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2012 IL App (3d) 110078-U

Order filed August 16, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 12th Judicial Circuit,
Plaintiff-Appellee,) Will County, Illinois,
)
v.) Appeal No. 3-11-0078
) Circuit No. 04-CF-1508
APOLINAR MEZA,)
) Honorable
Defendant-Appellant.) Robert P. Livas,
) Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice McDade specially concurred.

ORDER

- ¶ 1 *Held:* Defendant's postconviction petition was properly summarily dismissed at the first stage.
- ¶ 2 Defendant, Apolinar Meza, was charged with two counts of attempted first degree murder for the stabbing of his former wife, Ana Meza. 720 ILCS 5/8-4(a), 9-1(a)(1), (a)(2) (West 2004). Ultimately, defendant pled guilty, and was sentenced to 22 years in prison. Defendant appeals the denial of his postconviction petition, arguing he presented the gist of a constitutional claim.

We affirm.

¶ 3

FACTS

¶ 4 On November 4, 2004, defendant was charged by indictment with two counts of attempted first degree murder. On August 3, 2005, the trial court granted defense counsel's motion for a Rule 402 conference, because the State and defendant failed to reach an agreement in plea negotiations. The Rule 402 conference was held off the record. At the end of the conference, the judge stated on the record he "extended an offer to the defendant through his attorney" and the offer would be open until August 10, 2005.

¶ 5 On August 10, 2005, defendant informed the court he wished to enter a plea of guilty, pursuant to the Rule 402 conference. Both parties agreed defendant's plea would be an open plea. Defendant acknowledged the judge's admonitions that an open plea meant there was no plea agreement between the State and himself. The judge also admonished defendant regarding the nature of the charges, his trial rights, and his right to persist in a not guilty plea. The judge informed defendant he faced the possibility of between 6 and 30 years in prison for pleading guilty. Defendant acknowledged he understood the judge's admonitions. In response to the judge asking defendant if he was pleading guilty due to someone making promises or threats to him, defendant responded "uh-uh[,] " but did respond "yes" when asked if his plea was voluntary. Following these admonishments, the judge entered defendant's plea of guilty. The case was continued for a sentencing hearing, and a pre-sentence investigation report was ordered.

¶ 6 At the sentencing hearing on October 31, 2005, the State presented Ana's victim impact statement, as well as evidence that defendant sent a letter to Ana, asking her to sign an affidavit. The affidavit stated she lied about defendant's attempt to kill her and she had tried to kill herself.

The State recommended a sentence of 30-years' imprisonment, the statutory maximum. The defense responded that the judge stated a 15-year sentence would be appropriate. The judge acknowledged his recommendation of 15-years' imprisonment at the Rule 402 conference, but stated it was prior to finding out defendant sent the letter and affidavit to Ana. The judge then sentenced defendant to 22 years in prison.

¶ 7 The defendant filed a motion to withdraw his guilty plea, arguing, *inter alia*, the court should have allowed defendant to withdraw his guilty plea pursuant to Illinois Supreme Court Rule 402(d)(2) (eff. July 1, 1997) when the court declined to sentence defendant to 15-years' imprisonment. Defendant also argued if defendant withdrew his guilty plea, the trial judge was required to recuse himself. The trial court denied defendant's motion. Defendant's motion to reconsider sentence, claiming the sentence was excessive, was also denied by the trial court.

¶ 8 On direct appeal, defendant argued the trial judge violated Rule 402(d)(2) when he failed to give defendant the opportunity to withdraw his guilty plea after the judge withdrew his offer to sentence defendant to 15-years' imprisonment. This court affirmed defendant's conviction and sentence. *People v. Meza*, 376 Ill. App. 3d 787 (2007). The court held that the judge's conditional offer of 15-years' imprisonment was not a plea agreement to which Rule 402 applied, because plea agreements are between parties, not the judge and defendant. *Id.* As such, the judge's offer was not a negotiated plea, but merely a statement of the length of sentence the judge would be inclined to give defendant if he pled guilty. *Id.*

¶ 9 On June 24, 2008, defendant filed a *pro se* postconviction petition, alleging his constitutional rights were violated when the trial judge failed to fulfill his 15-year sentencing recommendation. Defendant claimed he should have been allowed to withdraw his plea under

Rule 402(d)(2). Defendant further alleged his plea was not voluntary and knowing due to the judge's misrepresentation he was offering defendant a negotiated plea agreement. The trial court summarily dismissed defendant's petition. Defendant appeals.

¶ 10

ANALYSIS

¶ 11 On appeal, defendant argues his postconviction petition should not have been dismissed because his contentions that he was denied the right to a neutral judge and a knowing and voluntary guilty plea stated the gist of a constitutional claim. Defendant asserts he was denied the right to a neutral sentencing judge, because the judge failed to recuse himself after becoming involved in plea negotiations. Defendant further asserts his guilty plea was not knowing and voluntary because the judge misled defendant to believe he had a negotiated plea agreement; therefore, defendant did not understand the actual sentence he faced when he pled guilty.

