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No. 1-10-1076

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court |
| Plaintiff-Appellee, |) | of Cook County. |
| |) | |
| v. |) | No. 05 CR 23522 |
| |) | |
| JOSE GONZALES, |) | Honorable |
| |) | John Flaherty, |
| Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE QUINN delivered the judgment of the court.

Justices Neville and Murphy concurred in the judgment.

ORDER

Held: Where defendant has not presented a substantial showing of a constitutional violation based on his claim of ineffective assistance of trial counsel or deprivation of his right to counsel of his choice, the second-stage dismissal of defendant's post-conviction petition is affirmed.

Defendant entered a guilty plea to attempted first degree murder in exchange for a nine-

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year prison sentence. Defendant, through his counsel, filed a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)), contending that his trial attorney was ineffective and his guilty plea was involuntary because it was based on his trial attorney's incorrect advice concerning the actual time he would be required to serve in prison. Defendant also argued that the trial court erred in denying his request for substitute counsel during the guilty plea and sentencing proceedings. The circuit court dismissed defendant's petition at the second-stage of proceedings and defendant now appeals. For the following reasons, we affirm.

I. BACKGROUND

Defendant was charged with attempted first degree murder and three counts of aggravated battery in connection with a shooting that occurred on August 24, 2005. Defendant's jury trial was set to begin on March 10, 2008. On that date, defense counsel requested a Supreme Court Rule 402 conference.

Following the conference, defense counsel indicated that he had explained the guilty plea offer of nine years in prison to defendant and defendant indicated that he did not want to accept the offer. Defendant stated, "Excuse me. Can I say something? I wanted to discharge my counsel. Can we like continue this? Can you give me like 30 days[?]" The trial court replied that defendant's jury trial had been set for a year. Defendant then stated, "But like, I haven't been communicating right with my lawyer." The court told defendant that he should have brought that up with the court prior to the day they were picking a jury.

The trial court then informed defendant that if he had a jury trial, defendant could face 20 or more years in prison. The trial court informed defendant that he would be required to serve no

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less than 85 percent of the sentence imposed. The following colloquy then occurred:

“[Defendant]: Okay. And if I - - if I take the nine years, then it’s more like four years or five years that I do?”

[The Court]: No. It will be 85 percent of nine years. You’ve got some time in. I don’t know how much time you’ve got in.

[Defense counsel]: A year.

[The Court]: I know, your lawyer said, you had at least about a year in. So you’ll do 85 percent of nine years. And off the top of my head that is eight years, approximately.

[State]: Almost. Not quite eight.

[The Court]: Not quite eight.

[State]: If somebody has a chart - -

[Defendant]: So seven-and-a-half?

[The Court]: It’s probably close to - - Is that a chart right there, Ted (indicating)?

[State]: Oh hello, it’s - - for nine years, it’s seven years, seven months and 25 days.

[The Court]: So seven years and nine months.

[State]: That’s the total.

[Defendant]: They usually give - - I get good time with that, right?

[Defense Counsel]: He does get good time.

[The Court]: No. That’s it. That’s the amount of time he actually does.

[State]: That’s 85 percent.

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[The Court]: He'll get his - - He'll get his year credit but - - So - -

[Defendant]: No - - I can't get - - There's no way that you can give me the two-years credit.

[The Court]: You'll get credit for the time you spent in jail, but you're not getting day-for-day good time as you were because of - because of the crime. So - -

[Defendant]: Is there any way that I can talk - - Is there any way I can talk to my family and -

[The Court]: Talk to your family. But if you're willing to roll the dice, because you'll be 48-years old by the time you get out - -

[Defendant]: I don't want to roll the dice.”

The case was then passed so defendant could speak with his family. When defendant's case was recalled, defendant indicated that he wanted to plead guilty. The trial court informed defendant that he was charged with attempted first degree murder. Defendant indicated that he understood the charge and entered a guilty plea. The trial court admonished defendant with respect to his right to a jury trial and defendant indicated that he understood his right to a jury trial and signed a jury waiver. The court also admonished defendant that his guilty plea would result in waiver of his privilege against self-incrimination and his rights to a trial, to call witnesses, and to confront the witnesses against him. The trial court then advised defendant regarding the minimum and maximum penalties:

“[T]his is Class X felony. I could sentence you anywhere from six to 30 years in the Illinois Department of Corrections. Under certain circumstances, I

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can extend it out to 60 years in the Illinois Department of Corrections. You are subject to three years mandatory-supervised release upon your release from the penitentiary, and I could fine you up to \$25,000.”

Defendant indicated that he understood, then asked, “I’m mandatory like three years?” The trial court explained that mandatory-supervised release used to be known as parole and defendant indicated that he understood.

