Defendant.**

ORDER ON DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

This matter is before the Court upon Defendant's *pro se* Motion for Post Conviction Relief filed on March 2, 2011 and *Amended* Motion to Vacate Judgment and Sentence filed on December 22, 2011. Both Motions were filed pursuant to Florida Rules of Criminal Procedure Section 3.850. The Court found Defendant's claim to be facially sufficient as to Grounds 2 and 3 and held an evidentiary hearing on Defendant's Motions on February 2, 2016 and March 8, 2016. The evidentiary hearing was transcribed and will be referred to as Court's Exhibits A and B. Having considered the Motion and the Amended Motion, the testimony presented at the evidentiary hearing, the arguments of counsel and being fully advised on all matters pertinent to the Defendant's Motions, the Court grants the Defendant's Motions.

A. Factual Background and Post-Conviction Procedural History of the Case

On February 10, 2010, the Defendant was found guilty by a jury of Robbery, as charged in the Information. The jury found that the Defendant did carry and did actually possess a firearm during the commission of the offense. On March 12, 2010, the Trial Court adjudicated

Defendant guilty of Armed Robbery and sentenced him to twenty-five years of imprisonment with a ten-year minimum mandatory sentence pursuant to section 775.087(2)(a)1, Florida Statutes. The Defendant filed a timely Notice of Appeal and his conviction and sentence was affirmed by Mandate on October 13, 2010. On March 2, 2011, the Defendant filed his original Rule 3.850 Motion. On December 22, 2011, the Defendant filed his Amended Rule 3.850 Motion. On February 2, 2016 and March 8, 2016, the Court held an evidentiary hearing on Grounds 2 and 3 of the Defendant's Motions.

B. The Standard for a Post-Conviction Motion Alleging Ineffective Assistance of Counsel

In the post-conviction context, the underlying conviction must be presumed correct. Patton v. State, 784 So.2d 380, 388-389 (Fla. 2000) and Spinkellink v. State, 313 So.2d 666, 671 (Fla. 1975). Thus, a defendant bears the burden of establishing a meritorious post-conviction relief claim. Prince v. State, 40 So.3d 11, 12 (Fla. 4th DCA 2010). The defendant must be able to demonstrate that but for trial counsel's error, it is reasonably likely that the result would be different. Williams v. State, 2014 WL 2619502, 1 (Fla. 2nd DCA 2014). For the reasons stated below, this Court finds that the Defendant has met his burden and has established a meritorious post-conviction relief claim.

C. Ground 2 : Misadvice Regarding Plea Negotiations

In order to establish prejudice relative to plea negotiations, a defendant must demonstrate a reasonable probability, defined as a probability sufficient to undermine confidence in the outcome that: 1) he would have accepted the offer; 2) the prosecutor would not have withdrawn the offer; 3) the court would have accepted the offer; and, 4) the conviction or sentence, or both,

under the offer's terms would have been less severe than under the sentence that was imposed. Alcorn v. State, 121 So.3d 419, 422 (Fla. 2013). This Court finds based upon the evidence that the Prosecutor would not have withdrawn the offer and the conviction or sentence, or both, under the offer's terms would have been less severe than under the sentence that was imposed. This Court additionally finds that the Defendant would have accepted the offer. This Court does not find that the Trial Court would have accepted the offer as charged but would have accepted the offer under a reduced charge of Strong Armed Robbery.

During the evidentiary hearing on February 2, 2016, the Defense Attorney testified that at her first meeting with the Defendant, she would have discussed the penalties, including the maximum sentence for the charge. **(Exhibit A at Page 45)**. Although initially the Defense Attorney testified that she did not recall an offer below the State's original offer of twenty years with a ten-year minimum mandatory sentence. The attorney testified under oath that she reviewed her file in preparation for the hearing. The evidentiary hearing was concluded. After returning to her office and reviewing the notes in her file **again** after the first evidentiary hearing concluded, she found a note that referenced the State's willingness to negotiate a lower charge and/or sentence, which is why a second evidentiary hearing was granted. **(Exhibit B at Pages 13-14)**. At the second evidentiary hearing on March 8, 2016, the Prosecutor testified and indicated that she was willing to lower the offer to include either a Strong Armed Robbery without a Firearm and/or a Youthful Offender disposition, which corroborated the accuracy of Ms. Gapske's file note. **(Exhibit B at Pages 7-8)**. However, despite the willingness to lower the State's offer, both the Prosecutor and the Defense Attorney testified that the Defendant was unwilling to accept any plea offer. **(Exhibit B at Pages 8-9 and 16-17)**. The Defense

Attorney testified that although the note in her file reflected that the State had been willing to negotiate a lower offer or charge, her testimony remained unchanged that the Defendant was unwilling to accept any plea offer. **(Exhibit B at Page 17).**

In contrast, the Defendant testified that he was never told that he was facing life in prison. **(Exhibit A at Page 35).** Additionally, the Defendant testified that had he known he was facing a life sentence, he would have pled his case out. **(Exhibit A at Page 35).** Furthermore, the Defendant testified at the second evidentiary hearing that he would have pled guilty and/or made a counter offer rather than go to trial if he had not been misadvised about the plea offer and/or the state of negotiations. **(Exhibit B at Page 22).** Thus, this Court must make a credibility determination based upon the difference in testimony.

