IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-33791-CFAES

STATE OF FLORIDA

v.

SCOTT HENRY WHEELER,
Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

This cause is before this Court on Defendant's "Motion for Post-Conviction Relief Pursuant to Florida Rule of Criminal Procedure 3.850," filed through counsel on May 17, 2013. On November 21, 2013, the State filed its "Amended Response to Defendant's Motion for Post Conviction Relief." This Court conducted an evidentiary hearing on the instant Motion on October 9, 2015 and January 7, 2016.[1]

On June 16, 2010, a jury found Defendant guilty of "Driving Under the Influence Manslaughter." (Ex. A.) On July 16, 2010, the court sentenced Defendant to a ten-year term of incarceration, followed by a fifty-five-and-a-half-month term of probation. (Ex. B.) On March 19, 2012, the Fifth District Court of Appeal (Fifth DCA) issued a mandate affirming Defendant's judgment and sentence. (Ex. C.)

In the instant Motion, Defendant raises ten grounds for relief, all of which are premised upon claims of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, Defendant must show that: (1) counsel's performance was outside the wide range of

[1] On December 16, 2013, the Florida Supreme Court assigned the undersigned Fourth Judicial Circuit Judge to hear and determine the instant cause.

reasonable, professional assistance; and (2) counsel's deficient performance prejudiced the defense in that there is a reasonable probability the outcome of the proceeding would have been different absent counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (1984); Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Spencer v. State, 842 So. 2d 52, 61 (Fla. 2003) (citing Strickland, 466 U.S. at 694). Because a defendant must satisfy both prongs of the Strickland standard, when a defendant fails to satisfy one prong, it is not necessary to determine whether he or she has satisfied the other prong. Stewart v. State, 801 So. 2d 59, 65 (Fla. 2001).

When considering claims for ineffective assistance of counsel, courts must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689. "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." Id. Additionally, "[s]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000). Moreover, counsel must be reasonably effective, not perfect. Terrell v. State, 9 So. 3d 1284, 1288 (Fla. 4th DCA 2009).

If an evidentiary hearing is afforded, a defendant must present evidence to prove a claim of ineffective assistance of counsel. Pennington v. State, 34 So. 3d 151, 154 (Fla. 1st DCA 2010). The state then has the burden to present contradictory evidence. Id. at 154-55. The court must assess "the credibility of witnesses, and upon evaluating the testimony, rely upon the

testimony found by it to be worthy of belief and reject such testimony found by it to be untrue." Bussell v. State, 66 So. 3d 1059, 1062 (Fla. 1st DCA 2011); see Thomas v. State, 838 So. 2d 535, 540-41 (Fla. 2003) (affirming lower court's finding counsel's testimony more credible and more persuasive than defendant's allegations and testimony); Smith v. State, 697 So. 2d 991, 992 (Fla. 4th DCA 1997) (reasoning trial court correctly made findings of credibility of key witnesses after evidentiary hearing); Moore v. State, 458 So. 2d 61, 61 (Fla. 3d DCA 1984) (holding trial court, during hearing on Rule 3.850 motion, may reject defendant's testimony in favor of counsel's conflicting testimony).

Ground One

In Ground One, Defendant alleges counsel was ineffective for failing to object to the trial court's use of an erroneous legal standard during Defendant's suppression hearing on Defendant's legal-blood-test results. At Defendant's suppression hearing, the trial judge used the standard provided in State v. Johnson, 695 So. 2d 771 (Fla. 5th DCA 1997), which provides the court is required to "view the evidence in a light most favorable to the prosecution unless the testimony is implausible or incredible as a matter of law." Id. at 774. Defendant avers the trial judge should have used the standard provided in Lewis v. State, 979 So. 2d 1197 (Fla. 4th DCA 2008), which provides the judge must weigh the testimony of all the witnesses and determine the issue based on a totality of the circumstances. Id. at 1200.

