2015 IL App (1st) 130509-U

THIRD DIVISION
March 11, 2015

No. 1-13-0509

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. 12 CR 3230
	)	
RODNEY JERNIGAN,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Pucinski and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant did not present an arguable claim of the ineffectiveness of counsel representing him during plea proceedings when counsel conveyed six-year sentencing offer to defendant, who rejected offer but later sought to receive that term of years.

¶ 2 Defendant Rodney Jernigan appeals the summary dismissal of his *pro se* post-conviction petition. Jernigan pled guilty to a reduced charge of armed robbery with a dangerous weapon in exchange for a nine-year prison sentence. On appeal, he contends his petition presented an arguable claim of the ineffectiveness of his guilty-plea counsel because counsel did not advise him that the State could withdraw an alleged previous offer of a six-year sentence. We affirm the dismissal of the petition at the first stage of post-conviction review as Jernigan's post-conviction

petition did not state an arguable claim of the ineffectiveness of his guilty-plea counsel. Also, we modify the mittimus to reflect Jernigan's conviction for the offense of armed robbery with a dangerous weapon.

¶ 3 Background

¶ 4 Jernigan was charged with committing armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2012)), a Class X felony subject to a prison sentence of 6 to 30 years, plus a required 15-year sentence enhancement, for an effective sentencing range of 21 to 45 years. 730 ILCS 5/5-8-1(a)(3) (West 2012); 720 ILCS 5/18-2(b) (West 2012). (Charges of unlawful use or possession of a weapon by a felon and aggravated unlawful restraint were nol-prossed as part of defendant's plea.) After the proceedings to be described, Jernigan agreed to plead guilty to armed robbery with a dangerous weapon (720 ILCS 5/18-2(a)(1) (West 2012)), which is a Class X felony but is not subject to the 15-year sentence enhancement. 720 ILCS 5/18-2(b) (West 2012).

¶ 5 A Cook County assistant public defender ("the APD") represented Jernigan and informed the court that he wanted to plead not guilty. She informed the court that Jernigan was attempting to hire private counsel, and the case was continued. At the next date, the APD requested a Rule 402 conference. Following the conference, the court asked Jernigan if he talked to his attorney "about the negotiated settlement," and Jernigan acknowledged that he had. Then this exchange occurred:

> "THE COURT: And she has explained to me that you want to say something?
>
> DEFENDANT: I want to say, sir, I really – I'm not a bad person. I don't feel –

THE COURT: If you were a bad person – and let me explain. I don't think anybody of all of us here think you're a bad person. If you were a bad person, you'd be looking at 21 years in the state penitentiary. But go ahead.

DEFENDANT: Please, could I get a six-year sentence? Please? I mean, I'm sorry.

THE COURT: Rodney, let me explain something.

DEFENDANT: I need a chance. If you could give me a chance, I promise you I will [] do right. I have kids. I want to get home to my kids.

THE COURT: Let me explain something, all right? The State is reducing the charge. They're taking off the 15 years that's on the table. All right? That's the enhancement on your sentence. All right?

They're coming down from 21 years in the state penitentiary, doing 85 percent, down to 9 years in the state penitentiary. You're getting 12 years off, all right?

Because your attorney has presented that you're a good person, and this was not – but the State has to look at the allegations, and it was brought out at the conference that you stuck a gun in somebody's chest. You did it in front of the police. You took their phone. They recovered the gun. They recovered the phone. All right?

So, I mean, it's a substantial case, and that's why they were very reluctant to come off the 21 years.

So it's against my philosophy to make anybody plead guilty. If you want to plead guilty, that's fine. If you don't, that's fine with me also. All right?

But the deal is off the table then. Then you're looking at a minimum, if you're convicted, of 21 years in the state penitentiary. Go ahead.

DEFENDANT: I don't understand how – why I wouldn't be able to get the six? I just need – I can't get another chance?

THE COURT: You're getting a chance."

¶ 6 Jernigan told the court he had no "violent background" and had stayed "out of jail most of [his] whole life." He asserted he had "just made a few mistakes" and that he was "not used to jail or nothing."

¶ 7 The court explained to Jernigan that the offense of armed robbery with a firearm carried a potential sentence of 6 to 30 years, plus a 15-year sentence enhancement. The court continued:

"THE COURT: And the State is willing because of the materials presented by your attorney to come off the minimum of 21 years in the state penitentiary and reduce it down to nine. If you don't think you're getting a break, you'd better start looking in the mirror, all right?

Now, the other thing is, again, I really don't want to force anybody to plead guilty, and I won't force anybody to plead guilty. It's up to you. If you want to accept it, that's fine. If you don't want to accept it, it's off the table.

DEFENDANT: Can I get time to think about it?

