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No. 3--09--0617

Order filed June 15, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 14th Judicial Circuit,
)	Mercer County, Illinois
Plaintiff-Appellee,)	
)	
v.)	No. 03--CF--77
)	
LUCIEN SCOTT McARTHUR,)	Honorable
)	James G. Conway, Jr.,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

Held: The trial court did not err in dismissing defendant's postconviction petition as the record clearly indicates defendant's guilty plea was knowingly and voluntarily made and his appellate counsel was not constitutionally ineffective.

Defendant, Lucien Scott McArthur, appeals from the dismissal

of his postconviction petition. He claims the trial court, when dismissing the petition, improperly found he failed to make a substantial showing that his plea was involuntary. He also argues that his trial and appellate counsel were constitutionally ineffective. We affirm.

FACTS

The State charged defendant with 21 counts of criminal sexual assault, alleging vaginal, anal and oral intercourse with his daughter and stepdaughter. The acts were committed at various times during 2003 while both girls were under the age of 18.

On June 21, 2004, defendant advised the trial court that he wanted to enter a guilty plea to four of the counts. The trial judge ascertained that defendant was not under the influence of drugs or alcohol and defendant was admonished as to the following: the definition of the offenses to which he proposed to plead guilty; which particular facts comprised each individual count; his right to a jury trial or bench trial; his right to remain silent; his right to testify on his own behalf and bring evidence in his defense; the State's burden to bring proof beyond a reasonable doubt; his right to be present during all proceedings; his right to confront and cross-examine the

witnesses against him; and his right to subpoena witnesses to testify in his defense. The trial judge ascertained that defendant understood the allegations against him, that defendant understood by pleading guilty, he was waiving the aforementioned rights, and that his plea had not been motivated by threats, coercion or promises beyond the plea agreement. Defendant executed a written guilty plea waiver form.

The State averred that it could present evidence at trial proving that on each of the identified occasions in October of 2003, defendant engaged in an act of sexual penetration with his minor daughters. Defendant acknowledged that he did, in fact, engage in acts of sexual penetration with his daughters, ages 17 and 15, in October of 2003 in Mercer County. It was further noted that defendant had no prior felony or juvenile criminal history, and he was advised that each count to which he intended to plead guilty carried a sentence ranging from probation to 4 to 15 years' imprisonment.

The trial court inquired as to the existence of a plea bargain and the parties explained that defendant agreed to plead guilty to 4 of the 21 counts against him in exchange for dismissal of the remaining counts and a 50-year sentencing cap. Defendant and defense counsel acknowledged those terms and

indicated their intention to argue for a sentence below the 50-year cap.

Defendant later filed a "motion to limit sentence to be imposed." Defendant argued to the trial court that the offenses were part of a single course of conduct, therefore triggering section 5/5-8-4(c)'s language mandating that a sentence for "offenses that were committed as part of a single course of conduct *** shall not exceed the sum of the maximum terms authorized under Section 5-8-2 for the 2 most serious felonies involved[.]" 730 ILCS 5/5-8-4(c)(2) (West 2004). The State responded by noting that sex offenses committed against two separate victims on four different dates were not part of a single course of conduct and, as such, no limitation on the aggregate term of consecutive sentences existed. The trial judge agreed with the State.

At sentencing, defendant argued for probation given his lack of criminal history and psychological problems. Ultimately, the trial court imposed four consecutive 12-year terms of imprisonment for an aggregate term of 48 years' imprisonment. Trial counsel filed a motion to vacate the plea and reconsider the sentence, arguing that since the law regarding mandatory consecutive terms changed in July of 2003 and, since the indictment

spanned the months of January 2003 through October 2003, defendant should not be subject to mandatory consecutive terms. The trial court rejected this argument, noting the counts to which defendant pled guilty related to actions occurring in October of 2003 after the new laws went into effect. Furthermore, the trial court found defendant received proper admonishments and while he hoped for a maximum sentence of 30 years, defendant was well aware of the possibility of a 50-year sentence. Therefore, the trial court denied defendant's motion to withdraw his guilty plea.