Defendant concedes the Fifth DCA had not yet receded from the standard in Johnson at the time of Defendant's suppression hearing. (Def. Mot. 10.) The Fifth DCA did not recede from Johnson until its Opinion affirming the denial of Defendant's Motion to Suppress. See Wheeler v. State, 87 So. 3d 5 (Fla. 5th DCA 2012). However, in its Opinion, the Fifth DCA notes counsel failed to object to the legal standard, and thus, the issue was not preserved for appeal. Id. at 6.

Initially, Defendant contends counsel's failure to object was prejudicial as it prevented the issue from being preserved for appeal. However, "[f]ailure to preserve issues for appeal does not show the necessary prejudice under Strickland." Strobridge v. State, 1 So. 3d 1240, 1242 (Fla. 4th DCA 2009). Instead, prejudice must be assessed "based upon its effect on the results of the trial, not on its effect on appeal." Id. (citing Carratelli v. State, 961 So. 2d 312, 323 (Fla. 2007)). Defendant also asserts that but for counsel's failure to object, the outcome of the suppression hearing would have been different, as well as the outcome of his trial. This allegation is the cornerstone of this Court's analysis and this Court finds Defendant has failed to show he was prejudiced by counsel's alleged deficiency.

This Court granted an evidentiary hearing on this Ground. At the evidentiary hearing, Defendant's trial counsel, Michael Lambert (Mr. Lambert), acknowledged he did not object to the Johnson standard during the suppression hearing. Mr. Lambert, however, explained that while other appellate courts used the totality of the circumstances standard, the Fifth DCA had not overruled or receded from Johnson at the time of the suppression hearing; thus, Johnson was still good law. This Court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Diaz v. State, 810 SO. 2d 1023, 1025 (Fla. 2d DCA 2002). As such, counsel cannot be deemed ineffective for failing to anticipate changes in the law. Id.

Further, assuming *arguendo* that counsel was unreasonable in failing to object, Defendant cannot show that but for this failure, he would have been acquitted. Mr. Lambert testified the State not only had the legal-blood-test result, but also had the medical-blood-test result. Mr. Lambert stated Defendant's legal-blood-test result was .16 and his medical-blood-test result was .18. Mr. Lambert explained that even if he was successful in excluding the legal blood test result,

the State would have been able to admit the more damaging and higher medical-blood-test result. Further, the Honorable Dennis Craig (Judge Craig), the Assistant State Attorney on Defendant's case, testified he did not have any concern about the admissibility of Defendant's medical blood. As such, Defendant cannot show that but for counsel's alleged deficiency, the outcome of the trial would have been different. Ground One is denied.

Ground Two

In Ground Two, Defendant alleges counsel was ineffective for failing to file a legally adequate Motion for Disqualification of the trial judge. In support of this contention, Defendant opines counsel should have disclosed information counsel learned from another sitting judge. Notably, that the trial judge severely disliked counsel and had a bias against counsel's clients.

A judge is obligated to disqualify himself when he reasonably concludes his impartiality might reasonably be questioned due to a personal bias or prejudice concerning a specific lawyer. Fla. R. Jud. Admin. 2.330; see Holt v. Sheehan, 122 So. 3d 970, 972 (Fla. 2d DCA 2013). Moreover, "allegations that the trial judge had formed a fixed opinion of the defendant's guilt, even where it is alleged that the judge discussed his opinion with others, is generally legally insufficient to mandate disqualification." Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992).

Here, counsel filed an Amended Motion to Disqualify on June 14, 2010. (Ex. D.) Contrary to Defendant's assertions, counsel did include the aforementioned claims in the Motion for Disqualification. Specifically, counsel moved for disqualification based on the judge's alleged bias, prejudice, and "ill will towards Attorney Lambert, and derivatively those that he represents . . . ." (Ex. D at 4.) After reviewing the facts within the Motion, the court properly determined it was legally insufficient and denied counsel's request. (Ex. E.) Thereafter, Defendant filed a Petition for Writ of Prohibition with the Fifth DCA seeking review of the

court's denial. (Ex. F.) Upon review of the Fifth DCA's docket, it appears Defendant's Writ of Prohibition was denied. (Ex. G.)