It is well settled that the finder of fact may rely upon testimony it finds 'worthy of belief.' Smith v. State, 697 So.2d 991, 992 (Fla. 4th DCA 1997). This concept applies to Rule 3.850 evidentiary hearings. Moore v. State, 458 So.2d 61 (Fla. 3rd DCA 1984). In fact, a trial court is entitled to deny a defendant's Rule 3.850 motion based on the testimony of the trial counsel if the testimony is deemed credible. Ballard v. State, 200 So.2d 597, 598 (Fla. 3rd DCA 1967). This Court finds that because of the Defense Attorney's change in testimony regarding the State's willingness to accept a lower offer, the Court cannot deem her testimony more credible or worthy of belief. The change in testimony causes the Court to question the accuracy of every other detail she testified to including the Defendant's willingness to plea. This change in testimony is crucial to the Court's determination of credibility because the testimony goes to the crux of the issue before this Court and was available to the Defense Attorney prior to her testifying in the first hearing. Therefore, the Defendant's testimony is more credible regarding

whether or not the Defendant would have accepted any plea offer. Accordingly, the Defendant has demonstrated prejudice regarding the plea negotiations.

In addition to proving that he would have accepted the offer had he not been misadvised, a defendant must demonstrate that the court would have accepted the offer. Alcorn at 422. In Florida, trial courts are not bound by plea offers. Id. at 430 and Florida Rule of Criminal Procedure 3.172(g). Thus, this Court begins its analysis and review of the Defendant's Motion with the understanding that the Trial Court can refuse to accept negotiations.

In the instant case, at the sentencing hearing, the Defense Attorney argued for a Youthful Offender sentence. **(Exhibit C at Pages 14-16)**. The Prosecutor recommended the imposition of fifteen years of incarceration with a ten-year minimum mandatory sentence. **(Exhibit C at Page 11)**. The Trial Court rejected both of those recommendations and sentenced the Defendant to twenty-five years of incarceration with a ten-year minimum mandatory sentence. **(Exhibit C at Page 22)**. The Trial Court specifically noted that it could not ignore the enormity of the charge, the impact of the crime on the victim and his family and the threat to the community. **(Exhibit C at Page 22)**. The Trial Court then stated that for those reasons, it could not agree with the State's recommendation and sentenced the Defendant to a longer period of incarceration. **(Exhibit C at Pages 22-23)**. Based on the Trial Court's statements in outlining its reasoning for rejecting both parties' recommendations, this Court concludes that had the State reduced the charge to a lesser offense, an offense that did not include a firearm, the enormity of the charge would have changed. Additionally, the minimum and maximum sentence under the Criminal Punishment Code would have changed. Finally, with a reduced charge as testified to by the State, Mrs. Anum, there would not have been a minimum mandatory sentence

required by law. Thus, this Court further finds that the Defendant has met his burden that the Trial Court would have accepted a lower State offer. Accordingly, this Court grants Ground 2 of the Defendant's Motion as he has demonstrated a legal deficiency by his attorney in the handling of the negotiations, prejudice to himself because the evidence showed that the Defendant was willing to accept an offer, the Prosecutor would not have withdrawn the offer, the sentence under the offer's terms was less severe than the sentence that was imposed and because the evidence showed that the Trial Court would have accepted the negotiations under a reduced charge.

D. Ground 3 : Failure to Investigate Exculpatory Evidence

As a result of the ruling in Ground 2, this Court will not address Ground 3.

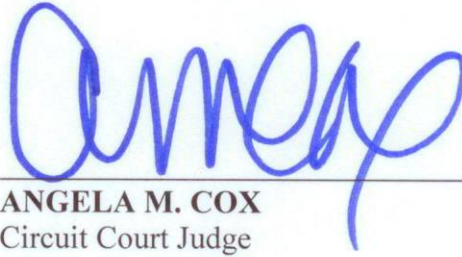
Conclusion

There is a strong presumption that a defendant must overcome to establish that trial counsel's performance was deficient. Johnston v. State, 63 So.3d 730 (Fla. 2011), citing Strickland v. Washington, 466 U.S. 668, 669 (1984). In this case, the Defendant has overcome that strong presumption. Accordingly, it is,

ORDERED AND ADJUDGED that:

1. Ground 2 of the Defendant's Motion for Post-Conviction Relief is hereby **GRANTED**. The State shall have thirty (30) days from the date that this Order is entered to take an appeal by filing a Notice of Appeal with the Clerk of the Court.
2. The Defendant's conviction and sentence is hereby **VACATED AND SET ASIDE**.
3. A hearing will be set by separate Order.

26th **DONE AND ORDERED** in Chambers in Jacksonville, Duval County, Florida on this
day of May, 2016.



ANGELA M. COX
Circuit Court Judge

cc :

Sheila Ann Loizos, Assistant State Attorney at sloizos@coj.net

William Kent, Attorney for Defendant at kent@williamkent.com and susan@williamkent.com

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