

FIRST DIVISION
Rule 23 filed July 8, 2014
Modified upon denial of rehearing September 29, 2014

No. 1-12-2642

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. 05 CR 21774
)	
JAMES NEWSON,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

O R D E R

¶ 1 *Held:* The trial court's second-stage dismissal of defendant's *pro se* postconviction petition was affirmed, as defendant failed to establish that he was prejudiced by his appellate counsel's erroneous advice that he withdraw his direct appeal on the basis that pursuing the appeal would expose defendant to imposition of the 15-year sentence enhancement for armed robbery while armed with a firearm.

¶ 2 Defendant James Newson appeals an order of the trial court granting the State's motion to dismiss his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, defendant requests that this court reinstate his 2008 direct appeal, which was withdrawn when his original appellate counsel erroneously believed the trial court was mistaken in failing to apply a mandatory 15-year sentence enhancement penalty in sentencing him for armed robbery while armed with a firearm, and that dismissal of the direct appeal denied defendant the opportunity to contest what he deems is an excessive 18-year armed robbery prison sentence. We affirm.

¶ 3 Defendant and codefendant Dartell Taylor were charged by indictment, *inter alia*, with attempted first degree murder of a peace officer, armed robbery, and aggravated discharge of a firearm. The charges arose from events occurring on September 1, 2005, when defendant, his younger brother Dartagnan Newson, and Taylor robbed an auto parts store in Chicago. It is not contested that during the course of the robbery, defendant personally was armed with a firearm.

¶ 4 Defendant was tried by jury; codefendant Taylor was tried simultaneously in a bench trial. During the State's case in chief, all four employees of the auto parts store who were present when it was robbed identified defendant as one of the robbers, and three of those witnesses testified they saw a gun in defendant's hand. Anthony Urbaniak, a Chicago police officer, testified that he responded to a call of robbery at the auto parts store. When the three suspects' vehicle became inoperable, they ran from the vehicle and Urbaniak gave chase. Dartagnan and Taylor successfully jumped a fence, but defendant failed to clear the fence on his first attempt. As Urbaniak approached, defendant attempted to jump the fence again and raised his hand in which he held a gun. A shot rang out and Urbaniak dove for cover. When he looked up, defendant had gone over the fence. All three offenders were apprehended by other officers.

¶ 5 Defendant testified in his own behalf. He admitted that he had entered the store with the intent to rob it and that he was in possession of a firearm. He claimed that he had not told his brother or Taylor that he had a gun or intended to rob the store. Defendant also testified that as he was attempting to scale a fence to avoid apprehension by Urbaniak, he dropped the gun and it discharged accidentally when it struck the ground.

¶ 6 The jury found defendant guilty of armed robbery, but not guilty of attempted first degree murder of a peace officer and aggravated discharge of a firearm. At defendant's sentencing hearing on February 11, 2008, the assistant State's Attorney stated that the applicable sentencing range was that for a Class X offense, a minimum of 6 years and maximum of 30 years in prison, and that it was her understanding the 15-year enhancement for possessing a firearm during the commission of the armed robbery was not applicable at the time of the 2005 offense. Following a hearing in aggravation and mitigation, the trial court sentenced defendant to 18 years in prison for armed robbery, a sentence which did not include a 15-year enhancement pursuant to section 18-2(b) of the armed robbery statute. 720 ILCS 5/18-2(b) (West 2008). Defendant's motion to reconsider sentence was denied.

¶ 7 Defendant filed a notice of appeal and the State Appellate Defender was appointed as defendant's counsel on appeal. The appeal was docketed in this court under number 1-08-0910. On August 13, 2009, the appeal was dismissed on defendant's motion.

¶ 8 On September 27, 2010, defendant's *pro se* petition for postconviction relief was filed in the trial court. The petition alleged that defendant was denied a direct appeal and the effective assistance of counsel because: (1) his counsel on direct appeal erroneously advised him that if he pursued his appeal, the State would seek to increase defendant's sentence, and that counsel's

inaccurate advice resulted in the dismissal of his direct appeal; and (2) his trial counsel was ineffective at his sentencing hearing.

¶ 9 Attached to the postconviction petition was a letter dated June 9, 2009, written by Jennifer L. Bontrager, Assistant Appellate Defender, defendant's direct appeal counsel, and addressed to defendant at Lawrence Correctional Center. The letter stated in pertinent part:

"I am writing to follow up on our last conversation and my last letter to you. I continue to believe that it is very likely that your sentence will increase if we pursue the appeal, because the only issue for appeal relates to your sentence, which will only focus the State's Attorneys and the appellate court on the sentence. And although, like I said, we would have some arguments against increasing your sentence, I believe we will ultimately lose those arguments. I think the best option is to dismiss the appeal and instead file a clemency petition asking the governor to reduce your sentence."