Further, while this Court did not grant an evidentiary hearing on this claim, Mr. Lambert testified as to his relationship with the trial court judge at the time of Defendant's trial. Mr. Lambert stated that while he believed the trial judge's actions at the suppression hearing may have negatively impacted the outcome of the suppression hearing, he believed his relationship with the trial judge did not negatively impact the trial. Accordingly, this claim is without merit and Ground Two is denied. See Bates v. State, 3 So. 3d 1091, 1106 n. 20 (Fla. 2009) (noting "counsel cannot be held ineffective for what counsel actually did.")

Ground Three

In Ground Three, Defendant asserts that approximately nine or ten months prior to trial, the State made a seven-year plea offer. Defendant claims he rejected the plea offer based on counsel's misadvice. Defendant avers that before he rejected the plea offer, counsel failed to advise Defendant: (1) of the potential statutory maximum sentence; (2) of the four-year mandatory minimum sentence; (3) that he would be required to serve eighty-five percent of the imposed sentence; and (4) that he faced a minimum sentence of 10.375 years per his scoresheet guidelines. Defendant contends that but for counsel's misadvice, he would have accepted the seven-year plea offer.

At the evidentiary hearing, Defendant testified that in October of 2009, he got a phone call from Mr. Lambert who referenced a possible seven-year plea offer. Defendant testified he told Mr. Lambert, "wow, that's a little more than I was hoping for." Defendant explained, however, that Mr. Lambert never indicated the offer was a firm offer, but instead represented the seven-year offer was merely a possibility based on discussions with family members. According

to Defendant, Defendant told Mr. Lambert, "I don't think I'd have a problem with 18 months to three years something in that ballpark." Defendant testified Mr. Lambert never told Defendant he needed to make a formal decision to accept or reject the plea offer. Defendant attested that during this phone conversation, Mr. Lambert never advised Defendant of the maximum sentence, the guidelines, nor the minimum mandatory. However, at the beginning of his testimony, Defendant stated Mr. Lambert mentioned "something about guidelines, some kind of score that [Defendant] really don't [sic] understand . . . . He just said a number, and I didn't know what it meant." Defendant asserted he never told Mr. Lambert he would not accept any plea, but merely told him "I'd like less." Defendant indicated Mr. Lambert never conveyed or discussed another plea offer after the October 2009 phone conversation. According to Defendant, if the seven-year plea offer was communicated to him formally and he was aware of all the referenced sentencing parameters, he "would have had to consider it very strongly" and "[m]ore than likely" would have accepted it.

Mr. Lambert testified he has been a criminal law attorney for over forty years and does DUI cases regularly. Mr. Lambert stated he had conversations with Defendant about pleading and attempted to negotiate a plea offer. Mr. Lambert stated he remembered having a conversation with Defendant over the phone about a seven-year plea offer, but does not recall the specific date the offer was made or the specific date he talked to Defendant about the offer. Mr. Lambert further testified he reviewed his personal file on Defendant and there is only one written correspondence of substance regarding a plea offer, which says "the State not going to offer anything other than prison sentence, so going to trial."[2] Mr. Lambert explained the correspondence was dated January 9, 2010.

---

[2] This Court did not review this written correspondence, but the witness read it on the record.

Mr. Lambert specified he told Defendant the seven-year offer was an actual offer and during this discussion, Defendant never stated he did not understand the nature or parameters of the offer. However, Mr. Lambert explained Defendant was not willing to plead as he did not believe he was at fault, but instead believed the victim was responsible. According to Mr. Lambert, the only sentence Defendant would accept would be a county jail sentence, and Mr. Lambert explained to Defendant that it was clear the State was only going to accept a prison sentence.

Mr. Lambert clarified he advised Defendant of the maximum sentence he was facing and specifically conveyed that the maximum sentence was fifteen years. Mr. Lambert stated he probably informed Defendant of the max when Defendant was first arrested. Mr. Lambert further explained that while he does not have an independent recollection of advising Defendant of the four-year minimum mandatory, there is a copy of the minimum mandatory statute in is trial notes, and he recalls speaking to Defendant's wife and Defendant's friend about the minimum mandatory. However, according to Mr. Lambert, the State's seven-year plea offer did not include a four-year minimum mandatory. Mr. Lambert also testified he advised Defendant he would be required to serve eighty-five percent of his sentence. Mr. Lambert stated it is his practice to generate a scoresheet to discuss sentence exposure with his clients and he did that in Defendant's case. According to Mr. Lambert, he told Defendant that since there was a death in his case, Defendant would be exposed to ten plus years.

