

2013 IL App (1st) 111247-U

THIRD DIVISION
May 8, 2013

No. 1-11-1247

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(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 93 CR 16210
)	
GERALD JONES,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Neville and Justice Sterba concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant's postconviction petition because defendant failed to make a substantial showing that his constitutional right to be present at all proceedings affecting his substantial rights was violated when the trial court engaged in *ex parte* communication with the jury during deliberations but defendant was not prejudiced by the *ex parte* communication. We affirm.

¶ 2 Following a jury trial, defendant Gerald Jones was convicted of two counts of first degree murder and one count of attempted first degree murder and sentenced to natural life imprisonment. On November 15, 1996, this court affirmed defendant's conviction and sentence on direct appeal. *People v. Gerald Jones*, No. 1-95-0299 (1996) (unpublished order under

Supreme Court Rule 23). In October 2008, defendant filed his *pro se* petition for relief under the Post-Conviction Hearing Act ("Act"). 725 ILCS 5/122-1 *et seq.* (West 2010). Defendant contended the trial court prejudicially engaged in *ex parte* communication with the jury during deliberations. The circuit court appointed a public defender to represent defendant and subsequently granted defendant's motion to proceed *pro se* on the petition. After conducting a hearing on the State's motion to dismiss the petition, the court dismissed the petition. Defendant appeals.

¶ 3 Defendant's convictions were based upon the gang-related shooting of three rival gang members. The evidence presented at trial showed that on May 7, 1993, defendant was with three friends, Tony Lewis, James Sparkman, and Elihu Timms. Until May 1993, defendant and his friends were members of the Gangster Disciple street gang. Unbeknownst to defendant's friends, defendant became a member of rival street gang, the Black Disciples. Before changing gangs, defendant owed Lewis \$2000 for drugs that defendant sold for Lewis.

¶ 4 Defendant arranged to get the money for Lewis and told Lewis that he had to get the money from the Altgeld Gardens Housing Project. He asked Lewis to drive him there. Before going to Altgeld Gardens, defendant told Lewis he had to get a key from the Stateway Gardens Housing Project. Lewis drove Jones, Sparkman, and Timms to Stateway where defendant went alone into an apartment and obtained a handgun. Defendant concealed the handgun and Lewis then drove the men to Altgeld Gardens. After no one answered the door at the apartment where defendant said he kept the money, the four men returned to the car. At that point, defendant fatally shot Sparkman and Lewis. He then struggled with Timms over the weapon, shooting Timms in the hand and then firing another shot that grazed Timms' head. Timms survived the gunshot wounds, identified defendant as the shooter in a photo array, and subsequently testified

against defendant. Defendant gave inculpatory written and oral statements to an assistant State's Attorney.

¶ 5 The common law record reveals that the jury sent two notes to the trial court during deliberations. The first note concerned a juror's reluctance in voting on a verdict due to the juror's religious principles regarding judging another person. The trial transcript revealed that after discussing the matter in open court with the parties, the judge advised the jury to continue deliberating. The second note from the jury states, "After reading your response we deliberated and reached a conclusion and we are not unanimous. With a 11 to 1 count. And will not change." In a written response, the trial court instructed the jury to "[c]ontinue to deliberate." There was no indication in the record that counsel for the State, counsel for defendant, or defendant himself was present when the trial court responded to the jury, or provided input to the trial court regarding how to respond to the jury's note regarding being deadlocked. The record on appeal does not reveal the amount of time the jury deliberated before or after sending either note to the trial court and receiving the court's responses. Ultimately, the jury returned guilty verdicts on two counts of first degree murder and one count of attempted first degree murder. Defendant was sentenced to life imprisonment.