¶ 10 The postconviction petition alleged that defendant's appellate counsel had advised him to dismiss his direct appeal because the trial court erred in not imposing the 15-year enhancement penalty for armed robbery while armed with a firearm and that defendant was in danger of having his sentence increased if he persisted in his appeal. Defendant further asserted that he subsequently learned from prison law clerks that appellate counsel's advice was erroneous, as the enhancement would not apply to him because of the date of his offense. Defendant contended he was deprived of his constitutional right to appellate review of his conviction and sentence and that his appellate counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984).

He argued that he was prejudiced by appellate counsel's failure to pursue a direct appeal because he had a viable argument to present in that appeal, namely, that his 18-year prison sentence was excessive. Defendant also asserted his trial counsel was ineffective for failing to argue factors in mitigation of sentence that would have lowered his 18-year sentence for armed robbery.

¶ 11 The postconviction proceedings advanced to the second stage and the trial court appointed counsel for defendant. The State filed a motion to dismiss the petition. The court granted the State's motion, finding that defendant had not established his appellate counsel was ineffective under the first prong of the *Strickland* test because appellate counsel's advice to defendant "was within the range of acceptable and competent representation." The court also found that defendant failed to establish prejudice under *Strickland's* second prong because his argument that his 18-year prison sentence was excessive would have been rejected on direct appeal. In addition, the trial court rejected defendant's argument that his trial counsel was ineffective.

¶ 12 In this appeal, defendant contends he was erroneously denied his right to a direct appeal. He asserts that the performance prong of *Strickland* was met when his counsel "unreasonably failed to perfect the direct appeal" by erroneously advising him to withdraw his appeal on the basis that otherwise he would be eligible to have a firearm enhancement penalty added to his sentence. Relying on *People v. Ross*, 229 Ill. 2d 255 (2008), he contends that the prejudice prong of *Strickland* was satisfied because prejudice was presumed where appellate counsel failed to perfect his direct appeal. Defendant asks that we reinstate his direct appeal and address the merits of his underlying claim of excessive sentence. In the alternative, defendant claims his postconviction counsel failed to provide a reasonable level of assistance, requiring that we remand this cause to the trial court for appointment of new postconviction counsel. The State

responds that defendant's direct appeal was perfected and was dismissed with defendant's consent, albeit on the erroneous advice of his counsel; that the second prong of *Strickland* was not satisfied where defendant could not show that his 18-year sentence for armed robbery was excessive; and that defendant was provided with reasonable assistance of counsel at the second-stage postconviction proceedings.

¶ 13 Our review of the second-stage dismissal of defendant's postconviction petition is *de novo*. *People v. Marshall*, 381 Ill. App. 3d 724, 730 (2008). We reject defendant's claim that his original appellate counsel failed to perfect his direct appeal. An appeal is perfected by the timely filing of a notice of appeal, and this step vests the appellate court with jurisdiction. *People v. Shaw*, 2014 IL App (2d) 121105, ¶ 3. Here, a timely notice of appeal was filed and this court had jurisdiction of defendant's appeal until he filed, and we granted, his motion to withdraw the appeal.

¶ 14 Defendant maintains that he would not have abandoned his appeal if appellate counsel had not erroneously informed him that he would be subject to an increased sentence on appeal. The increased sentence was based on appellate counsel's belief that defendant was subject to, but did not receive, a 15-year enhancement.

¶ 15 The parties agree that the 15-year sentencing enhancement did not exist at the time the instant armed robbery took place in 2005, and, therefore, appellate counsel's belief to the contrary was erroneous. In our prior decision, we held that appellate counsel was correct in believing that defendant was subject to the 15-year sentencing enhancement which was not imposed by the trial court based on an analysis of the history of the sentencing enhancements. Subsequently, this court filed an opinion reaching the opposite conclusion in *People v. Smith*, 2014 IL App (1st) 103436 (July 17, 2014), explaining that the sentencing enhancement, which

had been found unconstitutional, was not revived by the legislature until 2007. In a petition for rehearing, defendant seeks reconsideration of this issue. We now issue a modified order upon denial of rehearing to follow the opinion in *Smith* and conclude that the parties are correct in agreeing that the 15-year sentencing enhancement could not have been imposed on defendant who committed the instant armed robbery in 2005.

¶16 The inquiry thus becomes whether defendant's original appellate counsel was ineffective in advising defendant to withdraw his direct appeal which would have challenged his prison sentence.

