IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2012

KIMBERLY PAGE,

Appellant,

v. Case No. 5D11-3065

STATE OF FLORIDA,

Appellee.

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Opinion filed June 15, 2012

3.850 Appeal from the Circuit Court for Brevard County,
Charles J. Roberts, Judge.

Kepler B. Funk, Keith F. Szachacz and Alan S. Diamond, of Funk, Szachacz & Diamond, LLC., Melbourne, for Appellant.

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

GRIFFIN, J.

Appellant, Kimberly Page ["Appellant"], seeks review of the trial court's summary denial of Appellant's rule 3.850 motion for postconviction relief. We agree that summary affirmance of claims three and four was proper; however, we conclude that Appellant is entitled to an evidentiary hearing on claims one and two. To be sure, as the trial court said, Appellant was aware that if her attorneys were unable to establish a legal ground for downward departure, her prison sentence would be thirty-seven years instead of the

four-to-ten-year plea offer from the State. She was, however, entitled to be competently advised about the prospects of proving the downward departure ground, and she was entitled to competent representation in the sentencing hearing. There is enough in the record to warrant an evidentiary hearing to determine the facts.

AFFIRMED in part; REVERSED in part; and REMANDED.

PALMER, J., concurs.
MONACO, J., dissents, with opinion.

I respectfully dissent.

My reading of the case is that the trial judge, who was not the judge who considered the appellant's 3.850 motion, went to extraordinary lengths to warn the appellant that there would be no guarantees that she would receive a downward departure sentence, and that she should not think otherwise. She told her, moreover, that she should carefully consider the plea offer from the State, as an alternative to pleading open to the court:

> So, I couldn't give you any more than ten years, my hands would be tied if I accepted the plea, but I couldn't give you any less than four years. But that limits it. That is the parameter that I am under.

A short time later the appellant's counsel said to the court, "I submit that we are well able to prove that the facts -- the facts supporting the downward departure." The trial judge then cautioned that it is "very, very important" for her to understand that if her counsel did not prevail on the issue of a downward departure, the court would be compelled to give her at least the minimum calculated sentence. "I mean, that is in essence she would be getting out when she is like 70 years old if I got my math . . . correct." After gaining a positive response to the question of the appellant, "Do you understand that," the judge spoke prophetically:

> Okay, I don't want there to be any surprises, like I never thought she could do that. I am going to have to do it unless there is a legal reason for departure. And even then, if I find it and the State appeals me, the appellate court can reverse me. . . ."

The evidence did not develop as the appellant and her counsel thought it might and the court found no reason to downwardly depart.

While I fully understand that the minimum sentence for the appellant's crime is exceedingly harsh, it seems to me that she was fully apprised of the risks, elected to roll the dice, and lost. True enough, the evidence from the witnesses called to establish the downward departure did not develop as the appellant and her counsel expected; but that risk always exists when dealing with live testimony. I do not think the record supports the conclusion that counsel was ineffective. I would, therefore, affirm.