

NOTICE

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2014 IL App (4th) 130064-U

NO. 4-13-0064

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

July 7, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
SHEDRIC T. LEE,)	No. 09CF27
Defendant-Appellant.)	
)	Honorable
)	Leo J. Zappa,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in dismissing defendant's postconviction petition at the second stage of the proceedings where the record shows defendant was admonished about the maximum and minimum penalties the court could impose.

¶ 2 In May 2011, defendant, Shedric T. Lee, pleaded guilty to manufacture/delivery of a controlled substance (720 ILCS 570/401(c)(2) (West 2010)), pursuant to an open plea with no agreement as to the length of the sentence to be imposed. In July 2011, the trial court sentenced defendant to eight years' imprisonment. Defendant did not file any postsentencing motions or a direct appeal. In February 2012, defendant filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). In July 2012, defendant, through appointed counsel, filed an amended postconviction petition, which the court dismissed during the second stage of the postconviction proceedings. Defendant appeals,

arguing he made a substantial showing his constitutional rights were violated because (1) trial counsel provided him with an erroneous range of punishment, (2) the trial court's admonitions failed to cure the error because they were not sufficiently related to the erroneous advice, and (3) this constitutionally deficient advice was prejudicial since the State's case was based on evidence obtained through a warrantless strip search of his anus. We affirm.

¶ 3

I. BACKGROUND

¶ 4

In January 2009, defendant was charged with manufacture/delivery of a controlled substance (720 ILCS 570/401(c)(2) (West 2010)), in that defendant knowingly and unlawfully possessed with the intent to deliver more than 1 gram but less than 15 grams of a substance containing cocaine. At the first appearance, defendant was furnished with a copy of the charge and "advised of the nature of the charge and possible penalties."

¶ 5

In May 2011, defendant pleaded guilty as charged pursuant to an open plea and the State agreed to dismiss a different case, case No. 09-CF-687. Before defendant entered into the plea, he was admonished by the trial court as follows:

"THE COURT: You are charged in this case having on or about the 8th day of January, 2009[,] in Sangamon County having committed the offense of [m]anufacture/[d]elivery of a [c]ontrolled [s]ubstance. It is alleged that you knowingly unlawfully possessed with the intent to deliver more than [1] but less than 15 grams of a substance containing cocaine. As charged, that's a Class [1] felony.

Do you understand the charge?

THE DEFENDANT: Yes, sir.

THE COURT: And you could be sentenced to probation, conditional discharge, periodic imprisonment, be sentenced from [4] to 30 years because of a prior drug offense?

[ASSISTANT STATE'S ATTORNEY]: Yes.

THE COURT: Upon release, you would have to visit the parole officer for two years under what's now known as [m]andatory [s]upervised [r]elease, what we used to call parole.

Do you understand all the possible penalties?

THE DEFENDANT: Yes, sir.

THE COURT: Before I accept your plea today, I'm going to advise you of your rights, make sure you understand them, and then ask if you wish to give those rights up in open court.

[Defense counsel] has been representing you. Are you satisfied with his representation?

THE DEFENDANT: Yes, sir.

THE COURT: You previously pleaded not guilty. Do you understand if you want a trial, you could have one?

THE DEFENDANT: Yes, sir.

THE COURT: You're presumed to be innocent, and at that trial, the State would have to prove you guilty beyond a reasonable doubt.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: At a trial, you could testify or remain silent, you could subpoena witnesses and confront and cross-examine each and every witness the State's Attorney would call against you.

Do you understand those rights?

THE DEFENDANT: Yes, sir.

THE COURT: You could have a jury trial here in Sangamon County or a trial in front of this [c]ourt called a bench trial.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And [defendant], these rights I've explained, do you understand if you give them up today pursuant to the plea, there will not be a trial in your case?

THE DEFENDANT: Yes, sir.

THE COURT: And since this is an open plea, [defendant], I'm going to recommend or refer your case to the Adult Probation Office for preparation of a [p]resentence [i]nvestigation [r]eport [PSI], and with your cooperation, they will take, intake information about your family history, your criminal background, if any, educational background, employment history. All this information

will be contained in a report which we will review for accuracy and use at your sentencing hearing in about 60 days.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And at your sentencing hearing, we'll make sure it's accurate, the State will make a recommendation, and you, through [defense counsel], will make a recommendation.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And I've explained to you all the possible penalties, and as long as—I can sentence you to you [*sic*] any of those alternatives, but I have to stay within those boundaries that I told you about.

Do you understand?

THE DEFENDANT: Yes, sir."