Defendant filed a direct appeal to this court raising one singular issue: whether the trial court abused its discretion when denying defendant's motion to appoint a mitigation expert. We rejected that argument and affirmed the trial court's denial of defendant's motion. *People v. McArthur*, No. 3-05-0384 (2006) (unpublished order under Supreme Court Rule 23). Our supreme court denied defendant's petition for leave to appeal from our order. *People v. McArthur*, 223 Ill. 2d 661 (2007).

Thereafter, defendant filed a *pro se* postconviction petition on December 17, 2007. The trial court ruled that the petition stated the gist of a constitutional claim and appointed counsel to represent defendant in the matter. Counsel filed an amended

postconviction petition on February 26, 2008, and a Rule 651(c) certificate on March 10, 2009.

The petition alleged, *inter alia*: (1) that defendant's plea had not been knowingly and voluntarily made where defendant was not made aware of the maximum possible sentence at the time of the plea; (2) that defendant's plea was invalid since no meeting of the minds existed sufficient to effectuate a plea agreement; (3) that trial counsel was ineffective for coercing defendant into pleading guilty; (4) that trial counsel was ineffective for failing to investigate and present mitigating evidence at sentencing; and (5) that appellate counsel's failure to argue the aforementioned first four points constituted ineffective assistance of appellate counsel. In its motion to dismiss the petition, the State argued these claims were waived or forfeited and that none had any merit.

The trial court ruled that defendant's failure to raise all issues, except ineffective assistance of appellate counsel, on direct appeal mandated "the finding and conclusion by this court that those claims have been waived and are barred as a matter of law." The trial court went on to find that the claims, in addition to being waived and barred, were "frivolous and patently without merit." Finally, the trial court held that the claim of

ineffective assistance of appellate counsel was without merit. Specifically, the trial court found "that the issues raised and presented by defendant are completely contradicted by the record and so frivolous and patently without merit. As a matter of law, petitioner cannot establish a showing of a violation of his constitutional rights on these claims. Accordingly, the petition for post-conviction relief shall be and is hereby dismissed." Defendant appeals from this order of dismissal.

ANALYSIS

The sole issue raised in this appeal is whether the trial court properly dismissed defendant's petition. Defendant claims he made a proper showing that he "was never told what the maximum term was, and because his affidavit supporting his petition shows that counsel misinformed him about his sentencing exposure, his plea was not knowing and voluntary, trial counsel was ineffective, and appellate counsel was ineffective for failing to raise the issue on direct appeal." Therefore, defendant asserts the trial court erred in dismissing his petition.

The State contends that the trial court properly dismissed defendant's petition. The State claims defendant has waived or forfeited by not raising them on direct appeal, the right to raise issues concerning his sentencing exposure, whether he

knowingly and voluntarily entered his plea of guilty and effective assistance of trial counsel. The State further argues that the trial court properly rejected defendant's claim of ineffective assistance of appellate counsel as defendant failed to properly show that his underlying claims would have been successful if raised on direct appeal.

We review a trial judge's dismissal of a postconviction petition at the second stage of postconviction proceedings *de novo*. *People v. Coleman*, 183 Ill. 2d 366 (1998); *People v. Moore*, 189 Ill. 2d 521 (2000).

A. Issues Not Raised on Direct Appeal

The State argues that the first four "grounds for relief" stated in defendant's postconviction petition could have been raised on direct appeal and, as such, the trial court properly found defendant waived his right to raise those issues in a postconviction proceeding. We agree.