THE COURT: How big is the call on Friday? All right. The 24th of April. Then – like I said, then the thing is completely off the table. The State is not going to reduce. Motion defendant 4-24. Conference is entered and continued."

¶ 8 At the next hearing, attorney John Losito appeared as Jernigan's counsel and the APD withdrew from representing Jernigan. The court asked Losito if he wanted to "continue on with the conference." Losito replied in the affirmative. The prosecutor told the court the armed robbery charge against Jernigan would be amended to armed robbery with a dangerous weapon and the remaining counts would be nol-prossed. The court admonished Jernigan he was pleading guilty to armed robbery with a dangerous weapon in exchange for a sentence of nine years in the Illinois Department of Corrections. The court admonished Jernigan that his potential sentence was between 6 and 30 years in prison. Jernigan waived his right to a trial.

¶ 9 In response to the court's questioning, Jernigan confirmed that his guilty plea was of his own free will. The court stated that at the Rule 402 conference it had received a sufficient factual basis for Jernigan's plea. The court entered judgment and informed Jernigan of his appeal rights. Jernigan did not file a motion to withdraw his plea.

¶ 10 Several months later, Jernigan filed a *pro se* petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2012)), asserting that the APD provided ineffective assistance of counsel. The petition stated in pertinent part:

> "I know if]the APD] represented me in a professional manner with patients [*sic*] and care, I could've made a wise decision. When offered 6 years and didn't take it, [the APD] was upset and walked away from me. I didn't know anything about my case. I was told I mite get boot camp [*sic*]. A few days later I ask for 6 years it was off the table. If [the APD] would've explained to me the 6 will be off the table, or give me time to think about it. I could've made a decision. She act [*sic*] as if I done something to her. Honestly

she really wasn't any help. Why didn't she ask me # of times to take 6 years, like she ask me to do a 402 conference, and didn't explain to me."

¶ 11 Later in the petition, Jernigan states: "6 or 7 years, please! I made a terrible mistake."

¶ 12 Jernigan attached to the petition a letter from the Illinois Attorney Registration and Disciplinary Commission to Jernigan responding to a complaint submitted by Jernigan regarding the APD. The letter explained that the ARDC would take no action against the APD unless a court found that she provided ineffective assistance of counsel.

¶ 13 The circuit court, in a written order, dismissed Jernigan's petition as frivolous and patently without merit. The court observed that Jernigan did not allege the APD "failed to inform him of the 6-year plea offer, instead he attempts to argue that counsel should have harassed him into taking the offer." Jernigan now appeals that ruling.

¶ 14 Analysis

¶ 15 Jernigan contends his petition presented an arguable claim of the APD's ineffectiveness so as to withstand the first stage of post-conviction review. Jernigan asserts that the APD did not advise him that the State's initial offer of a six-year sentence "was a limited-time offer" and that she failed to provide him with competent legal advice as to whether he should accept or reject the six-year offer. He contends he would have taken the offer of six years had she fully explained the offer to him and that he was prejudiced by the APD's performance because that sentence would have been shorter than the nine-year term he ultimately accepted. The State responds that neither the record nor any documentation attached to his petition support Jernigan's claim an offer of six years was made. And, even assuming the offer, Jernigan's petition indicates he was informed of the offer and rejected it.

¶ 16 The Act allows a criminal defendant to initiate collateral proceedings to challenge a prior conviction based on allegations of a substantial denial of constitutional rights. *People v. Smith*, 2015 IL 116572, & 9. At the first stage of post-conviction review, the circuit court independently reviews the petition, accepting the allegations as true, and determines whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009).

¶ 17 At this initial juncture, a *pro se* defendant need only allege a "gist" of a constitutional claim, meaning that the petition must "allege enough facts to make out a claim that is arguably constitutional," and not include a fully developed contention supported by documentation. *Id*. at 9, citing *People v. Porter*, 122 Ill. 2d 64, 74 (1988). To state a claim of ineffective assistance of counsel at the first stage of post-conviction review, the petition must show: (1) it is arguable that counsel's performance fell below an objective standard of reasonableness; and (2) it is arguable the defendant was prejudiced by counsel's performance. *People v. Barghouti*, 2013 IL App (1st) 112373, & 13; see also *Strickland v. Washington*, 466 U.S. 668 (1984). We review the circuit court's dismissal of a post-conviction petition at the first stage under the *de novo* standard. *People v. Morris*, 236 Ill. 2d 345, 354 (2010).