¶ 6 Prior to accepting the plea, the following colloquy took place between the trial court and defendant:

"THE COURT: *** Other than for the dismissal of the other case, [defendant], has anybody made any threats or promises to get you to change your mind and enter a plea today?

THE DEFENDANT: No sir.

THE COURT: *** Knowing the nature of the charge

against you, the minimum and maximum penalties which could be imposed, and knowing of your rights I have explained to you, do you still desire to give up all those rights?

THE DEFENDANT: Yes, sir."

¶ 7 The sentencing hearing was scheduled for July 13, 2011, but defense counsel sought a continuance because he needed some additional time with regard to the PSI. Counsel stated:

"There were a number of things that came out in that that we had not contemplated, and there is—it is not going to take forever, but there is [*sic*] a couple of issues that I need to verify.

*** There was [*sic*] some things in here that weren't necessarily contemplated, including some out[-]of[-]state issues, which—two or three of which I need to verify, and I apologize. As I said, we went over it yesterday, and I just—there were a multitude of things in there that weren't contemplated, and, in fact, I know it will affect how we proceed with our position on this, and it might even result in maybe an agreed disposition."

¶ 8 At the July 27, 2011, sentencing hearing, neither party had changes to the PSI. The PSI reflected over eight pages of criminal history dating back to 1996, when defendant was 19 years old. In every year except 2008, defendant had received at least one conviction and, in some years, multiple convictions. The criminal history reflected more than 30 misdemeanor convictions in the States of Mississippi and Illinois and 2 felony convictions in Sangamon

County, Illinois. In the Sangamon County felony cases, defendant was sentenced to conditional discharge in one and probation in the other. He violated both and the cases were terminated unsuccessfully. Defendant was also convicted of two misdemeanor cases in Montgomery County, Illinois, for which he was sentenced to supervision, violated the conditions, and the cases were terminated unsuccessfully. Defendant also had two outstanding warrants in the State of Washington and one outstanding warrant in the State of Mississippi. During the pendency of the case *sub judice*, defendant was out on bond. The PSI reflected while defendant was out on bond he was (1) charged with possession of a controlled substance in Sangamon County, which case was dismissed as a part of the plea agreement in the instant case; (2) convicted of possession of drug paraphernalia and driving under the influence of drugs in Montgomery County, for which he received two years' supervision and was unsuccessfully terminated and sentenced to 14 days in jail; (3) convicted of driving on a suspended license in Sangamon County, for which he received one year of supervision; and (4) charged with domestic battery and criminal damage to property in Sangamon County, convicted of the criminal-damage-to-property charge, and ordered to pay a fine.

¶ 9 The PSI further reflected defendant told the report preparer he had never had a drug or alcohol problem. He stated he had last consumed alcohol in December 2010 and consumed alcohol only two to three times a year. Defendant also told the report preparer he first tried cannabis at age 17 and last smoked cannabis 45 days ago; he first tried cocaine at the age of 26 and last used cocaine 8 years ago. Records from Treatment Alternatives for Safe Communities (TASC) indicated an open case on defendant in 2003 from which he had been unsuccessfully discharged due to positive drug drops for cocaine and cannabis. Additionally,

Sangamon County Program records showed numerous positive drug drops for cocaine and cannabis in 2003 and 2004. In May 2010, defendant had been evaluated by Stillmeadows DUI Center and classified as a significant risk, primarily due to his cannabis use. During that evaluation, defendant admitted smoking cannabis daily since age 15 or 16. Treatment was recommended but no known treatment was completed. Defendant was drug tested for purposes of the PSI on May 16, 2011, and tested positive for cannabis. Noted in the report are the inconsistent stories defendant gave regarding his drug addiction. While telling the reporter he had no problem with drugs, the police report reflected defendant said he sold crack cocaine to support his habit. The reporter noted a discrepancy between the time defendant told her he last used cocaine and what he reported to the police.

¶ 10 Neither party presented other evidence in mitigation or aggravation. Given the fact this offense occurred in a public business and defendant's "repulsive" criminal history and criminal behavior while out on bond, the State recommended a sentence of incarceration of 13 to 15 years. Defense counsel noted his own surprise at defendant's "staggering" criminal history but argued most of defendant's criminal behavior consisted of misdemeanors and was largely due to his lifelong drug addiction. Counsel noted defendant had never been sentenced to the Department of Corrections (DOC), and "in fact[,] one of the contemplations when we were making a decision to do an open plea was, there was still some sliver of hope there." Counsel stated at the time of the plea negotiations, the State wanted four or five years and defense counsel was going to be asking for probation. Counsel admitted, based on defendant's other priors, he had a hard time recommending probation now. Counsel stated, "Again, it's a tough one for me from the standpoint there was a bit of a surprise because he sure didn't match the person I was

dealing with looking at all those out-of-state priors." Counsel recommended four years in DOC or, alternatively, eight years in DOC with a recommendation for boot camp.