The trial court then asked defendant, “Has anybody threatened or promised you anything to get you to plead guilty?” Defendant replied, “No.” The trial court asked defendant, “Are you pleading guilty of your own free will?” and defendant responded, “Yes, sir.”

In the factual basis for the charge, the State asserted that on August 24, 2005, at about 9:49 p.m., Matthew Oliver and Corey Fondren were walking near 12855 Division Street, in Blue Island, Illinois. Two vehicles pulled over and a large group of mostly Hispanic men confronted Oliver and Fondren. An argument ensued regarding Oliver and Fondren’s possible gang membership and a phone call was made to defendant. Shortly thereafter, defendant walked around the corner of a building with a firearm and began shooting. Oliver and Fondren started running, but a bullet struck Oliver in the stomach. Defendant fled from the scene in one of the vehicles that had originally pulled over and defendant gave the firearm to a fellow gang member. The police were able to locate the firearm and the shell casings recovered from the scene were found to be fired from the recovered firearm. The State asserted that witnesses, including Oliver and Fondren, would be able to identify defendant in open court as the shooter.

The trial court found that there was a factual basis and accepted defendant’s guilty plea.

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The trial court sentenced defendant to nine years in prison and admonished defendant regarding his rights to appeal. Defendant did not move to vacate his guilty plea and did not file a direct appeal.

On June 16, 2009, defendant, through his counsel, filed his post-conviction petition. Defendant asserted that he received ineffective assistance of trial counsel where his attorney erroneously advised him that he would only be required to serve 50 percent of his nine-year prison sentence, when in fact he would be required to serve 85 percent of his sentence. Defendant also asserted that the trial court improperly denied him his choice of counsel where the court refused his request for a continuance to obtain a new attorney.

In support of his ineffective assistance claim, defendant attached affidavits from family members Ivette Stewart and Jacquelyn Coffey. Both Stewart and Coffey attested that on the date of defendant's trial they were present when the trial court informed defendant that he would serve about seven years and seven months in prison, minus time spent in custody, if he pled guilty. Both Stewart and Coffey stated that they were present when defendant spoke with his attorney prior to pleading guilty. Stewart and Coffey stated that defense counsel told defendant that if he pled guilty, defendant would only spend three and a half years in prison. Stewart's affidavit stated that defense counsel told defendant not to listen to the judge's calculation of time served because defendant would get good time. Coffey's affidavit stated that defense counsel told defendant not to listen to the judge's calculation of time to be served because the reduced time would be calculated by the Department of Corrections.

On October 16, 2009, the State filed a motion to dismiss defendant's post-conviction

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petition. The State asserted that truth-in-sentencing is a collateral consequence of a plea, and defendant's reliance on his attorney's alleged statement was unreasonable. The State also argued that defendant's argument that he did not have the counsel of his choice should be deemed waived by his voluntary plea of guilty.

Following arguments, on March 19, 2010, the circuit court granted the State's motion to dismiss defendant's post-conviction petition. The court found that the record clearly indicated that defendant was adequately informed about the duration of his sentence and that defendant's request for a new attorney after the Rule 402 conference was a dilatory tactic. Defendant now appeals.

II. ANALYSIS

A post-conviction proceeding not involving the death penalty contains three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, the circuit court must, within 90 days of the petition's filing, independently review the petition, taking the allegations as true, and determine whether "the petition is frivolous or is patently without merit." *Hodges*, 234 Ill. 2d at 10; 725 ILCS 5/122-2.1(a)(2) (West 2004). If the court determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2004). If the petition is not dismissed, then the petition advances to the second stage, where counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2004)) and where the State is allowed to file a motion to dismiss or an answer to the petition (725 ILCS 5/122-5 (West 2004)).

At the second stage, the circuit court must determine whether the petition and any

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accompanying documentation make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). If no such showing is made, the petition is dismissed. However, if a substantial showing of a constitutional violation is set forth, the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. *Edwards*, 197 Ill. 2d at 246.

Here, the circuit court granted the State's motion to dismiss defendant's post-conviction petition at the second stage, which we review *de novo*. *People v. Alberts*, 383 Ill. App. 3d 374, 376 (2008).

A. Ineffective Assistance of Counsel Claim

Defendant first contends that the circuit court erred in dismissing his post-conviction petition where he made a substantial showing that his trial counsel was ineffective during his guilty plea and sentencing.

Claims of ineffective assistance of appellate counsel are evaluated under the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. More specifically, the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466

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U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

Defendant claims that the circuit court erred in dismissing his petition where trial counsel was ineffective for informing him that he would only serve 50 percent of his sentence when in fact defendant was required to serve 85 percent of his sentence. Defendant asserts that as a result of his trial attorney's erroneous advice, his guilty plea was involuntary.

