2015 IL App (1st) 131940-U

THIRD DIVISION
May 20, 2015

No. 1-13-1940

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. 08 CR 16465
	)	
THEOPHILUS JOHNSON,	)	Honorable
	)	Larry G. Axelrood,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant did not make a substantial showing of prejudice to warrant an evidentiary hearing on his postconviction petition alleging ineffective assistance of trial counsel for failure to present mitigation testimony during sentencing.

¶ 2 Following a bench trial, 51-year-old defendant Theophilus Johnson was convicted of robbery and sentenced to a Class X term of 23 years in prison. Defendant filed a postconviction petition alleging ineffective assistance of trial and appellate counsel. In response, the State filed a motion to dismiss, which was granted by the trial court after a hearing. Defendant appeals from

this ruling, alleging the trial court erred because his petition made a substantial showing of ineffective assistance of counsel during sentencing based on failure to present available mitigation testimony.

¶ 3 Defendant was charged with armed robbery for stealing the victim Ryan Pilot's wallet while on the red line train of the "El." Prior to trial, the State filed notice of its intent to seek that defendant be adjudged a habitual offender and sentenced to natural life imprisonment alleging that by committing the armed robbery defendant had committed his third Class X felony. Pilot, at trial, testified he boarded the train and fell asleep after leaving a friend's house sometime around 4 a.m. on August 2, 2008. He awoke to defendant standing over him and demanding that Pilot give him his wallet. When Pilot refused and stood up to exit at the next stop, defendant spun him around, cut open his right rear pocket with a "shiny, sharp object," grabbed his wallet when it fell onto the seat, and fled the scene when the train stopped at the next station. The next day, Pilot verified multiple unauthorized transactions had been made with his credit card and called the police. He was able to identify defendant from a photo array and later in a lineup. When the police brought defendant in for questioning, he told the investigating officers that he was part of a group known as the "sleep thief crew," that stole wallets from El riders that appeared to be sleeping or drunk by cutting the victims' pockets with razor blades. Investigators were able to link the unauthorized purchases on Pilot's credit card to defendant.

¶ 4 Although the State argued for a conviction on the armed robbery charge and a finding that defendant was a habitual criminal, the trial court found defendant guilty of the lesser included offense of robbery.

¶ 5 During sentencing, defendant entered a guilty plea to attempted robbery in an unrelated case, which carried a sentencing range of 2 to 10 years. The sentencing range for defendant's

robbery conviction was the Class X 6 to 30 years because of his criminal background. The State requested defendant receive maximum consecutive sentences for both convictions, resulting in an aggregate 40 years' imprisonment. The State argued his prior convictions, the length of his criminal activity, and the threat he posed to public safety by "terrorizing people on the train," justified the maximum sentence. During defendant's statement in allocution, he stated:

> "I know I did wrong. I'm sorry. I'm too old for this. My life of crime is over with, man. I can't take it. I lost a brother in December since I've been here. My mom passed in '94, my little brother in '95. I've got a brother right now they say he ain't going to make it. And I'm just through, man. "

Defense counsel requested a sentence "in the single digits," arguing a minimal sentence was deserved in light of defendant's remorse, current health conditions, age, and family history of illness and death. No additional mitigation evidence or testimony was presented.

¶ 6 The presentence investigation report (PSI) included five prior felony offenses including two for Class X armed robberies with additional theft, robbery, possession, and criminal trespass convictions dating back to July 1982. It also detailed defendant's history of substance and alcohol use since age 13, his current medical history detailing several physical health problems, the death of defendant's family members, and his past participation in a substance abuse treatment program. The trial court ultimately sentenced defendant to 23 years' imprisonment for the robbery conviction, and 6 years' for the attempt robbery, to run concurrently, and allowed for a presentence incarceration credit of 426 days. The trial court stated:

> "[T]he Court considering the nature and circumstances and the seriousness of these offenses, the facts and evidence that were heard at trial and this hearing, the matters set forth in the PSI, the arguments of Counsel, the statement of the defendant, and

> specifically considering the statutory factors in aggravation and mitigation, including but not limited to the history, age, and character of the defendant, the defendant's rehabilitative potential and the need to protect society and to deter this defendant and others from this type of criminal misconduct in the future, the Court at this time will impose a sentence which is fair and appropriate."