¶ 11 Defendant made the following statement in allocution: "I would like to say, you know, I went down the wrong road, and drug kinds [*sic*] of took control over my life a little bit, but I'm getting back together. If you can, Your Honor, be lenient with me, and I'll try to do better."

¶ 12 The trial court had an opportunity to review the PSI and stated, "Frankly, [defendant], I lost my breath when I was reading your PSI. Granted, a lot of misdemeanors, but my God, I don't know how you've had [time] to do anything else, you've been in and out of the court system so much." The court sentenced defendant to eight years in DOC, noting boot camp would deprecate the seriousness of his criminal history. Defendant did not file any postsentencing motions or a direct appeal.

¶ 13 In February 2012, defendant filed a *pro se* postconviction petition under the Act (725 ILCS 5/122-1 to 122-7 (West 2010)). The trial court advanced defendant's petition to the second stage of postconviction proceedings and appointed counsel to represent defendant. In July 2012, defendant filed an amended postconviction petition. In his amended petition, citing *Strickland v. Washington*, 466 U.S. 668 (1984), defendant alleged his plea was not knowingly and voluntarily made because he (1) received ineffective assistance of counsel for counsel's erroneous advice about the sentence defendant would receive; and (2) was prejudiced by that advice because he had a meritorious defense, *i.e.*, without being advised of his *Miranda* rights (see *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), he was subjected to a warrantless strip search where the cocaine was retrieved from his anus.

¶ 14 In February 2012, the State filed a motion to dismiss defendant's *pro se* postconviction petition. In November 2012, the State filed a memorandum in support of its motion to dismiss, arguing (1) counsel's advice about the sentencing range did not fall outside the range of competence, and (2) defendant had not been prejudiced because he did not have a defense since it was clear from discovery in the case defendant (a) waived his *Miranda* rights, (b) agreed to speak with the agents, (c) admitted he had a plastic bag of crack in the rear waistband of his pants, and (d) consented to a search of the waistband of his pants where the cocaine was found. No warrant was necessary because no strip search was conducted.

¶ 15 At the December 2012 postconviction proceeding, the State argued defendant had not met either prong of the *Strickland* test. Defense counsel argued the trial court provided erroneous advice upon which defendant relied in entering into the open plea, *i.e.*, the maximum sentence he could face was four years' incarceration. Upon questioning, counsel admitted the court had advised defendant at the open plea hearing of the possible range of sentencing, putting defendant on notice of the potential penalties he faced. The court took the matter under advisement.

¶ 16 In January 2013, the trial court dismissed the petition. The court found it had advised defendant of the sentencing range at the plea hearing and defendant indicated he understood the possible sentences. Therefore, the court could not find trial counsel's advice to defendant violated either prong of the *Strickland* test.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant argues the trial court erred in denying his postconviction

petition. He maintains he made a substantial showing his constitutional rights were violated because (1) trial counsel provided him with an erroneous range of punishment, (2) the trial court's admonitions failed to cure the error because they were not sufficiently related to the erroneous advice, and (3) this constitutionally deficient advice was prejudicial since the State's case was based on evidence obtained through a warrantless strip search.

¶ 20 The Act (725 ILCS 5/122-1 to 122-7 (West 2010)) provides a mechanism by which a criminal defendant may assert his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253, 882 N.E.2d 516, 519 (2008). The Act establishes a three-stage process for adjudicating a postconviction petition. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). Here, defendant's petition was dismissed at the second stage of postconviction proceedings. At the second stage of proceedings, a defendant has the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006). A petition may be dismissed at this stage only where the allegations, liberally construed in light of the trial record, fail to make such a showing. *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). All well-pleaded facts not positively rebutted by the record are to be taken as true. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. We review a trial court's dismissal of a postconviction petition at the second stage *de novo*. *Id.*

¶ 21 Ineffective-assistance-of-counsel claims are governed by the familiar two-pronged test set forth in *Strickland* and adopted by the Supreme Court of Illinois in *People v. Albanese*, 104 Ill. 2d 504, 526-27, 473 N.E.2d 1246, 1255-56 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show both counsel's performance was

deficient and the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687.