¶17 The *Strickland* test applies to claims of ineffective appellate counsel. *People v. Johnson*, 205 Ill. 2d 381, 405 (2002). In order to prevail on his claim of ineffective appellate counsel, defendant must satisfy both prongs of *Strickland*. *People v. Salas*, 2011 IL App (1st) 091880, ¶ 91. Defendant must show both that his counsel's failure to raise an issue on appeal was objectively unreasonable and that this decision prejudiced him. If we can dispose of defendant's claim on the basis that he suffered no prejudice, we need not address whether his counsel's performance was objectively unreasonable. *Id.* Defendant suffers no prejudice unless the underlying issue that appellate counsel failed to raise (here, that his 18-year prison sentence was excessive) is meritorious. *Jones*, 219 Ill. 2d at 23.

¶18 Defendant argues that his 18-year prison sentence for armed robbery was excessive and an abuse of the sentencing court's discretion, for these reasons: he was only 18 years old at the time of the offense; he had been employed for several months and was living in Wisconsin with his girlfriend and young son; his only prior offense was misdemeanor possession of cannabis; and he never denied responsibility for the offense, whose "prime facilitator," he now claims, was co-defendant Dartell Taylor, "a 32-year-old with a prior murder conviction." The State responds

that defendant's sentence fell within the sentencing parameters for armed robbery and that the trial court properly considered the evidence in mitigation.

¶19 A trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). Trial courts are in a superior position to assess a defendant's credibility, demeanor, general moral character, social environment, habits, and age. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Thus, a reviewing court must not substitute its judgment for that of the trial court simply because it would have weighed the factors in aggravation and mitigation differently. *Id.* Here, the trial court announced that it had considered the statutory factors in aggravation and mitigation of sentence, the facts and circumstances of the offense, the content of the presentence investigation report, and defendant's statement in allocution. The court stated defendant had made a good first step in accepting responsibility for his actions. The court then addressed the fact that the firearm defendant possessed during the armed robbery discharged as he attempted to flee from a police officer. The court commented: "I believe that the jury correctly determined that you did not have an intent to kill the police officer when you discharged that weapon. ***I think that would have been little solace for the officer had the bullet struck him." "I am aware that during the course of the armed robbery no one was injured, but I am also aware that [defendant] endangered the life of a person who was only doing their [*sic*] job."

¶20 Defendant's counsel filed a motion to reconsider sentence and argued that defendant's 18-year sentence was excessive where it was greater than the sentence imposed on codefendant Dartell Taylor, who had a prior murder conviction. Counsel also argued that it was improper to consider the discharge of defendant's firearm as an aggravating factor in sentencing him after the jury had acquitted him of attempted murder and aggravated discharge of a firearm. The court

responded that its statement at the sentencing hearing about the weapon's discharge was merely a comment on the facts and circumstances of the case, and that it had not considered the discharge an aggravating factor.

¶21 As to the fact that codefendant Taylor received a lesser sentence than defendant, the court noted that the jury had found Taylor accountable for the armed robbery, but Taylor did not enter the store armed nor take money from the store at gunpoint. The court denied the motion to reconsider defendant's sentence.

¶22 We find disingenuous defendant's argument on appeal that Taylor was the "prime facilitator" of the armed robbery. The trial evidence established that Taylor had entered the store and left prior to the entrance of defendant and his brother; Taylor was not present during the armed robbery. Critically, defendant testified at trial that he and he alone intended to rob the store, and neither his brother nor Taylor knew he possessed a gun. After defendant robbed the store, he placed the gun back in his pocket before returning to Taylor's car. Defendant testified he did not tell Taylor he had just robbed the store.

¶23 Without the 15-year enhancement for possessing a firearm during the armed robbery, the applicable sentencing range for the armed robbery, a Class X felony, was 6 to 30 years. 720 ILCS 5/18-2 (West 2008); 730 ILCS 5/5-8-1(a)(3) (West 2008). "A sentence which falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense." *People v. Jackson*, 375 Ill. App. 3d 796, 800 (2007). Defendant's 18-year sentence falls exactly in the middle of the 6-to-30-year range. Given that, by his own testimony, defendant was the instigator of the armed robbery and the only offender who was armed, the 18-year sentence imposed was not an abuse of discretion. If defendant had proceeded with his direct

appeal, challenging his sentence as excessive, there would not have been a reasonable probability that this court would have found his sentence excessive.

¶24 We also reject defendant's claim that his postconviction counsel failed to provide a reasonable level of assistance for failing to argue that defendant was not required to show he would have prevailed on direct appeal in order to have the appeal reinstated. As we noted above, defendant was required to establish that he was prejudiced by the dismissal of his direct appeal,

¶25 We conclude that the trial court correctly ruled that defendant had failed to establish prejudice under the second prong of the *Strickland* test because his argument that his 18-year sentence was excessive would have been rejected on direct appeal. Accordingly, we affirm the trial court's second-stage dismissal of defendant's postconviction petition

¶26 Affirmed.