¶ 6 Defendant filed a direct appeal to his conviction, and this court affirmed his convictions and sentences. *People v. Jones*, No. 1-95-0299 (1996) (unpublished order under Supreme Court Rule 23). Defendant alleges that on June 18, 2008, he received a copy of his common law record for the first time and, upon review, learned that the trial court engaged in *ex parte* communication with the jury during deliberations. On October 3, 2008, defendant filed his *pro se* petition for post-conviction relief contending *inter alia* the trial court prejudicially engaged in *ex parte* communication with the jury during deliberations. On May 29, 2009, the circuit court docketed the petition for second stage proceedings and appointed a public defender to represent

defendant. Defendant then requested to proceed *pro se* and the court granted defense counsel's motion for leave to withdraw. The State filed a motion to dismiss and defendant responded. After a hearing on the motion, the trial court dismissed defendant's petition as untimely and barred by *res judicata* and forfeiture.

¶ 7 Defendant appeals, contending the petition presented a substantial showing that the trial court violated defendant's right to be present at all stages of trial affecting his substantial rights when it engaged in *ex parte* communication with the deliberating jury. At the second-stage of postconviction proceedings, defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A petition may be dismissed at this stage only where the allegations contained in the petition, liberally construed in light of the trial record, fail to make such a showing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). The reviewing court takes "all well-pleaded facts that are not positively rebutted by the trial record" as true. *Pendleton*, 223 Ill. 2d at 473. A second-stage dismissal of a postconviction petition is reviewed *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 14 (2007).

¶ 8 The trial court found that defendant's petition was untimely and barred by the application of *res judicata* or procedurally defaulted. On appeal, defendant has abandoned the other claims in this postconviction petition and identifies a single issue, the trial court's *ex parte* response to the jury's question, which defendant claims deprived him of his right to be present at a critical stage of his trial. The State, as it did below, responds that defendant's petition was untimely filed many years after the expiration of the Act's limitation period, and procedurally defaulted because the basis of the claim was contained in the common law record yet defendant failed to raise the issue on direct appeal. Defendant, contends that his claim was timely because he learned of the existence of the jury's note and the trial court's response in the common law record only a few months before he filed his postconviction petition and that procedural default should not bar

relief because he was denied the effective assistance of appellate counsel when counsel failed to raise the issue on direct appeal. Although the parties disagree and present extensive argument on a range of issues related to timeliness and procedural default, we believe that the most efficient disposition of this case can be had by examining first the substantive merits of defendant's claim.

¶ 9 To warrant remand for an evidentiary hearing on his petition alleging ineffective assistance of appellate counsel, defendant must make a substantial showing that (1) appellate counsel's performance fell below an objective standard of reasonableness and (2) defendant was prejudiced by counsel's deficient performance. See *People v. Makiel*, 358 Ill. App. 3d 102, 105-06 (2005), citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984). At the second stage of a postconviction proceeding, the defendant must make a substantial showing of each prong. *Id.* at 106. A reviewing court may dispose of an ineffective assistance of counsel claim solely on the lack of prejudice without considering the performance prong. *People v. Scott*, 2011 IL App (1st) 100122, ¶ 27, citing *Strickland*, 466 U.S. at 697. Unless the underlying issue has merit, a defendant has suffered no prejudice as the result of appellate counsel's failure to brief and argue it on appeal. *Makiel*, 358 Ill. App. 3d at 113. Thus the inquiry into prejudice requires a consideration of the merits of the underlying claim. *Scott*, 2011 IL App (1st) 100122, ¶ 28, citing *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 10 Defendant has a "constitutional right to appear and participate in person and by counsel at all proceedings involving his substantial rights." *People v. Kliner*, 185 Ill. 2d 81, 162 (1998). Once a jury has begun deliberations, communication between the jury and the trial court must be held in open court and in the defendant's presence. *Id.* To warrant remand for an evidentiary hearing at the second stage of defendant's postconviction proceeding alleging a constitutional violation due to *ex parte* communication between the jury and the trial court during deliberations, the defendant must make a substantial showing that he was prejudiced as a result

of the communication. *Kliner*, 185 Ill. 2d 81 at 162; and *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 11 In this case, taking defendant's well-pleaded factual allegations as true, because they are not affirmatively rebutted by the record (*Pendleton*, 223 Ill. 2d at 473), an *ex parte* communication occurred between the trial court and the jury. In a note, the jury stated it deliberated and reached a verdict that was not unanimous, at 11 to 1, and that its position would not change. In a written response, the trial court instructed the jury to continue to deliberate. There is no indication in the record that the court notified defense counsel or defendant of the jury's note. Rather, the trial court responded *sua sponte* to the jury during deliberations, a critical stage of trial affecting defendant's substantial rights. See *Kliner*, 185 Ill. 2d at 162. Consequently, the trial court conducted an *ex parte* communication with the jury. *Id.*