¶ 7 On direct appeal, defendant argued only that he was entitled to an additional day of presentence credit. This court denied defendant's request and affirmed the trial court's judgment. *People v. Johnson*, No. 1-09-3209 (2011) (unpublished order under Supreme Court Rule 23).

¶ 8 Defendant filed a *pro se* postconviction petition alleging ineffective assistance of counsel based on trial counsel's failure to investigate the facts of the case prior to the grand jury proceeding which resulted in an indictment on false evidence; ineffective assistance based on trial counsel's failure to present witnesses on his behalf during the sentencing hearing which could have "opposed" the sentence; and ineffective assistance of appellate counsel based on failure to raise the aforementioned claims on direct appeal. Attached to his petition, defendant submitted five affidavits from his sisters, Lizzie, Pamela, Sharon, and Deborah Johnson, and fiancée, Annie Wright, stating they were told by defendant's trial counsel they would be able to testify on his behalf during sentencing, that they would have done so given the opportunity, and that trial counsel failed to notify them of the date of the sentencing hearing. Defendant's *pro se* postconviction petition was advanced to the second stage and postconviction counsel was appointed.

¶ 9 Defendant's postconviction counsel filed an amended postconviction petition alleging trial counsel knew of mitigating evidence from these affiants and failed to present and investigate

such testimony, and supplemented defendant's original petition with five affidavits outlining the testimony his family would have presented if given the opportunity.

¶ 10 The affidavit from Lizzie Johnson averred that defendant turned to drugs and alcohol after his mother and brother died. She argued her brother could be reformed if provided substance abuse treatment prior to his release and claims "the system failed [her] brother by not giving him the treatment he needed." The affidavit from Pamela Johnson stated that defendant's "mental health [is not] good," and also stated defendant's brother has lung cancer. Sharon Johnson's affidavit outlined defendant's inability to deal with his brother's illness, and also stated defendant "is very childlike" and "sometimes can't understand the things that he does." Deborah Johnson indicated defendant had problems during his youth but did not receive help because "[he] came from a big family with little money," and his issues worsened as he became older and compounded due to family death and illness, which eventually led to drug use. Finally, Wright wrote defendant was "a good guy" that had "bad drug[s]" and "was not in his right mind."

¶ 11 The State filed a motion to dismiss defendant's postconviction petition contending defendant did not make a substantial showing that his right to effective assistance of counsel was violated because he could not show deficient performance or prejudice. The State argued, in part, that the failure to present character witnesses during sentencing was trial strategy and their testimony would have been primarily cumulative to the evidence presented in the PSI and defense counsel's argument. The State also argued that defendant did not show actual prejudice with regard to sentencing because he was found guilty of a lesser-included offense, instead of the offense for which he was charged which carried a harsher sentence. The State finally argued that because of trial counsel's argument in mitigation, defendant received lesser concurrent sentences for his convictions, instead of the maximum consecutive sentences requested by the State.

¶ 12 In response, postconviction counsel conceded that parts of the family members' testimony may have been cumulative, but maintained that the affidavits conveyed additional evidence not included in the PSI (like defendant's mental capacity) and would have expanded on the information already included. The trial court then questioned counsel as follows:

> "THE COURT: Let me ask you a question. He was looking at natural life.
>
> [POSTCONVICTION COUNSEL]: True, Your Honor; before trial.
>
> THE COURT: Before trial. The attorney was able to get him convicted on a lesser-included, which meant that it was not a mandatory life.
>
> ***
>
> THE COURT: The trial attorney was also capable and able and did convince the judge not to do a consecutive sentence, correct?"

¶ 13 The trial court granted the State's motion to dismiss defendant's postconviction petition and explained:

> "I just don't see anything to substantiate any ineffective actions. I would say quite the opposite. [Defendant] got great representation by the Office of the Public Defender from inception to this point."

¶ 14 On appeal, defendant contends he made a substantial showing of ineffective assistance based upon trial counsel's failure to present mitigating testimony during sentencing and requests this court grant an evidentiary hearing on the matter. In the alternative, defendant requests this court remand the cause back to the trial court for a proper second-stage postconviction hearing because the trial court improperly analyzed defendant's claim and relied on knowledge outside the record to make its determination.