Judge Craig testified he is currently a Circuit Court Judge for the Seventh Circuit, but was an Assistant State Attorney between 2008 and 2010. Judge Craig explained that while it was typically his practice to make plea offers in writing, plea offers could be conveyed during off-the-record communications with defense counsel. Judge Craig stated he does not have an

independent recollection of making a seven-year plea offer, but it appears from the file that such an offer was made; though, Judge Craig could not be certain when the offer was conveyed. Judge Craig explained it was not generally his practice to extend downward departure plea offers and he is fairly certain it was not his idea to make a seven-year plea offer. Judge Craig testified the offer may have been made because the victim's family was satisfied with seven years. When asked if either party extended any other plea offers, Judge Craig stated he only recalls one occurrence when Defendant met with Port Orange Police and made a "plea pitch." Judge Craig stated he does not remember the exact terms of Defendant's "plea pitch," but knows it was a significantly lower sentence and does not think Defendant's offer even included prison time.

After hearing testimony from Defendant's trial counsel and Judge Craig, observing their demeanor, and comparing it to Defendant's allegations, this Court finds Mr. Lambert and Judge Craig's testimony to be more credible and more persuasive. Upon review of the sentencing transcript, it is apparent the State made a seven-year plea offer prior to trial. (Ex. I at 81.) Mr. Lambert advised Defendant of the maximum sentence he faced and that he would be required to serve eighty-five percent of his sentence. Further, while Mr. Lambert did not have an independent recollection of advising Defendant of the four-year minimum mandatory sentence, he did recall advising Defendant's wife of the minimum mandatory. This Court finds that if Defendant's wife was informed, it is logical that Mr. Lambert informed Defendant as well. Further, through Defendant's own testimony, he admitted Mr. Lambert mentioned sentencing guidelines.

More importantly, it is clear from each witnesses' testimony that at the time the seven-year plea offer was made, Defendant was not willing to accept such an offer. Defendant admitted he told Mr. Lambert he would "like less" and Mr. Lambert and Judge Craig explained Defendant

was not willing to accept a seven-year prison sentence. Accordingly, this Court finds Defendant was fully aware of all potential sentencing parameters when he was presented with the seven-year offer. Defendant, however, knowingly rejected the offer because he believed seven years was too long of a sentence to serve for a crime for which he blamed the victim. As such, Ground Three is denied.

Ground Four

In Ground Four, Defendant claims counsel was ineffective for agreeing to stipulate that a nurse conducted Defendant's legal-blood draw. In support of this contention, Defendant opines that at the time of Defendant's trial, the nurse was unavailable, and thus, the State did not have the benefit of her testimony to establish she was statutorily authorized to conduct a legal-blood draw. Defendant argues stipulating to the nurse's qualifications allowed the State to admit the blood into evidence, which was the most significant evidence of impairment. Defendant contends that but for counsel's failure, the outcome of the trial would have been different.

On June 15, 2010, immediately before trial, Mr. Lambert and the State filed a Stipulation with the trial court. (Ex. J.) According to this Stipulation, the parties agreed a nurse at Halifax Hospital Medical Center drew blood from Defendant for blood-alcohol analysis. (Ex. J.) When presented with this Stipulation, the trial court conducted a colloquy with Defendant. (Ex. H at 166-68.) During this colloquy, Defendant testified he had an opportunity to go over the Stipulation with his attorney and was in agreement with it. (Ex. H at 168.)