¶ 12 Defendant argues he was prejudiced because had the trial court involved defense counsel in the instruction to continue deliberating after the jury informed the court it was deadlocked at 11 to 1, defense counsel could have requested a *Prim* instruction (*People v. Prim*, 53 Ill. 2d 62 (1972)) that would have instructed the jurors not to change their opinions solely for the purpose of returning a verdict.

"The *Prim* instruction informs the jury of the requirement that the verdict be unanimous; that the jury has a duty to deliberate; that jurors must impartially consider the evidence; and that jurors should not hesitate to reexamine their views and change their opinions if they believe them to be erroneous, provided the change is not solely because of the opinion of fellow jurors or for the mere purpose of returning a verdict. *Prim*, 53 Ill. 2d at 75-76."
People v. Chapman, 194 Ill. 2d 186, 222 (2000).

While the purpose of the *Prim* instruction is to "guide a jury that is unable to reach a unanimous verdict," it is nevertheless within the trial court's discretion to determine whether and when to give a *Prim* instruction. *Chapman*, 194 Ill. 2d at 222; see also *People v. Cowan*, 105 Ill. 2d 324, 328 (1985). Defendant speculates that the trial court would have given the *Prim* instruction had defense counsel requested it. However, speculation is insufficient to make a substantial showing of prejudice. See *People v. Jackson*, 205 Ill. 2d 247, 278 (2001).

¶ 13 Moreover, the trial court's communication to the jury was not coercive. Here, the trial court merely told the jury to continue deliberating. See *People v. Outlaw*, 388 Ill. App. 3d 1072, 1096 (2009) (There is no prejudice where the trial court receives an unsolicited note from the jury during deliberations indicating it is deadlocked and providing the numerical division of the jurors, and the trial court, in response, instructs the jury, without coercion, to continue deliberating.). The court's instruction to continue deliberating did not urge the holdout juror to change his or her mind, nor did it imply that the jurors would not be going home unless they returned a unanimous verdict. *Id.* at 1095.

¶ 14 Further, the record does not indicate how long the jury had been deliberating before it sent the note to the judge stating it was deadlocked, nor how long the jury continued to deliberate after the trial court's instruction to continue doing so. Although "the length of deliberations following the instruction is not alone conclusive in determining whether a verdict was coerced," a long period of time would suggest that the jurors were not coerced. *Outlaw*, 388 Ill. App. 3d at 1095. Without evidence of the length of time the jury deliberated, defendant's claim of coercion is speculative because there is no indication that the deadlocked jury returned a verdict immediately after the trial court instructed it to continue deliberating, which would provide some evidence that the stand-alone juror changed his or her position merely to return a verdict. *People v. Chapman*, 194 Ill. 2d 186, 222 (2000). Therefore, defendant failed to make a

substantial showing of prejudice as a result of the trial court's *ex parte* communication with the jury during deliberations.

¶ 15 Because defendant failed to make a substantial showing on the merits of his claim that his constitutional right to be present at all stages of trial affecting his substantial rights was violated when the trial court communicated with the jury *ex parte* during deliberations, he cannot establish the prejudice necessary to support a claim of ineffective assistance of counsel or overcome procedural default on that basis. Having determined that defendant did not make a substantial showing of a constitutional violation we find it unnecessary to address the parties' timeliness arguments.

¶ 16 Based on the foregoing, we affirm the judgment of the circuit court of Cook County dismissing defendant's second-stage postconviction petition.

¶ 17 Affirmed.