¶ 15 Defendant first argues that his postconviction petition warrants an evidentiary hearing because he made a substantial showing of ineffective assistance of counsel during sentencing where the petition alleged that his trial counsel rendered deficient performance because she failed to investigate and present potential sources of mitigating evidence, and that he was prejudiced by such error because he would have received a lesser sentence had this testimony been presented.

¶ 16 There are three stages of the postconviction process. *People v. Pendleton,* 223 Ill. 2d 458, 472-73 (2006). The purpose of the second stage is to determine whether defendant is entitled to an evidentiary hearing based upon the plain language in his petition. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If the State responds by filing a motion to dismiss at this stage, the trial court may only rule on the legal sufficiency of defendant's claim as stated in the petition. *People v. Ward*, 187 Ill. 2d 249, 255 (1999). Dismissal is warranted if defendant fails to make a substantial showing that his constitutional rights were violated which would necessitate relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2012)) if proven true at an evidentiary hearing. *Coleman,* 183 Ill. 2d at 381; *People v. Domagala*, 2013 IL 113688, ¶ 35. At this stage of the proceedings, the trial court must not engage in any fact-finding or credibility determinations; all well-pleaded facts are to be taken as true. *People v. Caballero*, 126 Ill. 2d 248, 259 (1989); *Domagala,* 2013 IL 113688, ¶ 35. The trial court's dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*. *Coleman,* 183 Ill. 2d at 389.

¶ 17 Claims alleging ineffective assistance of counsel are judged against the standards set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at 397. Under *Strickland,* a defendant alleging ineffective assistance of counsel must establish that defense counsel rendered performance that fell below an objective standard of reasonableness, and that

defendant was prejudiced because of this deficient performance. *Strickland*, 466 U.S. at 688, 694; *People v. Morgan*, 187 Ill. 2d 500, 529-30 (1999). Prejudice means a reasonable probability that but for counsel's deficient performance, the outcome at sentencing would have been different. *People v. Daugherty*, 204 Ill. App. 3d 614, 618 (1990). If the claim may be disposed of on grounds that defendant suffered no prejudice, a court need not determine whether counsel's performance was deficient. *People v. Griffin*, 178 Ill. 2d 65, 74 (1997).

¶ 18 Here, defendant argues that the mitigating evidence he attached to his petition made a substantial showing of prejudice because it proves he would have received a lesser sentence, and any increase in prison time, however small, is sufficient to establish prejudice. Defendant argues the Supreme Court holding in *Glover v. United States*, 531 U.S. 198 (2001), supports this proposition.

¶ 19 The Supreme Court in *Glover* rejected the contention that an increase in sentence must be "significant" in order to show prejudice, holding that any increase may suffice. See generally *Glover*, 531 U.S. 198. The *Glover* Court, however, expressly rejected its application to the argument defendant now asserts. *Id.* at 204 ("This is not a case where trial strategies, in retrospect, might be criticized for leading to a harsher sentence.").

¶ 20 Furthermore, the defendant in *Glover* alleged actual prejudice by presenting evidence that the class of his offense was mistakenly increased by two classes, resulting in a sentence between 6 to 21 months greater than the sentence he should have received. *Id.* at 200. Defendant makes no such showing in the present case, submitting only that he received substantially more than the minimum sentence and that there was additional evidence in mitigation to be considered.

¶ 21 Defendant also relies on *People v. Towns*, 182 Ill. 2d 491, 521 (1998), and similar capital sentencing cases where the Illinois Supreme Court rejected the argument that much of the proposed mitigation was cumulative to the PSI and remanded the cause for an evidentiary hearing. In *Towns*, the supreme court concluded that the proposed mitigation testimony would have provided a more complete picture of defendant's background, including specific details. *Id.* at 521. Defendant's reliance on *Towns*, however, is inapposite.