Mr. Lambert testified that prior to trial, he spoke with the State about the nurse's, Carol Ricker (Ms. Ricker), location. Mr. Lambert explained the State located Ms. Ricker and told Mr. Lambert she was available to testify. Mr. Lambert, however, stated he did not make an effort to locate Ms. Ricker as he began stipulation negotiations with the State. Specifically, according to

Mr. Lambert, he discussed with the State that if he did not contest the qualifications of the legal-blood draw, the State would agree that the police officers would not testify about how Defendant was uncooperative during the blood draw. According to Mr. Lambert, the nurse's notes indicated Defendant struggled with the officers while they were trying to draw blood and Mr. Lambert felt such testimony would negatively impact the jury's perception of Defendant. Mr. Lambert stated he does not have an independent recollection about discussing this Stipulation with Defendant, but explained he is sure he would have had a discussion regarding the reasons for not calling the nurse as a witness.

Mr. Lambert stated he believed the State had contact with Ms. Ricker and she was available. Mr. Lambert explained he never believed there was an issue with the legality of the blood draw, and he has a personal recollection of seeing Ms. Ricker's signature depicting she was a registered nurse on the blood draw kit and other hospital records. Mr. Lambert also stated he was concerned that if the State was not able to present the legal-blood-test results, it would attempt to introduce the medical blood, which contained a higher alcohol content. However, Mr. Lambert explained he still attempted to exclude the blood test results by claiming there was a lack of probable cause, though, he never believed the blood draw was illegal. Mr. Lambert stated it was his trial strategy to focus on causation of the accident rather than focus on the blood-alcohol results.

Judge Craig testified he does not recall whose idea it was to enter into the Stipulation, but stated it was generally not his practice to initiate stipulations with defense attorneys. Judge Craig stated he has no recollection about having difficulty locating a witness. According to Judge Craig, he would have remembered specific issues with prosecuting this case and locating a

witness was not an issue. Judge Craig further explained that if Defendant's legal blood was excluded, he did not have any concern about being able to admit Defendant's medical blood.

This Court finds it was Mr. Lambert's trial strategy to enter into a stipulation to not call the nurse. At the evidentiary hearing, Defendant even testified the nurse who drew his blood was located in another state. Mr. Lambert, however, believed it was more prudent to stipulate to the nurse's qualifications in exchange for the State's agreement not to elicit testimony regarding Defendant's physical resistance to the blood draw. This Court finds such strategy was reasonable. Defendant's legal-blood test was .16 and his medical-blood test was .18. Since one of Defendant's blood test results would have been admitted, Mr. Lambert made the executive decision to refrain from contesting the legal blood any further as the higher medical blood would have undoubtedly been more damaging. Further, considering Defendant's high blood-alcohol content, Mr. Lambert focused on causation at trial. "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and Counsel's decision was reasonable under the norms of professional conduct." Occhicone, 768 So. 2d at 1048. Accordingly, this Ground is denied.

Ground Five

In Ground Five, Defendant claims counsel was ineffective for failing to object to the court instructing the jury, before they entered into deliberations, to "finish the case." Defendant claims this instruction made the jurors believe they were required to reach a verdict before they could go home that night, and was thus, coercive in nature.

Here, Defendant is referring to page 727 of the trial transcript. (Ex. H at 727.) After review of the trial transcript, there is no evidence the court coerced the jury into reaching a verdict. In context, it is clear the trial court was merely asking the jurors to contact their families

and let them know they would be home late, but that they needed to stay and finish. (Ex. H at 727.) It is the trial court's prerogative to have the jury begin deliberations while the case is fresh on their mind. This Court finds the trial court's statements, when read in context, were not improper, thus, counsel is not ineffective for failing to object. See Mungin v. State, 932 So. 2d 986, 997 (Fla. 2006) (holding defense counsel not ineffective for failing to object because none of the comments were improper).

Further, considering the overwhelming amount of evidence presented at trial, Defendant cannot show he was prejudiced by any improper comment. Officer Slease testified the speed limit on the roadway where the incident occurred was forty miles an hour. (Ex. H at 199.) Officer Slease explained there was no evidence of skid marks, but he knew the location where Defendant's vehicle struck the victim because of where the blood trail began. (Ex. H at 201.) Kathleen Mazek (Mazek), a toxicologist with Florida Department of Law Enforcement (FDLE), testified she tested Defendant's blood-alcohol level after the accident and the results showed 0.164 and 0.165 grams of Ethyl alcohol per 100 milliliters of blood. (Ex. H at 283.)

