

No. 1-09-2347

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	02 CR 4055
	)	
LEONARDO DELAVEGA,	)	Honorable
	)	Ellen Beth Mandeltort,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Presiding Justice Steele and Justice Murphy concurred in the judgment.

**ORDER**

¶ 1 *Held:* When a defendant alleges in a postconviction petition, with support in the record, that he rejected a plea bargain because his counsel misrepresented the range of possible sentences the trial court could impose if it found the defendant guilty, the defendant has stated adequate grounds for advancing his postconviction petition to the second stage of postconviction proceedings.

¶ 2 This case arises on appeal from a first-stage dismissal of a postconviction petition.

The trial court, after a bench trial, found the defendant, Leonardo Delavega, guilty of murder

and home invasion, both committed with a firearm Delavega personally discharged. The court imposed the statutory minimum sentence of 76 years for the charges, and this court affirmed. *People v. Delavega*, No. 1-06-2292 (2008) (unpublished order under Supreme Court Rule 23). In his postconviction petition, Delavega alleged that misinformation he received from his trial counsel led him to reject a plea agreement offered after a pretrial conference. The trial court dismissed the postconviction petition as frivolous. We reverse and remand for advancement of the petition to the second stage of postconviction proceedings because Delavega has adequately alleged the gist of a claim that his counsel committed unprofessional errors that prejudiced him by causing him to reject the plea agreement.

¶ 3

### BACKGROUND

¶ 4

On October 2, 2001, Phillip McGovern answered a knock on his door. Marco Canas, holding a pizza, stood outside next to a second man. McGovern yelled to his fiancé, Maureen Rodak, "did you order a pizza?" Rodak said she had not, and she went to join McGovern at the front door. She saw two men in the living room, and at least one pointed a gun at McGovern. When McGovern went outside with the men, Rodak ran to the bedroom to get McGovern's gun. Canas came into the house to find Rodak. Rodak came into the hall and aimed McGovern's gun at Canas, who aimed his gun at her. They shot at each other and Rodak ducked. A few minutes later, the men left and McGovern stumbled back into his house and fell on the floor, bleeding profusely from a large bullet wound to his chest. He died from the wound.

¶ 5 A few days later, police showed Rodak arrays of photographs to see if any looked like the men who came to the door with the pizza. She chose photographs of Canas and Delavega as pictures of the men she saw. Canas later told police he and Delavega murdered McGovern. A grand jury indicted Canas and Delavega for murder and home invasion, with both defendants charged with personally discharging firearms to cause McGovern's death. Canas pled guilty in exchange for a sentence of 29 years in prison.

¶ 6 Police arrested Delavega in February 2008. After two days in custody, Delavega made a videotaped statement in which he confessed to the murder and home invasion.

¶ 7 At a pretrial conference, the trial court offered to sentence Delavega to 29 years in prison in exchange for a guilty plea. After consulting with his attorney, Delavega decided not to accept the offer.

¶ 8 Delavega moved to suppress his statement. The trial court denied the motion.

¶ 9 Rodak testified at the bench trial that she had a good view of the man who accompanied Canas when Canas invaded McGovern's home. She again identified Delavega as that man. The court also viewed Delavega's videotaped confession. Delavega did not testify. The trial court found Delavega guilty of murder and home invasion, and the court specifically found in addition, as charged in the indictment, that Delavega personally discharged a firearm, and the gunshot proximately caused McGovern's death.

¶ 10 The prosecution asked the court to sentence Delavega to a term of 50 years in prison. Defense counsel argued for a sentence of 20 years. The court found that applicable statutes required the court to enhance the sentences for both murder and home invasion by 25 years

because Delavega personally discharged a firearm to cause death. See 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2000). Another statute required the sentences for the crimes to run consecutively. See 730 ILCS 5/5-8-4(a)(i) (West 2000). Therefore, the court held that the law required a minimum sentence of at least 76 years, consisting of 20 years for murder plus a 25 year enhancement and 6 years for home invasion with another 25 year enhancement, all running consecutively. See 730 ILCS 5/5-8-1(a)(1)(a), 5-8-1(a)(3); 720 ILCS 5/12-11(a)(3) (West 2000). The court imposed the minimum sentence of 76 years.

¶ 11 On the direct appeal, Delavega challenged only the constitutionality of the sentencing scheme that made the minimum sentence 76 years. This court affirmed the convictions and sentences, but we corrected the mittimus to reflect that Delavega committed only one murder and only one home invasion. *Delavega*, No. 1-06-2292.

