IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC
CASE NO: 502012AP900027XXXXMB
L.T. NO: 502011MM008212XXXXSB

DOMENICK WATSON,
Appellant,
v.

STATE OF FLORIDA,
Appellee.
_____/

Opinion filed: APR - 3 2014

Appeal from the County Court in and for Palm Beach County,
Judge Paul Evans.

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PER CURIAM

Appellant Domenick Watson appeals his conviction and sentence. We affirm all claims, but we write to address Appellant's ineffective assistance of counsel claim and Appellant's vindictive sentencing claim.

With respect to Appellant's ineffective assistance of counsel claim, Appellant argues that but for his trial counsel's ineffective representation he would have accepted a plea offer from the trial court prior to trial. Although the State concedes the ineffectiveness of Appellant's counsel, "it is the practice of Florida appellate courts not to accept erroneous concessions by the state." *Perry v. State*, 808 So. 2d 268 (Fla. 1st DCA 2002). We find that the ineffectiveness of Appellant's trial counsel is not apparent on

the face of the record as there is incomplete information in the record both as to the content of a certain piece of evidence, a video surveillance tape, as well as the specific representations the State made concerning the content of the video surveillance tape. The specific representations the State made about the tape are necessary to properly consider the reasonable reliance of Appellant's counsel on those representations and, by extension, to consider the effectiveness of Appellant's counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Strickland,* 466 U.S. at 691 (finding that "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments"); *see also Lightner v. State*, 59 So. 3d 282, 286-87 (Fla. 3d DCA 2011) (finding that a court should consider several factors when determining whether counsel's underlying investigation was reasonable under *Strickland*, including the "reasons for limiting or abandoning a particular investigation"). Furthermore, the specific content of the tape is necessary to consider the prejudice, if any, that trial counsel's alleged deficient performance would have caused under *Strickland. See Alcorn v. State*, 121 So. 3d 419, 433 (Fla. 2013) ("Prejudice therefore is determined based upon a consideration of the circumstances as viewed *at the time of the offer* and what would have been done *with proper and adequate advice.*") (emphasis in original).

Because we conclude that the record is insufficient to review Appellant's ineffective assistance of counsel claim, this case is not one of the rare cases in which ineffectiveness may be considered on direct appeal. *See Smith v. State,* 998 So. 2d 516, 522-23 (Fla. 2008). We therefore deny Appellant's ineffective assistance claim without prejudice for Appellant to raise this claim in an appropriate postconviction motion. *Id.*; *see Robards v. State*, 112 So. 3d 1256, 1266-67 (Fla. 2013). Also, we believe the appropriate remedy for any such established claim would not be a new trial, but a *de novo* sentencing hearing. *See Lafler v. Cooper*, --- U.S. ---, 132 S. Ct. 1376, 1389 (2012); *Alcorn*, 121 So. 3d at 428-30.

With respect to Appellant's vindictive sentencing claim, we find that the trial court did not engage in vindictive sentencing under *Wilson v. State*, 845 So. 2d 142, 156 (Fla. 2003). Under *Wilson*, four factors determine whether a trial court engaged in vindictive sentencing: (1) whether the trial judge initiated the plea discussions with the defendant in violation of *State v. Warner,* 762 So. 2d 507 (Fla. 2000); (2) whether the trial judge, through his or her comments on the record, appears to have departed from his or her role as an impartial arbiter by either urging the defendant to accept a plea, or by implying or stating that the sentence imposed would hinge on future procedural choices, such as exercising the right to trial; (3) the disparity between the plea offer and the ultimate sentence imposed; and (4) the lack of any facts on the record that explain the reason for the increased sentence other than that the defendant exercised his or her right to a trial or hearing. *Id.* Although the first and third *Wilson* factors are likely in favor of finding vindictive sentencing in this case, the second and fourth factors are not. More specifically, we do not find that the trial judge departed from his role as an impartial arbiter and we do not find that there was a lack of facts in the record to support an increased sentence. As for the trial judge's role as an impartial arbiter, the trial judge neither urged Appellant to accept the plea offer nor implied or stated that Appellant would receive a harsher sentence if he did not accept the plea offer. As for facts in the record to support an increased sentence, the trial court learned from the State's recitation of Appellant's criminal history at sentencing that Appellant had been convicted of a crime at least every four years from 1979 until sentencing in 2012, that he repeatedly committed the same types of crimes, and that Appellant had previously been convicted of nine (9) counts of petit larceny or theft. Weighing the four *Wilson* factors, we find that the trial court did not engage in vindictive sentencing and affirm the trial court's sentence.

We affirm Appellant's remaining claims without comment.

RAPP, KASTRENAKES, and MARTZ, JJ. concur.