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2013 IL App (3d) 110771-U

Order filed July 15, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

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. 3-11-0771
	)	Circuit No. 01-CF-311
	)	
JAMES H. GODSEY,	)	Honorable
	)	Edward A. Burmila, Jr.,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justices O'Brien and Schmidt concurred in the judgment.

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ORDER

- ¶ 1 *Held:* The trial court did not err in granting the State's motion to dismiss the defendant's fourth amended postconviction petition.
- ¶ 2 The defendant, James H. Godsey, appeals the second-stage dismissal of his fourth amended postconviction petition. On appeal, the defendant argues that the trial court erred in granting the State's motion to dismiss the petition because counsel erroneously advised him that

he would have to register as a sex offender for 10 years when he was required to register for life. We affirm.

¶ 3

### FACTS

¶ 4 On March 7, 2001, the defendant was charged by indictment with three counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 1998)) and three counts of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 1998)). Each of the first three counts alleged that the defendant, who was over 17 years of age, committed an act of sexual penetration with the victim, who was under 13 years of age, between January 1, 1990, and January 31, 1998. Each of the criminal sexual assault charges alleged that the defendant committed an act of sexual penetration with the victim between January 1, 1990, and February 2001. Thereafter, the trial court appointed public defender Joseph Polito to represent the defendant.

¶ 5 On December 4, 2001, the case was called for the presentation of an agreed disposition. At the hearing, the State moved to dismiss the indictment and filed a six-count information in its place. The information charged the defendant with three counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 1996)) and three counts of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 1996)). However, the predatory criminal sexual assault of a child charges collectively alleged that the defendant committed the charged acts between June 1 and August 31, 1996. Likewise, the criminal sexual assault charges collectively alleged that the defendant committed the charged acts between June 2 and July 15, 1997. The State also presented a plea agreement to the court in which the defendant would plead guilty to the six

counts in the information in exchange for 20-year concurrent prison sentences on counts I through III and concurrent 15-year prison sentences on counts IV through VI.

¶ 6 Before accepting the plea, the trial court advised the defendant that if the case went to trial, he could be sentenced to between 6 and 30 years' imprisonment for each of the charged Class X felonies. Further, if the defendant proceeded to trial under the original indictment, he faced the possibility of extended term or consecutive sentences. However, the charges in the information permitted concurrent sentencing.

¶ 7 The State provided a factual basis for the plea. The factual basis stated that the victim was the defendant's stepson. At the age of 16, the victim reported to a neighbor that the defendant had sexually abused him for over 11 years. The victim later revised the period of abuse to 9 or 10 years. The victim reported that the defendant had oral and anal sex with him up to five days per week over the stated period. In a videorecorded interview, the defendant admitted that he had anal and oral sex with the defendant over a nine-year period. At the conclusion of the factual basis, the defendant agreed that if witnesses were called by the State, the evidence would be sufficient for a jury or the court to find him guilty.

¶ 8 The trial court entered an order of certification of a child sex offender (730 ILCS 150/2(A) (West 1996)) and an order sentencing the defendant to a total of 20 years' imprisonment.

¶ 9 On December 24, 2001, the defendant filed a *pro se* motion to withdraw his guilty plea. The trial court appointed public defender Julie Keller to represent the defendant. Keller filed a motion on the defendant's behalf to withdraw his guilty plea. The motion argued that Polito misinformed the defendant that he would be required to register as a sex offender for 10 years.

At a hearing on the motion, Keller represented that she spoke with Polito and, at the time of the plea, Polito was unaware that the sex offender registration law had changed to require the defendant to register for life. The trial court denied the motion, noting that the sex offender registration issue was a collateral consequence of the plea. The defendant filed a notice of appeal.

¶ 10 On direct appeal, we remanded the cause to the trial court for compliance with Supreme Court Rule 604(d). *People v. Godsey*, No. 3-02-0383 (2002) (unpublished order under Supreme Court Rule 23).

¶ 11 On remand, public defender Michael Phillips represented the defendant. Phillips filed a new motion to withdraw the plea with an accompanying Rule 604(d) certificate. The motion did not raise the issue of Polito's incorrect advice regarding the defendant's sex offender registration term. The trial court denied the motion.

¶ 12 On October 18, 2004, the defendant filed a *pro se* postconviction petition. The petition was amended on July 2, 2007. On July 19, 2007, the trial court summarily dismissed the petition, and the defendant filed a notice of appeal.

¶ 13 On appeal, we vacated the trial court's dismissal and remanded the cause for the appointment of counsel and further postconviction proceedings. *People v. Godsey*, No. 3-07-0597 (2009) (unpublished order under Supreme Court Rule 23).

¶ 14 On remand, public defender Jason Strzelecki filed a fourth amended postconviction petition on the defendant's behalf. The petition raised four claims of ineffective assistance of counsel regarding counsel's failure to: (1) challenge the unlawful seizure of the defendant; (2) correctly advise the defendant as to the sex offender registration requirement; (3) accurately

advise the defendant as to the length of time to be served; and (4) prevent the defendant from pleading guilty to charges that were barred from prosecution by the statute of limitations.

Regarding counsel's failure to advise defendant of the correct sex offender registration period, the petition alleged that Keller and Phillips were ineffective for failing to properly raise this claim in a motion to withdraw the defendant's guilty plea, and the appellate defenders' office rendered ineffective assistance when it failed to raise this issue in the defendant's direct appeal. The State filed a motion to dismiss the petition, arguing that Polito had no duty to advise the defendant of the sex offender registration period because it was collateral to his plea. The defendant filed a response, and in a supporting affidavit, the defendant stated that Polito told him that he would have to register as a sex offender for 10 years. The defendant further averred that he entered the plea pursuant to Polito's advice.