¶ 12 On June 15, 2009, Delavega filed his postconviction petition, in which he raised more than 30 separate claims for constitutional violations. We will focus on only one of the claims because we find it dispositive of the appeal.

¶ 13 Delavega alleged that when the court offered to impose a sentence of 29 years in exchange for an appropriate guilty plea, his trial counsel told him he faced a minimum sentence of 20 years and a maximum of 60 years if the court found him guilty as charged. Counsel said the sentence for home invasion, which would fall between 6 and 30 years, would run concurrently with the murder sentence. Counsel told Delavega that if he did not plead guilty, the trial court would most likely sentence him to a term of about 29 years because he was a minor at the time of the crime and he had no past criminal history.

Delavega swore in his supporting affidavit:

"Although I consist[e]ntly maintain my innocence had [defense counsel] properly informed me of the true sentence exposure I faced if I rejected the Courts offer and proceeded to trial and was found guilty \*\*\* I would have accepted the Courts offer of 29 years \*\*\* under an *Alfords* plea."

He added separately that, for the postconviction petition, he had tried to contact his trial counsel from prison, but his trial counsel had not responded.

¶ 14 The trial court dismissed the petition as frivolous. Concerning the allegation now at issue, the court said:

"Petitioner claims counsel failed to tell him that in exchange for his plea, the court would sentence him to 29 years imprisonment. The record belies his contention. In fact, it shows that counsel informed the court that he had discussed the offer with petitioner numerous times and that petitioner wanted to think about it longer. The court refused. On the next court date, counsel informed the court that petitioner did not want any other offers and wished to proceed to trial. Therefore, the record demonstrates that petitioner's claim is without merit."

Delavega now appeals.

¶ 15 ANALYSIS

¶ 16 We review *de novo* the dismissal of a postconviction petition at the first stage of postconviction proceedings. *People v. Coleman*, 183 Ill. 2d 366, 387-88 (1998). At this stage of proceedings, "a petition alleging ineffective assistance may not be summarily

dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009).

¶ 17 We assume the truth of all facts alleged in the postconviction petition, unless the record contradicts the allegations. *Coleman*, 183 Ill. 2d at 385. Thus, for purposes of this appeal, we must assume that after a conference with defense counsel and the prosecutor, the court offered to impose a sentence of 29 years on Delavega if he agreed to plead guilty in the manner discussed in the conference. Delavega's attorney told Delavega that if Delavega went to trial and lost, the court would impose a sentence of between 20 and 60 years for the murder, with a sentence of between 6 and 30 years for home invasion, with the sentences to run concurrently. The attorney told Delavega that if he lost the trial, the court would probably impose a sentence in the neighborhood of 29 years, because of Delavega's youth and lack of a prior criminal record.

¶ 18 From this record, we must infer that Delavega learned from his attorney that if he went to trial, he faced some risk of a sentence twice as long as the offered sentence of 29 years, but most likely, even if he lost at trial, the court would impose a sentence similar to the sentence offered in the conference. Compare *People v. Miller*, 393 Ill. App. 3d 629, 635 (2009). To the best of Delavega's knowledge, he faced no risk of a sentence in excess of 60 years, and some nonnegligible chance that he could convince the court that the State failed to prove him guilty. With that understanding of the risks and possible rewards of going to trial, he decided to reject the offered plea bargain.

¶ 19 The defendant in *People v. Curry*, 178 Ill. 2d 509 (1997), similarly received misinformation from his attorney about the possible range of sentences he could face, and defense counsel in *Curry*, like defense counsel here, did not understand that the law required consecutive sentences if the court found the defendant guilty as charged. Our supreme court said:

"A criminal defendant has the constitutional right to be *reasonably* informed with respect to the direct consequences of accepting or rejecting a plea offer. [Citations.] Concomitantly, a criminal defense attorney has the obligation to inform his or her client about the maximum and minimum sentences that can be imposed for the offenses with which the defendant is charged. [Citations.] In the case at bar, defense counsel did not fulfill this obligation. \*\*\* [D]efense counsel affirmatively misstated the consequences of rejecting the plea offer \*\*\*.

\*\*\* Based on the facts before us, we conclude that defense counsel's performance during plea negotiations was objectively unreasonable." (Emphasis in original). *Curry*, 178 Ill. 2d at 528-29.