It is well settled that a defendant's acknowledgment in open court, at a plea hearing, that there were no agreements or promises regarding his plea serves to contradict a post-conviction assertion that he pled guilty in reliance upon an alleged, undisclosed promise by defense counsel regarding sentencing. *People v. Torres*, 228 Ill. 2d 382, 396-97 (2008). In *Torres*, the defendant claimed that he did not understand the consequences of entering a blind plea of guilty and his counsel had promised him that he would receive the minimum sentence of 20 years' imprisonment if he pled guilty. Our supreme court concluded in *Torres* that the defendant's post-conviction allegations were patently without merit and frivolous because the claims were belied by the record. *Torres*, 228 Ill. 2d at 396-97. Our supreme court explained that the record showed that the defendant had responded in the negative in open court when asked whether any promises had been made to cause him to enter his plea of guilty; the trial court had repeatedly admonished the defendant that the maximum sentence that it might impose could be as high as 60 years; and the defendant indicated that he understood the trial court's admonishments. Therefore, the defendant's own words refuted his post-conviction allegations. *Torres*, 228 Ill. 2d

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at 397.

Similarly, defendant in this case was asked by the trial court at the plea hearing whether any promises had been made to get him to plead guilty, and defendant replied, “No.” The record also shows that the trial court repeatedly admonished defendant regarding the charge and that defendant would be required to serve 85 percent of his nine-year prison sentence. The State calculated the 85 percent and informed defendant that it would amount to approximately “seven years, seven months and 25 days” in prison. Defendant never indicated that he did not understand the sentence that the court would impose or the amount of time in prison that he would be required to serve. Therefore, defendant’s post-conviction allegation is contradicted by the record in this case.

Defendant, nonetheless, relies on *People v. Hall*, 217 Ill. 2d 324 (2005) to support his argument that he pled guilty based on his attorney’s statement that he would serve only half of his sentence. In *Hall*, the defendant alleged, in his post-conviction petition, that his guilty plea was involuntary where his attorney provided ineffective assistance in advising the defendant that he did not have a valid defense to aggravated kidnapping based on the defendant’s lack of knowledge that the child was inside the car. *Hall*, 217 Ill. 2d at 334. Our supreme court determined that the defendant made a substantial showing, during second stage post-conviction proceedings, that he was prejudiced by his attorney’s alleged erroneous advice where the defendant was not given any admonition that specifically addressed the erroneous advice of his attorney. Our supreme court explained that “[t]he critical issue” was “whether the trial court’s admonitions were sufficiently related to counsel’s erroneous advice to overcome the prejudice

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created by that advice.” *Hall*, 217 Ill. 2d at 339.

In *Hall*, our supreme court distinguished the facts of the defendant’s case from its previous decisions in *People v. Ramirez*, 162 Ill. 2d 235 (1994) and *People v. Jones*, 144 Ill. 2d 242 (1991). In *Ramirez*, the defendant alleged that his attorney stated that he had worked out an agreement with the judge and the defendant would be sentenced to two years’ probation. *Ramirez*, 162 Ill. 2d at 240. The defendant pled guilty and was sentenced to a five-year term of imprisonment. The defendant subsequently filed a post-conviction petition claiming his guilty plea was involuntary because it was based on his attorney’s misrepresentation. *Ramirez*, 162 Ill. 2d at 240.

Similarly, in *Jones*, the defendant alleged that his attorney pressured him to plead guilty by suggesting the judge would not impose the death penalty because he owed the attorney a favor. *Jones*, 144 Ill. 2d at 262. The defendant pled guilty and was ultimately sentenced to death. The defendant filed a post-conviction petition asserting that his guilty plea was involuntary due to the erroneous advice of his attorney. *Jones*, 144 Ill. 2d at 262-63.

In both *Ramirez* and *Jones*, our supreme court found that the trial court’s admonishments were “lengthy and exhaustive.” *Ramirez*, 162 Ill. 2d at 245; *Jones*, 144 Ill. 2d at 263. Our supreme court noted that the defendants were thoroughly admonished to ensure their guilty pleas were not obtained by any threats, promises, or coercion. *Ramirez*, 162 Ill. 2d at 241-43; *Jones*, 144 Ill. 2d at 263. Our supreme court concluded that the trial court’s admonitions in those cases were sufficient to ensure the defendants entered voluntary pleas of guilty despite the alleged erroneous advice of counsel. *Ramirez*, 162 Ill. 2d at 245; *Jones*, 144 Ill. 2d at 265.