¶ 15 After arguments on the defendant's petition, the trial court granted the State's motion to dismiss. The defendant filed a motion to reconsider. The court denied the motion, stating "[w]hether or not [the defendant] would have to register, how long he would continue to register are matters that continue to be in the hands of the general assembly" and "[t]hey could do away with the registration provision tomorrow." The defendant appeals.

¶ 16 ANALYSIS

¶ 17 The defendant argues that the trial court erred in denying his postconviction petition at the second stage of proceedings because Polito actively misrepresented the length of the sex offender registration period.

¶ 18 The State responds that the defendant has waived or forfeited review of this issue because he failed to raise the issue in his second motion to withdraw his guilty plea and on direct appeal.

However, we find that this issue was preserved. The defendant's petition alleged that he received ineffective assistance of postplea and appellate counsel, permitting this issue to be raised anew in his postconviction petition. See *People v. Myers*, 386 Ill. App. 3d 860 (2008) (doctrines of *res judicata* and forfeiture are relaxed where the forfeiture stems from the ineffective assistance of counsel).

¶ 19 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a three-stage process for the adjudication of postconviction petitions. *People v. Hodges*, 234 Ill. 2d 1 (2009). We review *de novo* the trial court's dismissal of a postconviction petition at the second stage. *People v. Turner*, 2012 IL App (2d) 100819. The dismissal of a postconviction petition is warranted at the second stage where the defendant's claims, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Hall*, 217 Ill. 2d 324 (2005). At the second stage, all factual allegations that are not positively rebutted by the record are accepted as true. *People v. Young*, 355 Ill. App. 3d 317 (2005).

¶ 20 To prevail on an ineffective assistance of counsel claim, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504 (1984); see also *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 21 Generally, a defendant's awareness of the collateral consequences of his guilty plea is not a prerequisite to the entry of a knowing and voluntary plea. *People v. Manning*, 227 Ill. 2d 403 (2008). However, in *Correa*, our supreme court held that a defendant's reliance on defense counsel's erroneous and misleading advice of a collateral consequence of a plea rendered the plea

involuntary. *People Correa*, 108 Ill. 2d 541 (1985). In *People v. Stewart*, 381 Ill. App. 3d 200 (2008), the fourth district reasoned that the *Correa* decision drew a distinction between counsel's passive failure to discuss the collateral consequences of a guilty plea and counsel's unequivocal, erroneous, and misleading representations. The *Correa* and *Stewart* decisions found ineffective assistance of counsel without reviewing the prejudice prong. See *People v. Presley*, 2012 IL App (2d) 100617 (discussing that *Correa* was decided before a defendant was required to show prejudice regarding a claim of ineffective assistance of counsel in a guilty plea proceeding).

¶ 22 In the present case, the defendant argues that, similar to *Correa* and *Stewart*, Polito actively misrepresented the length of his sex offender registration period. This assertion finds support in the record, as Keller stated at a hearing on the defendant's first motion to withdraw his guilty plea that she spoke with Polito and he had admitted that he was unaware of the correct sex offender registration period. However, the defendant has not made a substantial showing that he suffered prejudice as a result of counsel's erroneous advice.

¶ 23 To advance to a third stage evidentiary hearing on a postconviction claim of ineffective assistance of counsel, the defendant must make a substantial showing that, but for counsel's errors, the result of the proceeding would have been different. *People v. Hughes*, 2012 IL 112817. To satisfy this " 'prejudice' requirement," the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *People v. Pugh*, 157 Ill. 2d 1, 15 (1993) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). A bare assertion that the defendant would not have pleaded guilty is not sufficient to establish prejudice. *Hughes*, 2012 IL 112817. The defendant must assert either a claim of actual innocence or articulate a plausible defense that could have been

raised at trial. *Hughes*, 2012 IL 112817. Overall, the defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, \_\_\_, 130 S. Ct. 1473, 1485 (2010).

¶ 24 In the instant case, the defendant has not made a sufficient showing of prejudice to support his ineffective assistance argument. The defendant merely asserts that, given Polito's active misrepresentation of the lifetime registration requirement, fundamental fairness warrants a remand for an evidentiary hearing. However, to be entitled to an evidentiary hearing, the defendant needed to show both that counsel's performance was deficient and that he suffered prejudice. Here, the defendant has not made a substantial showing of prejudice.

¶ 25 In his petition, the defendant alleged that he would not have pleaded guilty if Polito had advised him of the correct registration period. While we recognize that defendant's fourth amended postconviction petition included two claims that raised potential defense strategies, they were not advocated as a viable trial defense on appeal. In the absence of a claim of actual innocence or plausible defense strategy, we can assume the defendant would have been convicted after a trial. The State's factual basis indicated that the victim would testify at trial to many years of repeated sexual abuse and that it would introduce the defendant's videorecorded confession. Following the conviction, the defendant would still have been required to register as a sex offender for the remainder of his life and, under the indictment, the defendant would be subject to mandatory consecutive sentencing. 730 ILCS 5/5-8-4(a)(ii) (West 2000). Consequently, the defendant's bare assertion that he would not have pled guilty, but for Polito's erroneous advice, does not establish prejudice. See *People v. Presley*, 2012 IL App (2d) 100617 (dissatisfaction about the effects of registration, which would not have changed if the defendant had gone to trial

and been convicted, do not establish prejudice). Therefore, we affirm the trial court's dismissal of the defendant's second-stage postconviction petition.

¶ 26

#### CONCLUSION

¶ 27 For the forgoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 28 Affirmed.