Dr. Predrag Bulic (Dr. Bulic), the medical examiner, testified the vehicle struck the victim with such force his head was decapitated and his lower limbs were amputated. (Ex. H at 304.) Dr. Bulic stated that according to research studies on dismembered people in traffic accidents, dismemberments are typically seen in speeds no less than 56 miles per hour. (Ex. H at 307.) Dr. Bulic also stated the victim sustained complete transection or disruption of his aorta. (Ex. H at 310.) Dr. Bulic opined transection of the aorta is a common injury sustained during car accidents. (Ex. H at 310.) However, such injury rarely occurs under 60 miles per hour and uniformly happens over 63 miles per hour. (Ex. H at 310.)

Thomas Aiken (Aiken), a traffic homicide investigator and accident reconstructionist with the Port Orange Police Department, testified he conducted various tests to determine the speed of Defendant's vehicle at the time it hit the victim. (Ex. H at 398.) Aiken first looked at the severe amputation of the victim's legs, and stated such trauma occurs if the vehicle is moving 50 miles per hour or above. (Ex. H at 399.) Next, Aiken testified the point of impact of the victim's body with Defendant's windshield was indicative of a speed around 60 miles per hour. (Ex. H at 400.) Based on this evidence of impairment and disregard, the jury found Defendant guilty. Accordingly, Defendant cannot show that but for the trial court's comments, he would have been acquitted. This Ground is denied.

Ground Six

In Ground Six, Defendant claims trial counsel was ineffective for failing to object and affirmatively request a re-read of witness James Clark's (Clark) testimony in response to the jury's request of a transcript of Clark's testimony. Defendant states that forty-five minutes into deliberations, the jury requested the transcript of the defense expert's testimony. The court responded by telling the jury a transcript was not available and that they instead should rely on their best recollection of the testimony. Defendant alleges counsel should have requested a read-back of the testimony as it was critical to the defense's case.

During deliberations, the jury submitted a question to the trial court asking, "Can we have Mr. Clark's transcript?" (Ex. H at 780.) In response to this question, the trial court advised the jury that generating a transcript at that time could not be done and that they must rely on their recollection of Mr. Clark's testimony. (Ex. H at 781.) At the evidentiary hearing, Mr. Lambert explained he knew the law regarding the read-back of testimony, but stated it was his trial strategy not to object to the court's failure to instruct the jury of such an option. According to

Mr. Lambert, he obtained Mr. Clark as an expert accident reconstructionist and found his testimony to be generally beneficial regarding the lighting at the time of the accident. Mr. Lambert, however, testified that one aspect of Mr. Clark's testimony negatively impacted Defendant. Specifically, Mr. Clark testified Defendant contributed to the accident, which muddled Mr. Lambert's causation defense.

Upon review of the trial transcript, it is apparent Mr. Clark testified Defendant's speed was a contributing factor in the accident. (Ex. H at 718-19.) Based on this testimony, it is a reasonable trial strategy to not request a read-back of Mr. Clark's testimony or object to the court's statements. "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and Counsel's decision was reasonable under the norms of professional conduct." Occhicone, 768 So. 2d at 1048. Accordingly, this Ground is denied.

Ground Seven

In Ground Seven, Defendant alleges counsel was ineffective for failing to object to Sergeant Besuaden's testimony regarding his "ambient-lighting observations" made on the night of the accident. Specifically, Defendant maintains Sergeant Besuaden testified that on the night of the accident, he could clearly see the crash scene and the officers working from several hundred feet away. Defendant claims the testimony amounted to "inadmissible experiment testimony" from a law enforcement officer used to support the State's contention that Defendant could see the victim prior to impact. Defendant asserts it was inadmissible because his testimony was based on dissimilar circumstances.