Here, we find the facts in the present case to be similar to those in *Ramirez* and *Jones*. As in *Ramirez* and *Jones*, the trial court thoroughly admonished defendant to ensure that his guilty plea was not obtained by any threats or promises. The record shows that the trial court, unlike in *Hall*, provided admonishments that specifically related to counsel's alleged erroneous advice concerning the amount of time defendant would be required to serve in prison. Thus, the admonishments were sufficient to overcome any prejudice from counsel's alleged erroneous advice.

B. Choice of Counsel Claim

Defendant also contends that the circuit court erred in dismissing his post-conviction petition where he made a substantial showing that the trial court deprived him of his Sixth Amendment right to counsel of choice when it denied his request for a continuance to retain substitute counsel.

A defendant's right to counsel is absolute and unqualified, but his right to counsel of choice is limited. *People v. Antoine*, 335 Ill. App. 3d 562, 580 (2002). The exercise of the right to choice of counsel may be denied if it will unduly interfere with the administration of justice. *Antoine*, 335 Ill. App. 3d at 580. It is within the trial court's discretion to determine when defendant's right interferes with the orderly process of judicial administration. *Antoine*, 335 Ill. App. 3d at 580.

The trial court must inquire into whether the request is being used merely as a delay tactic. *Antoine*, 335 Ill. App. 3d at 580. The denial of a motion for continuance to obtain new counsel is not an abuse of discretion " 'if new counsel is not specifically identified or does not

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stand ready, willing, and able to make an unconditional entry of appearance *instanter.*’ ” *Antoine*, 335 Ill. App. 3d at 580 (quoting *People v. Burrell*, 228 Ill. App. 3d 133, 142 (1992)).

In *People v. Terry*, 177 Ill. App. 3d 185, 190-91 (1988), this court affirmed the trial court’s denial of a motion to continue when the defendant “was represented by counsel for almost four months and at no time prior to the day of trial complained about his representation, or indicated a desire to obtain other counsel.” A court may infer from these two factors whether a defendant’s motion is “really for purposes of delay.” *Terry*, 177 Ill. App. 3d at 190. Similarly, in the present case, the record indicated that defendant had been awaiting trial for over two years. On the day of trial, defendant participated in a Rule 402 conference. After defendant’s privately-retained attorney informed the court that the defendant did not want to accept the offer made at the conference, defendant asked for a continuance and complained, “I haven’t been communicating right with my lawyer.” There is no indication in the record that defendant complained about his representation during the two years prior to the day of trial. Therefore, the trial court’s denial of defendant’s request for a continuance was not an abuse of discretion and cannot support defendant’s post-conviction claim that he was denied his choice of counsel.

Defendant, however, contends that this case is analogous to *People v. Green*, 42 Ill. 2d 555 (1969) and *People v. Washington*, 195 Ill. App. 3d 520 (1990), where the trial courts’ decisions to deny motions for continuance were reversed. We find defendant’s reliance on these cases unconvincing.

In *Green*, the defendant requested a continuance on the day of his trial because his newly retained attorney was in Washington on a different case. *Green*, 42 Ill. 2d at 556. The defendant

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told the trial court that a church had paid the attorney. The trial court denied the defendant's motion, appointed a public defender, and allowed the case to proceed to trial that same day. Our supreme court reversed and remanded for a new trial, explaining: "[W]e are of the opinion that the defendant's constitutional right was violated when the court, without any inquiry into the truth of the circumstances described by the defendant, summarily denied his request for a continuance and insisted that he go to trial that day, represented by an assistant public defender who had no opportunity to investigate the case." *Green*, 42 Ill. 2d at 557.

Unlike the defendant in *Green*, defendant in this case had been represented by his privately-retained attorney for two years prior to the date of his scheduled trial. Thus, defendant's attorney was well acquainted with the case. The trial court also considered defendant's complaint and noted that defendant had not raised any issues regarding his representation prior to that date.

In *Washington*, the trial court received a call from the secretary of the attorney that the defendant said he retained. When the defendant made his motion for a continuance, he requested a seven-day period to allow for the appearance of the attorney. *Washington*, 195 Ill. App. 3d at 525. Here, there was no such confirmation of defendant's intention to retain substitute counsel or that defendant had already retained an attorney. After defendant made a complaint that he was not "communicating right" with his attorney, the trial court noted that defendant should have raised any issues prior to the day of trial. Defendant then continued to participate in the proceedings with his attorney. There was no evidence that defendant had another attorney that was ready, willing, or able to take over defendant's case. Rather, the trial court was within its

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discretion in denying defendant's request for a continuance based on defendant's last-minute claim that he was having difficulty communicating with his attorney.

For the above reasons, the judgment of the circuit court, dismissing defendant's post-conviction petition, is affirmed.

Affirmed.