¶ 18 A defendant's right to effective assistance of counsel extends to plea negotiations. *People v. Hale*, 2013 IL 113140, & 16. To establish counsel's deficient representation under the first prong set, the defendant must prove counsel's performance akin to not functioning as a "counsel" guaranteed by the sixth amendment. *People v. Manning*, 227 Ill. 2d 403, 416 (2008). The right to decide what plea to enter belongs to the defendant and is not a part of defense counsel's trial strategy. *Id*. But, for purposes of a plea offer or plea negotiations, a criminal defendant "'has the

constitutional right to be reasonably informed with respect to the direct consequences of accepting or rejecting a plea offer.'" (Emphasis omitted.) *Hale*, 2013 IL 113140, & 16, quoting *People v. Curry*, 178 Ill. 2d 509, 528 (1997).

¶ 19 The U.S. Supreme Court recently discussed the obligations of defense counsel in the context of a plea offer carrying a "fixed expiration date" in *Missouri v. Frye*, 132 S. Ct. 1399 (2012). The prosecution in *Frye* sent a letter to defense counsel offering a choice of two plea bargains stating the offers would expire in about 45 days. No one communicated the offers to the defendant. *Id*. at 1404. The Supreme Court held that to show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, a defendant must demonstrate a reasonable probability that he would have accepted the earlier plea offer had he or she received the effective assistance of counsel. *Id*. at 1409. The Court concluded the defendant's counsel was ineffective for permitting the plea offer "to expire without advising the defendant or allowing him to consider it." *Id*. at 1408-09.

¶ 20 Jernigan agreed to plead guilty to the reduced charge of armed robbery with a dangerous weapon, which carries the Class X felony sentencing range of 6 to 30 years in prison. Jernigan did not assert in his petition that the APD failed to inform him of the offer of six years or contend he was not properly advised of the applicable sentencing range. Rather, he contends the APD provided deficient representation in failing to tell him that the State's offer of six years was available for a limited time. Jernigan stated in his petition that when he was offered "6 years and didn't take it, [the APD] was upset and walked away from me." Taking the assertions in Jernigan's petition as true, as required at his initial stage of post-conviction review (*Barghouti*, 2013 IL App (1st) 112373, & 13), that statement strongly suggests that the APD advised him to

accept the offer of six years, as evidenced by his description of her displeasure with his decision to reject the offer. Further support for that conclusion is Jernigan's statement in his petition asking why the APD did not ask him a "# (number) of times" to accept the offer of six years.

¶ 21 Despite Jernigan's assertion that he could have made a better decision had he known the six-year offer would be "off the table" several days later, the statements in his petition indicate he was allowed to consider the offer before it expired. Whether to accept or reject the offer was Jernigan's decision alone. See *Manning*, 227 Ill. 2d at 416. This court has observed that a defendant's role in seeking a plea agreement "is not to 'haggle' with the prosecutor by directing counsel during the negotiation process; his or her role is to decide whether to accept or reject the plea agreement" reached by defense counsel and the State. *People v. Robinson*, 2012 IL App (4th) 101048, && 33-36 (further noting that plea negotiations are governed by contract law, under which a "rejected offer cannot be revived by a later acceptance.")

¶ 22 Jernigan cites *Barghouti*, 2013 IL App (1st) 112373, as an example of an arguable post-conviction claim of the ineffectiveness of guilty-plea counsel. There, the defendant alleged that his attorney did not correctly advise him of the applicable range of sentences, leading him to reject a plea offer of 12 years, and incur a sentence of 35 years in prison. *Id*. && 6-8. The affidavits of the defendant and the defendant's father accompanying the post-conviction petition in *Barghouti* attested that defense counsel told them of a possible sentencing range of 8 to 10 years in prison as opposed to the actual range of 6 to 60 years. *Id*. && 7-9. This court held that the defendant had established prejudice from defense counsel's incorrect advice because the actual sentence greatly exceeded the State's plea offer, and the defendant arguably suffered

prejudice because he would have accepted the 12-year offer had he known the correct range of sentences to which he was subject. *Id*. & 18.

¶ 23 Unlike in *Barghouti*, Jernigan acknowledges he was informed of the plea offer of six years but instead contends that after his initial rejection of the offer, he should have been given more time to change his mind. Because Jernigan's counsel informed him of the State's offer of six years and Jernigan was able to consider that offer, Jernigan has not established an arguable claim of counsel's deficient performance.

¶ 24 Finally, Jernigan asserts, and the State correctly concedes, that the mittimus should be modified to accurately reflect Jernigan's conviction as armed robbery with a dangerous weapon. Section 18-2(a)(1) (720 ILCS 5/18-2(a)(1) (West 2012). A review of the mittimus reveals that it incorrectly lists the conviction as armed robbery with a firearm under section 18-2(a)(2) of the Criminal Code of 2012 (720 ILCS 5/18-2(a)(2) (West 2012)), the offense with which he was charged. We direct the circuit court to correct the mittimus to reflect the offense for which Jernigan plead guilty. See *People v. Cotton*, 393 Ill. App. 3d 237, 268 (2009) (remand not required for correction of the mittimus).

¶ 25 Affirmed as modified.