IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

NIMA NASH MORADI,

Petitioner,

v. Case No. 5D18-3713

STATE OF FLORIDA,

Respondent.

_____/

Opinion filed October 4, 2019

Petition Alleging Ineffectiveness of Appellate Counsel, A Case of Original Jurisdiction.

Nima Nash Moradi, Avon Park, pro se.

Ashley Moody, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Respondent.

EDWARDS, J.

In his habeas corpus petition, Nima Nash Moradi claims that because his appellate attorneys did not argue for the retroactive application of the amended Stand Your Ground statute, shifting the burden of proof during the pretrial immunity hearing from the defendant to the State, he was prejudiced by ineffective assistance of appellate counsel. We disagree and deny Moradi's petition for the reasons set forth below.

"The standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the *Strickland v. Washington* standard for claims of trial counsel ineffectiveness." *Valle v. Moore*, 837 So. 2d 905, 907 (Fla. 2002) (citation omitted). "A fair assessment of attorney performance requires that every effort 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." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Therefore, "[t]he effectiveness of appellate counsel is judged as of the time of the appeal." *Leon v. Moore*, 734 So. 2d 513, 514 (Fla. 3d DCA 1999).

In order to analyze whether appellate counsel's performance was deficient for failing to raise an argument on appeal, we must consider the state of the law as it existed at the time of the appeal. *Lopez v. State*, 68 So. 3d 332, 333–34 (Fla. 5th DCA 2011). In order to do that, we need to examine the chronology of Moradi's appeal, vis-a-vis the changes in the Stand Your Ground statute, section 776.032, Florida Statutes, and the development of the related retrospective application argument.

Moradi shot and killed someone on February 9, 2012, he was subsequently charged with murder, but pled that he acted in self-defense. Moradi filed a pretrial motion asserting immunity based on the then-current version of the Stand Your Ground statute. § 776.032, Fla. Stat. (2011). The Stand Your Ground statute in effect at the time of Moradi's hearing contained no procedural guidelines on how such an immunity defense would be raised, when it would be adjudicated, or who would bear the burden of proof. *Fuller v. State*, 257 So. 3d 521, 534 (Fla. 5th DCA 2018). The Florida Supreme Court confirmed the procedure to be followed was that such motions would be determined at a

pretrial evidentiary hearing,[1] and that the defendant would bear the burden of proving entitlement to the immunity by a preponderance of the evidence.[2] According to the then-applicable procedures, the trial court conducted a pretrial immunity hearing and denied the motion, finding that Moradi failed to carry his burden of proof. His defense at trial focused on self-defense. On December 18, 2015, Moradi was convicted of second-degree murder.

After his appeal had commenced, the Legislature passed a bill amending the Stand Your Ground statute by placing the burden on the State to disprove by clear and convincing evidence the defendant's prima facia claim of self-defense. *See* § 776.032(4), Fla. Stat. (2017). The governor signed it into law on June 9, 2017. In his direct appeal, Moradi's appellate counsel did not raise the argument that the changed burden and quantum of proof should apply retroactively so as to entitle Moradi to a new immunity hearing. Moradi's conviction was affirmed by this Court on direct appeal on September 26, 2017, and the mandate issued on December 5, 2017.

On May 4, 2018, the Second District released *Martin v. State*, in which it announced its decision that the amended Stand Your Ground statute applies retroactively, entitling Martin to a new immunity hearing where the burden of proof would rest with the State. 43 Fla L. Weekly D1016, D1018 (Fla. 2d DCA May 4, 2018). *Martin* was the first appellate opinion in Florida to discuss the issue. After *Martin*, the other four district courts issued opinions on the same retroactivity issue. On September 28, 2018, this Court decided in *Fuller v. State* that the amended statute with its changed burden

[1] *Dennis v. State*, 51 So. 3d 456, 462 (Fla. 2010).

[2] *Bretherick v. State*, 170 So. 3d 766, 779 (Fla. 2015).

and quantum of proof should be applied retroactively to all pending cases, including those in the appellate pipeline. 257 So. 3d at 537. There is a split among the districts on the retroactive application, as three district courts issued opinions holding that the amended Stand Your Ground statute applied retrospectively, while the other two district courts opined that it was to be applied prospectively only. The law on this point remains unsettled, and the conflicting cases are currently before the Florida Supreme Court awaiting decision. *Love v. State*, 247 So. 3d 609 (Fla. 3d DCA), *review granted*, No. SC18-747, 2018 WL 3147946 (Fla. June 26, 2018).

"[A]ppellate counsel is not required to anticipate changes in the law." *Lopez*, 68 So. 3d at 334. But appellate counsel may be found "ineffective for failing to raise favorable cases decided by other jurisdictions during the pendency of an appeal, which could result in a reversal." *Id.* (quoting *Granberry v. State*, 919 So. 2d 699, 701 (Fla. 5th DCA 2006)). Taking it one step further, the failure of appellate counsel to request permission to file supplemental briefs, while that defendant's appeal was pending, in order to make an argument based on a new, favorable decision from another district court, can constitute ineffective assistance of counsel. *Ortiz v. State*, 905 So. 2d 1016, 1017 (Fla. 2d DCA 2005). The new, favorable decision need not be from the district in which the appeal is pending, nor must the law on the issue be completely settled before appellate counsel is obligated to bring it to the appellate court's attention. *Whatley v. State*, 679 So. 2d 1269, 1270 (Fla. 2d DCA 1996).

However, "[t]he ineffectiveness of appellate counsel cannot be based upon the failure of counsel to assert a theory of law which was not at the time of the appeal fully articulated or established in the law." *Alvord v. State*, 396 So. 2d 184, 191 (Fla. 1981).

Here, the theory that the amended Stand Your Ground statute should apply retroactively had not been mentioned even once by any Florida appellate court during the pendency of Moradi's appeal, much less "fully articulated" or "established in the law." Thus, Moradi's appellate counsel was not ineffective in failing to raise that then-novel argument. Accordingly, we deny the petition.

PETITION DENIED.

EVANDER, C.J. and ORFINGER, J., concur.