¶ 22 A capital sentencing hearing requires the balance of aggravating and mitigating factors in order to determine whether defendant receives one of two sentences – "life or death." See generally *People v. Pulliam*, 176 Ill. 2d 261 (1997). The "consideration of mitigating factors does not concern the enhancement of [a] defendant's sentence because once a defendant is found eligible for the death penalty, the prescribed statutory maximum is death." *People v. Harris*, 206 Ill. 2d 293, 327 (2002). Therefore, any evidence in mitigation, however small, may theoretically "tip the scale" in favor of a different outcome.

¶ 23 In non-capital cases, the balance of aggravating and mitigating factors can produce any number of available outcomes within a given sentencing range, because the sentence must be based upon the "particular circumstances of each individual case." *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). Furthermore, the proffered "mitigating" evidence does not necessarily have to be considered as such. See *People v. Peeples*, 205 Ill. 2d 480, 552 (2002). It follows, therefore, when evaluating whether a defendant has been prejudiced by defense counsel's failure to present specific evidence during sentencing in non-capital cases, a reviewing court may consider the strength of the proposed mitigating evidence and whether the admission of such evidence might have actually been harmful to defendant's case. *Id.* at 550. As such, the mere availability of a lesser sentence is insufficient to demonstrate a substantial showing of actual prejudice. See

People v. Olinger, 176 Ill. 2d 326, 363 (1997) ("pure speculation falls far short of the demonstration of actual prejudice required by *Strickland*"); see also *People v. Palmer*, 162 Ill. 2d 465, 481 (1994) ("Proof of prejudice, however, cannot be based on mere conjecture or speculation as to outcome").

¶ 24 The proposed mitigating evidence in defendant's affidavits does not substantially support the conclusion that absent the allegedly ineffective representation, there is a reasonable probability defendant would have received a lesser sentence. See *Daugherty*, 204 Ill. App. 3d at 618. The affidavits defendant submitted are largely cumulative to the evidence presented in the PSI and by defendant himself. Moreover, in light of defendant's lengthy criminal history that spanned decades and included multiple convictions for the same and/or similar offenses, evidence that defendant is a "good guy," grew up poor, or a layperson's opinion that defendant is "child-like," is not so significant that it reasonably suggests the trial court would have imposed a lesser sentence. This is especially true given much of the proposed evidence could also have been considered in aggravation. *Griffin*, 178 Ill. 2d at 74; *People v. Shatner*, 174 Ill. 2d 133, 160 (1996) (evidence of a troubled childhood, educational disabilities, and history of drug use could be considered mitigating or aggravating evidence).

¶ 25 Therefore, because defendant's claim of prejudice relies solely on the basis that he received more than the minimum sentence, and we do not believe the weight of the aggravating and mitigating factors reasonably suggests he would have received a lesser sentence, we cannot find that defendant has made a substantial showing of actual prejudice to warrant an evidentiary hearing.

¶ 26 Defendant next contends the trial court applied an improper analysis during the second-stage hearing and relied on knowledge outside of the record. He requests this court, in the

alternative, remand the cause to the trial court for a second-stage rehearing if we do not find an evidentiary hearing was warranted.

¶ 27 Our analysis of defendant's appeal from the trial court's dismissal of his second-stage postconviction petition was conducted under a *de novo* standard of review. See *Coleman*, 183 Ill. 2d at 389. The remedy for improper dismissal at a second-stage hearing is to remand the cause for an evidentiary hearing, advancing the postconviction claim to the final stage of proceedings without a second-stage rehearing. See *Id.* at 396; see also *Pendleton*, 223 Ill. 2d at 472-73 (after second-stage postconviction petition advances to "third stage" evidentiary hearing). This is because under a *de novo* standard, the reviewing court is not bound to defer to the trial court's judgment or reasoning; our analysis and conclusions are completely independent from that of the trial court. See *People v. Vincent*, 226 Ill. 2d 1, 14 (2007). The reviewing court essentially takes the place of the trial court and performs the same analysis the trial court would have performed. See *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 48. Therefore, we are unconcerned with the trial court's method and manner of analysis because our own review takes its place, and our analysis concluded defendant did not make a substantial showing of prejudice to warrant an evidentiary hearing on his postconviction ineffective assistance claim. See *People v. Reid*, 2014 IL App (3d) 130296, ¶ 19.

¶ 28 For these reasons, the judgment of circuit court of Cook County is affirmed.

¶ 29 Affirmed.