Here, too, we find that Delavega has sufficiently alleged facts to support the conclusion that his counsel's performance fell below an objective standard of reasonableness.

¶ 20 The State argues that Delavega's petition does not sufficiently allege facts that could support a finding of prejudice. Delavega swore in his affidavit that if he had known that a finding of guilt on all counts would result in a sentence of at least 76 years, he would have accepted the plea bargain. The State contends that the record contradicts Delavega's

allegation, because the record of the trial, as well as Delavega's postconviction petition, show that he claimed that he did not commit the crimes charged, and he sought a chance to prove his innocence. But a claim of innocence and the presentation of a defense to charges "does little, by itself, to answer the question of why he refused the plea offer in the first place." *Curry*, 178 Ill. 2d at 532. Nothing in the record contradicts Delavega's assertion that he would have accepted the offer of 29 years had he known that he faced a minimum sentence of 76 years, and potentially a much longer sentence, if the court found him guilty as charged. See *People v. Paleologos*, 345 Ill. App. 3d 700, 705-06 (2003).

¶ 21 The State also claims that Delavega's self-serving assertion in his affidavit cannot suffice to show he would have accepted the offered plea had he known the real risks he faced by going to trial. In *Curry*, on a direct appeal from three convictions with sentences of 4 years each, to be served consecutively for a total of a 12 year sentence, the parties stipulated that the defendant would testify that he would have taken the plea bargain for a 4½ year sentence if he had known the law required consecutive sentences for the charges brought against him. The *Curry* court said that the defendant's self-serving testimony alone would not sufficiently prove that he suffered prejudice due to his counsel's erroneous advice. The *Curry* court reversed the convictions and remanded for a new trial because the defendant's attorney supplied a supporting affidavit. *Curry*, 178 Ill. 2d at 533. In the affidavit, counsel admitted that he mistakenly advised the defendant that the court would probably sentence him to a term of 4 years in prison if it found him guilty as charged. Counsel added that the defendant rejected the plea offer based on the erroneous advice about the minimum sentence.

¶ 22 Delavega has only his own affidavit to support his postconviction petition. He explained that he wrote to his trial counsel to try to get further support for his petition, but his trial counsel had not answered his letter. But the defendant in *Curry* needed to persuade the court that a much smaller discrepancy between the expected sentence and the actual sentence made the difference in whether he would have accepted the plea bargain. Here, counsel's advice missed the minimum sentence Delavega faced by 50 years, and the record of the trial itself supports Delavega's assertion that his counsel erroneously believed Delavega faced a minimum sentence of only 20 years. Moreover, the defendant in *Curry*, for his direct appeal, needed to establish prejudice well enough to obtain a new trial. Here, at the first stage of postconviction proceedings, Delavega must only allege facts to state the gist of a claim for ineffective assistance of counsel, and the court must not dismiss the petition as long as Delavega, in the petition, alleged facts that show "it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17. Delavega's petition meets that standard.

¶ 23 Finally, the State argues that Delavega suffered no prejudice because the trial court could not legally impose the promised sentence of 29 years, and the court actually imposed the statutory minimum sentence. For this argument, the State relies on the fact that the record does not include any explicit statement by the assistant state's attorney that he agreed to reduce or *nol pros* any of the charges. The record does not show what the State agreed to do in the conference that ended with the court offering to sentence Delavega to a term of 29 years in prison. Canas, who faced exactly the same charges Delavega faced, reached a plea

bargain that resulted in a sentence for him of 29 years in prison. From the court's explicit offer of a term of 29 years following the conference, we infer that the State in the conference agreed to appropriate concessions to make the sentence possible. For example, the State could have agreed not to pursue the firearm enhancements for both Canas and Delavega. We cannot say from this record that the court could not have found some way to impose a valid sentence of 29 years on Delavega for an appropriate plea.

¶ 24

#### CONCLUSION

¶ 25

Delavega has stated the gist of a claim that his trial counsel provided ineffective assistance when counsel misrepresented the range of possible sentences Delavega faced if he rejected the court's offer and went to trial. He has also sufficiently alleged that he suffered prejudice due to his counsel's unprofessional error. Therefore, we advance Delavega's entire petition for second stage review (see *Paleologos*, 345 Ill. App. 3d at 706-07), and we express no opinion on the other issues Delavega raises in his postconviction petition.

¶ 26

Reversed and remanded.