¶ 12 The Post-Conviction Hearing Act provides for a three stage review process in noncapital cases. 725 ILCS 5/122-1 *et seq.* (West 2008); *People v. Hodges*, 234 Ill. 2d 1 (2009). At the first stage, the trial court must independently determine whether the petition is "frivolous or is patently without merit," and based on that finding, either summarily dismiss the petition or docket it for further review. 725 ILCS 5/122-2.1(2) (West 2008). The petition's allegations, liberally construed and taken as true, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115 (2007). We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 13 Defendant argues he is entitled to relief under Rule 402(d)(2), which provides a procedure for a judge's recusal after the judge declines to impose a sentence that was previously agreed upon. This argument fails for two reasons.

¶ 14 First, we agree with the State that this claim is barred by principles of *res judicata* and forfeiture. Issues which were raised and decided on direct appeal are barred by the doctrine of *res judicata*. *People v. Blair*, 215 Ill. 2d 427 (2005). Additionally, issues which could have been raised on direct appeal but were not are forfeited. *People v. Petrenko*, 237 Ill. 2d 490 (2010). Defendant's claim he was denied a neutral judge is intertwined with judicial recusal procedures under Rule 402(d)(2). In our previous opinion, we found that Rule 402(d)(2) did not apply. See *Meza*, 376 Ill. App. 3d 787. Therefore, this issue is barred by *res judicata*. See *Blair*, 215 Ill. 2d 427. Conversely, if we determine this issue is not similar to the Rule 402 issue raised on appeal, defendant has forfeited the issue by failing to raise it, because the claim was based on facts contained in the record. See *Petrenko*, 237 Ill. 2d 490.

¶ 15 Second, even if we review the merits of this claim, Rule 402 is not applicable to this case. *Meza*, 376 Ill. App. 3d 787. Under the form of Rule 402 in effect at the time of the plea negotiation, a trial court could not initiate plea negotiations; however, the rule did not prohibit the trial court from suggesting a sentence it would impose if defendant were to plead guilty.¹ Ill. S. Ct. R. 402(d)(1) (eff. July 1, 1997); see *Meza*, 376 Ill. App. 3d 787. Therefore, the judge's "offer" of 15-years' imprisonment was not a plea agreement to which Rule 402 applied, but merely a statement of the length of sentence the judge would be inclined to give defendant if he pled guilty. *Id.* Because Rule 402 was not applicable to defendant's guilty plea, the judge did not

¹ We note that under the current form of the rule, a judge still may not initiate plea discussions, but may participate in plea discussions, upon agreement by both parties; and, following the Rule 402 conference, the judge may make a recommendation as to what an appropriate sentence would be. Ill. S. Ct. R. 402 (d)(1) (eff. July 1, 2012).

err when he did not allow defendant to withdraw his plea, which would in turn require the judge to recuse himself pursuant to Rule 402(d)(2). See *Meza*, 376 Ill. App. 3d 787; Ill. S. Ct. R. 402(d)(2) (eff. July 1, 1997).

¶ 16 Similarly, defendant's argument his guilty plea was not knowing and voluntary is also without merit. Again, defendant's failure to raise this issue on direct appeal results in forfeiture of the issue. See *Petrenko*, 237 Ill. 2d 490. Even without forfeiture, defendant has not demonstrated his guilty plea was improperly influenced by the trial judge. See *People v. Smith*, 406 Ill. App. 3d 879 (2010). Despite language that the trial court made an offer of 15-years' imprisonment to defendant, following the Rule 402 conference, the parties agreed on the record that defendant was entering an open plea. Defendant acknowledged on the record there was no agreement between the State and himself, and he could receive between 6 and 30 years' imprisonment. Although defendant argues his plea was not voluntary because he responded "uh-uh" with regard to whether any promises or threats were made to obtain defendant's plea, defendant responded "yes" when asked whether his plea was voluntary. See *People v. Mehmedoski*, 207 Ill. App. 3d 275 (1990). Consequently, we conclude the trial court's summary dismissal of defendant's postconviction petition was proper.

¶ 17 CONCLUSION

¶ 18 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 19 Affirmed.

2012 IL App (3d) 110078-U, *People v. Apolinar Meza*

¶ 20 JUSTICE McDADE, specially concurring:

¶ 21 The majority has affirmed the order of the circuit court of Will County summarily

dismissing the *pro se* postconviction petition of defendant, Apolinar Meza, at the first stage of the postconviction proceedings. I concur in that decision.

¶ 22 I write separately to observe that it is unclear in this case what the value and meaning of the rule 402(d)(2) conference might be. Certainly, as it developed for this defendant and his attorney, it was nothing more than a trap for the unwary. Although it was made clear to the defendant that there was no agreement between himself and *the State*, he did have an indication from the judge that he would impose a sentence of fifteen years if Meza pled guilty. The trial judge changed his mind in the face of new evidence – which was certainly his right – but Meza relied on the earlier representations to his detriment. Simple fairness would seem to dictate that the defendant should have been given the opportunity to withdraw his guilty plea.