Here, Defendant is referring to the testimony found of page 572 through 576 of the trial transcript. (Ex. H at 572-76.) An investigating officer's testimony, based on his personal

observations of lighting conditions at a crime scene, do not amount to a "scientific test." State v. Lewis, 543 So. 2d 760, 766 (Fla. 2d DCA 1989). In the instant case, Sergeant Besuaden was simply testifying about his personal observations regarding the street lighting on the night of the accident. Counsel cannot be deemed ineffective for failing to challenge the admission of evidence when such challenge would have been fruitless. See Reed v. State, 875 So. 2d 415, 432 (Fla. 2004). Accordingly, Ground Seven is denied.

Ground Eight

In Ground Eight, Defendant claims counsel was ineffective for failing to challenge the reliability and accuracy of the State's legal-blood-test results. In support of this contention, Defendant avers counsel should have challenged admissibility in two ways. First, Defendant asserts counsel should have challenged the insufficiency of FDLE's rules governing blood-alcohol tests. Specifically, Defendant maintains Rules 11D-8.011 through 11D-8.013 as written fail to: (1) identify the volume of blood which collection vials will contain; (2) specify the amount of anticoagulant or preservative necessary to maintain the vials of blood; and (3) specify the temperature range required to maintain the samples. Next, Defendant maintains counsel should have called an independent toxicologist as a witness in order to present evidence about what happens if blood samples are improperly collected.

At the evidentiary hearing, Defendant called chemist and laboratory quality auditor Janine Arvizu (Arvizu) as a witness. Arvizu testified extensively about the FDLE rules governing legal-alcohol-blood tests and her opinions on the rules' insufficiencies. However, Arvizu acknowledged she did not physically inspect the legal blood in the instant case nor did she physically visit the labs where the instant blood was tested. Arvizu further testified she has

never worked in a lab where the primary purpose is forensic testing nor has she ever personally conducted an alcohol-blood test.

Mazek, the FDLE toxicologist who conducted Defendant's legal-blood analysis, testified for the State. Mazek stated she has worked for FDLE for eleven-and-a-half years and has testified as an expert on blood-alcohol analysis in forty-three jury trials. Mazek explained the tubes used in Defendant's case are known for providing scientifically accurate and reliable analysis results. According to Mazek, she knows there was an adequate amount of Defendant's blood in the tubes she received for testing because she was able to aliquot the amount needed for the analysis and her notes do not indicate the tubes were less than seven milliliters. Mazek stated she knows Defendant's blood sample contained adequate preservative or anticoagulant because she was able to test the sample. If the sample was not adequately preserved, the blood would have been too thick to conduct the analysis. Mazek further testified that the sample was refrigerated when she received it. Nevertheless, according the Mazek, as long as there is a preservative and anticoagulant in the blood tube, the sample is stable for several weeks without refrigeration.

During the evidentiary hearing, Mr. Lambert testified he made a public records request to FDLE requesting production of evidence pertaining to Defendant's toxicology testing. Notably, Mr. Lambert requested, among other things, the chain of custody document, all quality control material, and the refrigeration log. Mr. Lambert testified he provided this evidence to Mr. Lawrence Maston (Maston), an independent toxicologist he obtained for Defendant's case. Mr. Lambert explained he consulted Maston about Defendant's blood test results and based on Maston's opinion, Mr. Lambert "didn't think there was anything really there to devote a lot of time to, that my concentration needed to be more on how the accident occurred."

Further, Mr. Lambert explained that in his practice as a criminal defense attorney, he discusses DUI issues with other practitioners in the area. Mr. Lambert stated he was aware of other defense attorneys attempting to attack the admissibility of legal-blood results based on issues with FDLE regulations. According to Mr. Lambert, at the time of Defendant's pending case, there were no successful attacks on FDLE regulations in Volusia County. Mr. Lambert further explained that looking back on Defendant's case now and considering what he knows about collection issues with FDLE regulations, he does not believe his trial strategy and approach would have been different.

As discussed *supra*, Mr. Lambert testified he made a specific decision not to go after the legal-blood results based upon Defendant's higher medical-blood results. Because of the medical blood, Mr. Lambert explained his concentration was more on the accident and whether or not Defendant had the ability to stop in time. Judge Craig further explained that if Defendant's legal blood was excluded, he did not have any concern about being able to admit Defendant's medical blood.