"Failure to raise a claim which could have been addressed on direct appeal is a procedural default which results in a bar to consideration of the claim's merits in a post-conviction proceeding." *People v. Erickson*, 161 Ill. 2d 82, 87 (1994); see also *People v. Sanders*, 238 Ill. 2d 391 (2010). This procedural bar may be relaxed only when: (1) a defendant offers information

not contained with the record; (2) that supports a previously unmade claim; and (3) the information also explains why the claim it supports could not have been raised on direct appeal.

Erickson, 161 Ill. 2d at 87. When a postconviction petition and the affidavits supporting it do nothing more than recite matters contained within the record relating to alleged ineffectiveness of counsel, the ineffective assistance claim is barred.

Erickson, 161 Ill. 2d at 87-89; see also *People v. Jones*, 109 Ill. 2d 19 (1985).

When discussing the first four grounds for relief raised in his postconviction petition, defendant specifically acknowledges "that the basis for the arguments are contained in the record of the trial court."

We find the allegations pertaining to defendant's first four claims in his second amended postconviction petition do nothing more than recite matters contained within the record on appeal, and there is no explanation given as to why they were not or could not have been raised on direct appeal. As such, we hold these matters are procedurally defaulted and barred.

B. Ineffective Assistance of Appellate Counsel

Defendant claims that the trial court "erred in finding that McArthur failed to state a constitutional claim of ineffective

assistance of trial and appellate counsel." Specifically, defendant claims the trial court erred when finding certain issues not raised during his direct appeal had no merit and, as such, defendant's appellate counsel was not ineffective for failing to raise those claims. We agree with the trial court.

Strickland v. Washington's (466 U.S. 668 (1984)) familiar two-prong test applies to claims of ineffective assistance of appellate counsel just as it applies to claims of ineffective assistance of trial counsel. *People v. Golden*, 229 Ill. 2d 277, 283 (2008). To be entitled to relief, a petitioner must show that appellate counsel's performance fell below an objective standard of reasonableness and that this substandard performance caused prejudice, *i.e.*, there is a reasonable probability that, but for appellate counsel's errors, the appeal would have been successful. *Golden*, 229 Ill. 2d at 283, "In order to show prejudice, the defendant must show that the underlying issue had merit." *People v. Moore*, 402 Ill. App. 3d 143, 147 (2010) (citing *People v. Childress*, 191 Ill. 2d 168, 175 (2000)). We find defendant's claims of error are simply without merit and, as such, he has not met his burden of showing appellate counsel was ineffective for failing to raise the matters on direct appeal.

The claims defendant asserts his original appellate counsel

failed to raise on direct appeal include: (1) that he did not knowingly enter into his guilty plea as it was not clear to him that his maximum sentence could exceed 30 year; (2) that no meeting of the minds existed sufficient to effectuate a plea agreement; (3) that his pleas was involuntary as his trial counsel was too coercive; and (4) that his trial counsel's failure to investigate and present mitigation evidence further constituted ineffective assistance of counsel. The record belies defendant's claims that his plea was not knowingly and voluntarily made as he was not made aware of the maximum possible sentence, that no meeting of the minds existed sufficient to effectuate a plea agreement and that his plea was involuntarily entered into due to overly coercive counsel. As noted above, the trial court correctly instructed defendant that each of the Class 1 felonies to which he intended to plead guilty carried a sentencing range of either probation, or 4 to 15 years' incarceration. Immediately thereafter, the following exchange took place:

"THE COURT: So in other words, Mr.

McArthur, you are telling the court you are pleading guilty to Count 1, Count 2, Count 3 and Count 4 because you are in fact guilty of

each of those four counts?

DEFENDANT: Yes.

THE COURT: What are the negotiations for the record?

MR. MCHUGH [State's Attorney]: Your Honor, upon the defendant's plea to Counts 1,2,3 and 4, all Class one felonies, the State at sentencing would dismiss the balance of the counts. There would be a total exposure cap of 50 years in the Illinois Department of Corrections. There is an option for probation here under the old law with the family relationship and it is the State's opinion that any Department of Corrections sentences have to be served consecutively.