Put another way, the defendant must show counsel's performance was "objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v. Petrenko*, 237 Ill. 2d 490, 496-97, 931 N.E.2d 1198, 1203 (2010) (quoting *Strickland*, 466 U.S. at 694). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

¶ 22 In the case *sub judice*, defendant argues the trial court erred in dismissing his petition where he was denied effective assistance of trial counsel because of counsel's erroneous advice he would receive a maximum sentence of four years in prison, or eight years in prison if he failed to complete boot camp. Defendant maintains this advice fell below an objective standard of reasonableness because he was not accurately informed of the direct consequences of his plea, thereby making his plea involuntary. Defendant acknowledges the trial court admonished him about the minimum and maximum penalties he could receive but argues (1) the trial court's admonitions at the time of his plea were not sufficiently related to his attorney's erroneous advice to cure the ineffective assistance; and (2) he was prejudiced by this constitutionally deficient advice because, had he been provided with competent advice and gone to trial, he likely would have been successful since the State's case was premised on evidence illegally obtained during a warrantless strip search in which the cocaine was discovered in his anus.

¶ 23 The State initially mentions this case was not defendant's first experience in criminal court, pointing out the eight-plus pages of prior criminal history contained in the PSI.

The State argues defendant told the court at sentencing no promises had been made to cause him to plead guilty, thereby refuting his postconviction allegations.

¶ 24 Defendant relies on *People v. Morreale*, 412 Ill. 528, 107 N.E.2d 721 (1952), to support his argument. In *Morreale*, the supreme court held the trial court's admonitions at the plea proceedings were insufficient to negate the effect of counsel's erroneous advice regarding the defendant's sentence. *Id.* at 533-54, 107 N.E.2d at 724. The court found several circumstances peculiar to the record, which led it to believe the defendant's guilty plea was involuntary. *Id.* at 532, 107 N.E.2d at 724. These factors are not present here. The defendant in *Morreale* pled guilty to the charge of committing a crime against nature and was sentenced to a term of 5 to 10 years' imprisonment. The record demonstrated the defendant initially pled not guilty to the charge and retained counsel to represent him. *Id.* at 529, 107 N.E.2d at 722. When the cause was called for trial, a "youthful associate" of the defense attorney appeared and asked that the matter be continued because defendant's counsel was engaged in the trial of another case. *Id.* at 530, 107 N.E.2d at 722-23. The prosecutor advised the court the matter could be disposed of quickly and asked the case be passed, rather than continued, while he spoke with the defendant's attorney. *Id.* at 530, 107 N.E.2d at 722-23. The prosecutor then sought out the defendant's counsel in another courtroom and suggested the defendant plead guilty and seek probation. When the defendant's counsel stated he could not appear and dispose of the matter that day, the State's Attorney urged counsel's associate to appear on the defendant's behalf. The defendant's counsel acquiesced and his associate advised the defendant to plead guilty. When the defendant expressed doubts about following this course, he was taken to the other courtroom, where his retained counsel told him not to "worry about anything; plead guilty and you will get

probation." *Id.* at 530, 107 N.E.2d at 723. The defendant then returned to the courtroom, withdrew his plea of not guilty and entered a plea of guilty. Subsequently, the trial court denied probation and entered sentence as described above. *Id.* at 530-31, 107 N.E.2d at 723.

¶ 25 In holding the defendant's guilty plea was involuntary, the court in *Morreale* relied upon unique facts not present here. Specifically, the court noted the hurried consultations between the defendant, his attorney, the "youthful associate" and the prosecutor, which took place during a recess of court by passing back and forth between two courtrooms, inevitably engendered confusion and misapprehension. *Id.* at 532-33, 107 N.E.2d at 724. The court also noted the pressure exerted by the prosecutor resulted in denying the defendant representation by the actual counsel of his choice. The haste and manner in which the guilty plea was arranged led the court to believe the defendant was induced to change his plea while confused. Considering all of the circumstances, including the fact the prosecutor was the one who suggested the defendant would not be harmed by pleading guilty, the court found the *Morreale's* guilty plea was not a "knowing and studied attempt to throw himself on the mercy of the court in a hope for milder punishment." *Id.* at 533, 107 N.E.2d at 724.

¶ 26 Here, on the other hand, defendant was not being represented by his counsel's "youthful associate." The State's Attorney was not advising or pressuring defendant to plead guilty in return for a more lenient sentence. Defendant was not "induced to change his plea while confused and in a state of misapprehension." *Id.* at 533, 107 N.E.2d at 724.