Based on this testimony, this Court finds it was Defendant's trial strategy not to contest the legal blood results or call an independent toxicologist as a witness at trial. Mr. Lambert consulted an independent toxicologist to review Defendant's blood sample and based on the toxicologist's findings, Mr. Lambert made a conscious decision to pursue another defense. This Court also finds Mazek's testimony more credible than Arvizu, and thus, any attack on the FDLE procedures would be unfounded. Based on Mazek's statements, Defendant's blood sample was properly preserved in that it could produce an adequate and reliable result. Accordingly, Defendant cannot show that but for counsel's alleged deficiency, the outcome of his case would have been different. Ground Eight is denied.

Ground Nine

In Ground Nine, Defendant claims counsel was ineffective for failing to call paramedic David Gill (Gill) as a witness during the suppression hearing and at trial. In support of this contention, Defendant avers Gill testified during his deposition that he did not smell alcohol on Defendant when he was rendering medical care. Defendant claims counsel should have presented this testimony to refute evidence that Defendant was impaired.

At the evidentiary hearing, Mr. Lambert testified he deposed Gill prior to trial. According to Mr. Lambert, he did not believe any of Gill's statements were exculpatory or valuable to Defendant's defense. Mr. Lambert stated Gill's testimony was merely that he did not recall whether he smelled alcohol, so his testimony would not benefit anyone. Mr. Lambert further explained Defendant decided he was going to testify at trial and admit he consumed three beers, so any testimony about not smelling alcohol would be irrelevant.

This Court finds it was Mr. Lambert's trial strategy not to call Gill. Upon review of Gill's deposition, Gill testified he did not include any statements in his written report about smelling alcohol. (Ex. K at 7.) However, according to Gill, he does not always report such occurrences as it is not his job to make such determinations or assessments. (Ex. K at 7.) As such, Gill never affirmatively stated he did or did not smell alcohol. Gill simply omitted said observation from his written report. Accordingly, Defendant cannot show that but for counsel's alleged error, the outcome would have been different. Ground Nine is denied.

Ground Ten

In Ground Ten, Defendant alleges counsel's errors, viewed cumulatively, justify post-conviction relief. "Where individual claims of error alleged are either procedurally barred or

without merit, a claim of cumulative error must fail." Griffin v. State, 866 So. 2d 1, 22 (Fla. 2003). Since Defendant's individual claims are without merit, this Ground is denied.

ORDERED AND ADJUDGED that Defendant's "Motion for Post-Conviction Relief Pursuant to Florida Rule of Criminal Procedure 3.850" is **DENIED**. Defendant shall have thirty (30) days from the date that this Order is filed in which to take an appeal, by filing a Notice of Appeal with the Clerk of the Court.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 16 day of February, 2016.

LINDA MCCALLUM
Circuit Court Judge

Copies to:

Thomas D. Sommerville, Esq.
Attorney for Defendant
529 North Magnolia Ave.
Orlando, FL 32801

Rosemary Calhoun, Esq.
Assistant State Attorney
251 N. Ridgewood Ave.
Daytona Beach, FL 32114

Scott Wheeler
D.O.C.#: V36025
Tomoka Work Camp
3950 Tiger Bay Rd.
Daytona Beach, FL 32124-1098

CERTIFICATE OF SERVICE

I do certify that a copy of the foregoing has been furnished to Defendant by U.S. mail this _____ day of _____, 2016.

_____,
Deputy Clerk

Case No.: 2009-33791-CFAES
Exhibits: A-K
/jd

Exhibits

A. Verdict Form	June 16, 2010
B. Judgment and Sentence	July 16, 2010
C. Fifth District Court of Appeal Mandate	March 19, 2012
D. Amended Notice of Disqualification	June 14, 2010
E. Order Denying Motion for Disqualification	June 14, 2010
F. Petition for Writ of Prohibition	July 6, 2010
G. Fifth District Court of Appeal Case Docket	
H. Trial Transcript	June 15-16, 2010
I. Sentencing Transcript	July 16, 2010
J. Stipulation	June 15, 2010
K. Deposition of David Gill	January 22, 2010