THE COURT: Indeed under the amended statutes for 85 percent of the time. With regard to that then, are those your respective understandings of the negotiated terms? First, Mr. McArthur, is that your understanding?

DEFENDANT: Yes.

THE COURT: Then defense counsel, is that your understanding?

MR. APPLETON [Public Defender]: Yes, it is my understanding. But further, that the defense at sentencing is free to argue for any option less than the cap. And indeed we've pointed out to the State there's a provision in the Corrections Code, Chapter 730 ILCS 5/5-8-4(c)(1) that puts a maximum, by our reading puts a maximum sentence exposure that this defendant can suffer at two times the maximum term authorized for the two most serious felonies ***.

THE COURT: Your position is that as a matter of law 30 years would be the maximum sentence that might be imposed?

MR. APPLETON: It is and we would be free to argue less than that.

THE COURT: Thank you. You have made a very adequate record. Did we have his history of criminality?

MR. MCHUGH: Yes, your honor. No felony. No crimes of violence.

THE COURT: The court will find that this man's history is one of no felonies and no

crimes of violence, nor are there any matters of delinquency. Sir, the court will advise you at this time that it will be bound by these plea negotiations.

Now, Mr. McArthur, knowing the nature of the four class one felony charges against you, the consequences of each, and the penalty that may be imposed upon you for each and in the context of a bargained for open plea, knowing your rights that you have just waived in open court, do you still persist in your desire to enter a plea of guilty to each of Counts 1,2,3 and 4 alleging criminal sexual assault?

DEFENDANT: Yes, sir."

The trial court also asked defendant:

"THE COURT: It is my understanding that there have been certain plea negotiations and we will be talking about those on the record again in a few minutes. First I will ask you, have you been threatened or has anyone close to you been threatened in order to get

you to answer guilty to these charges?

DEFENDANT: No.

THE COURT: Have any other promises of any kind or nature been made to you by the State's Attorney Office, your attorney or any other person or persons to induce you to enter a plea of guilty to these four charges?

DEFENDANT: No."

The record positively rebuts defendant's assertion that he was unaware of the possibility of receiving a sentence of greater than 30 years, or that his trial counsel somehow coerced him into pleading guilty. The agreement in which the State would dismiss additional counts and recommend a 50-year sentencing cap in exchange for defendant's plea of guilty on four counts was clearly explained in open court. Defendant acknowledged in open court the terms of the plea and that he fully understood those terms. Given the clarity of the record regarding defendant's knowledge of the terms of his plea bargain, we cannot say the trial court erred in finding defendant's claims regarding the voluntary nature of his guilty plea were without merit. As such, we hold appellate counsel was not constitutionally ineffective for failing to raise those claims.

The record on appeal also positively rebuts defendant's final contention that appellate counsel was constitutionally ineffective for failing to properly argue that "trial counsel failed to investigate and present mitigating evidence at sentencing." The only issue raised on defendant's direct appeal concerned trial counsel's attempt to present additional mitigation testimony. *People v. McArthur*, No. 3-05-0384 (2006) (unpublished order under Supreme Court Rule 23) (*McArthur I*). In *McArthur I*, we held that the trial court did not abuse its discretion in denying defendant's motion to appoint a mitigation expert. We noted defense counsel brought to light significant testimony concerning defendant's bipolar disorder as well as evidence indicating that defendant's mental condition "can account for deviant sexual behavior." *McArthur I*, No. 3-05-0384 (2006) slip op. at 5 (unpublished order under Supreme Court Rule 23).

The trial court held defendant's claim that his trial counsel was constitutionally ineffective for failing to properly investigate mitigating factors or present evidence in mitigation was without merit. As such, the trial court found defendant's appellate counsel was not constitutionally ineffective for failing to raise that issue. We agree and hold the trial court

did not err in so ruling.

CONCLUSION

For the foregoing reasons, the order of the circuit court of Mercer County is affirmed.

Affirmed.