¶ 27 Defendant cites *Morreale*, 412 Ill. 2d at 529-32, 107 N.E.2d at 722-24, as well as *Hall*, 217 Ill. 2d at 338-39, 841 N.E.2d at 922-23, *People v. Ramirez*, 162 Ill. 2d 235, 241-245, 642 N.E.2d 1224, 1226-28 (1994), and *People v. Jones*, 144 Ill. 2d 242, 263-67, 579 N.E.2d 829,

838-40 (1991), to argue admonitions cannot remedy the erroneous advice of counsel when the admonitions are not sufficiently related to the prejudicial erroneous advice, *i.e.*, not comprehensive or specific, and, even if sufficiently related, are still insufficient in curing the ineffective assistance when a *Morreale* factor—confusion, misapprehension, or pressure from the state—is present. Defendant maintains the trial court's admonitions were not curative of his counsel's erroneous advice because, when advising defendant of the potential penalties, the court "did not ask a question" but rather made a "conditional" (could) and "declarative statement" when advising defendant, "[a]nd you *could* be sentenced to probation, conditional discharge, periodic imprisonment, be [*sic*] sentenced from [4] to 30 years because of a prior drug offense?" (Emphasis added.)

¶ 28 We fail to see anything wrong with the trial court using the word "could" to advise defendant of the potential penalties the court was allowed to impose at sentencing. In fact, we are hard-pressed to find a better word to be used in these circumstances since this was an open plea with no agreement as to sentencing.

¶ 29 Further, defendant misrepresents the trial court's admonition about potential penalties as a "declarative statement" when he argues the court did not ask him if he understood those penalties until nine questions later. Defendant fails to acknowledge, immediately after the court advised defendant of the potential penalties as quoted above, the court advised defendant about the mandatory supervised release requirements and then immediately asked defendant, "Do you understand all the possible penalties?" Defendant responded, "Yes, sir." Clearly, the admonitions were sufficiently related to the alleged prejudicial erroneous advice and cured any potential confusion or misapprehension defendant may have suffered.

¶ 30 We further note, under the first part of the *Strickland* analysis, where we are tasked with determining whether an attorney's representation fell within professional standards of competence, that determination must be viewed in terms of the reasonableness of the representation in light of the individual facts known to counsel at the time he engaged in the challenged conduct. *Strickland*, 466 U.S. at 690. With this in mind, the record in the case *sub judice* reflects defense counsel's representation fell well within professional standards of competence.

¶ 31 What is clear from the record in this case is, at the time of the plea, defense counsel did not know exactly who he was representing, not because he was incompetent but because defendant obviously had not been honest with his attorney. However, after the PSI was prepared, everyone involved, with the likely exception of defendant himself, was taken aback by the breadth of his criminal history. Defense counsel even asked for a continuance of the sentencing hearing so he could digest the contents of the PSI and verify the out-of-state criminal history reflected therein. Counsel mentioned the "multitude of things in [the PSI] that weren't contemplated and, in fact, I know it will affect how we proceed with our position on this, and it might even result in maybe an agreed disposition." At the sentencing hearing, counsel, when making his recommendations, mentioned, "in fact one of the contemplations when we were making a decision to do an open plea was, there was still some sliver of hope there *** and we were going to be asking for probation." Counsel went on to say, "Again, it's a tough one for me from the standpoint there was a bit of surprise because he sure didn't match the person I was dealing with looking at all those out-of-state priors."

¶ 32 Under these circumstances, it is understandable why defense counsel may have

advised defendant, in his opinion, the trial court would impose a sentence on the minimum side of the scale. In fact, counsel was originally going to ask the court to consider sentencing defendant to probation. But that was before counsel knew about the extent of defendant's criminal history. At sentencing, counsel was hard-pressed to argue for leniency given defendant's staggeringly extensive criminal record. Defendant's lack of candor with the very person advocating for his interests put counsel in a difficult position before the sentencing court.

¶ 33 Counsel provided defendant with effective representation. He negotiated a plea agreement where another pending charge was dismissed and advocated for a lighter sentence than the maximum available to the trial court. In the end, defendant received a sentence far below the maximum, 8 years out of a potential 30 years in DOC. Defendant has failed to prove the first prong of the *Strickland* test.

¶ 34 Because we can affirm the trial court's dismissal of defendant's postconviction petition based on failure to satisfy either prong of the *Strickland* test, we need not discuss the prejudice prong. However, we note defendant failed to satisfy that prong also. The record refutes defendant's allegation the cocaine he possessed with intent to deliver was seized during an unlawful strip search of his anus. According to the Illinois State Police report discussed in the PSI, defendant admitted he had the crack cocaine "hidden in the rear of his pants" where the police recovered a plastic bag containing the cocaine.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2012).

¶ 37

Affirmed.