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2015 IL App (3d) 130369-U

Order filed February 23, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0369
JASON W. PRUITT,)	Circuit No. 3-CF-137
Defendant-Appellant.)	Honorable Cynthia M. Raccuglia, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice McDade and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Plea counsel was not ineffective where defendant rejected a 19-year plea offer, only for trial counsel to argue for a 20-year sentence at a subsequent open-plea sentencing hearing. Defendant rejected the 19-year offer against counsel's advice, and counsel argued for 20 years as a realistic option when contrasted against the State's recommendation of 30 years.

¶ 2 After turning down a plea deal that included a sentence of 19 years' imprisonment, defendant, Jason W. Pruitt, entered into a guilty plea agreement that was open as to sentencing, other than a recommended cap of 30 years' imprisonment. At the sentencing hearing, the State

recommended a 30-year sentence, and defense counsel argued for a 20-year sentence. The trial court sentenced defendant to 30 years' imprisonment. Defendant filed a petition for postconviction relief, arguing that his counsel was ineffective for advising him to reject the 19-year plea deal and then arguing for a 20-year sentence during sentencing on the blind plea. The circuit court denied the petition following an evidentiary hearing. Defendant appeals, arguing ineffective assistance of counsel. We affirm.

¶ 3

FACTS

¶ 4

Defendant was charged with two counts of unlawful possession of a controlled substance (cocaine) with intent to deliver (counts I and II) (720 ILCS 570/401(a)(2)(A) (West 2002)), residential burglary (count III) (720 ILCS 5/19-3 (West 2002)), and unlawful possession of a stolen vehicle (count IV) (625 ILCS 5/4-103(a)(1) (West 2002)). Counts II, III, and IV occurred while defendant was on bond on count I; as a result, any sentence on count I was required to run consecutively to counts II, III, and IV. 730 ILCS 5/5-8-4(h) (West 2002).

¶ 5

The record is clear that the State offered defendant a plea deal under which he would plead guilty to all four counts and receive an aggregate sentence of 19 years' imprisonment. Defendant rejected that offer.

¶ 6

The State later added two counts of unlawful possession of a controlled substance (cocaine) (counts V and VI) (720 ILCS 570/402(a)(2)(A) (West 2002)) and criminal trespass to a residence (count VII) (720 ILCS 5/19-4(a)(2) (West 2002)).

¶ 7

Defendant accepted the State's offer to plead guilty to counts IV through VII, with a recommended sentencing cap of 30 years' imprisonment. The court accepted the plea, and the cause proceeded to sentencing. The sentence on count V was required to run consecutively to the sentences on counts IV, VI, and VII. See 730 ILCS 5/5-8-4(h) (West 2002). Because of

defendant's prior criminal history, counts V and VI were subject to Class X sentencing. 730 ILCS 5/5-5-3(c)(8) (West 2002). At the sentencing hearing, the State recommended a 30-year sentence. Defense counsel argued for a 20-year sentence. The court sentenced defendant to 10 years on count IV; 15 years on count V; 15 years on count VI; and 6 years on count VII, for an aggregate sentence of 30 years. Defendant did not file a motion to reconsider the sentence, nor did he pursue a direct appeal.

¶ 8 Defendant filed a *pro se* petition for postconviction relief (725 ILCS 5/122-1 *et seq.* (West 2006)). In it, he argued that trial counsel was ineffective for advising him to reject the 19-year plea offer only to argue for a greater sentence—20 years' imprisonment—at the sentencing hearing. According to defendant, he rejected the 19-year plea offer based on counsel's advice that, if sentenced by the court, defendant would receive less than 19 years' imprisonment. The court appointed counsel, and the petition proceeded to an evidentiary hearing.

¶ 9 At the hearing, defendant's plea counsel, Fred Cohn, testified that he did not file a motion to reconsider the court's 30-year sentence. Defendant presented testimony that Cohn had promised to file the motion but failed to do so. The court stopped the testimony and stated that defendant should have had the opportunity to challenge his sentence in a motion to reconsider. The court granted defendant leave to file a motion to reconsider the 30-year sentence without addressing the remainder of defendant's postconviction petition.

¶ 10 Defendant, still represented by appointed postconviction counsel, filed a motion to reconsider his sentence, arguing that the court failed to consider various sentencing factors, including his history of substance abuse and his struggles with bipolar disorder. The court denied the motion. Defendant filed a direct appeal from the denial of his motion to reconsider sentence, arguing that the 30-year sentence was excessive and an abuse of discretion. This court

affirmed defendant's sentence on appeal. *People v. Pruitt*, No. 3-07-0942 (2009) (unpublished order under Supreme Court Rule 23).

¶ 11 In 2012, defendant filed another petition for postconviction relief, again raising ineffective assistance of plea counsel. The court appointed counsel. The State moved to dismiss the petition, arguing, among other things, that it was a successive petition and that defendant had not demonstrated cause and prejudice necessary to file it. See 725 ILCS 5/122-1(f) (West 2012). Defendant responded that the claims in his first petition were never ruled upon and that he had a right to have the court rule upon those claims through his new petition. The court found that defendant was entitled to an evidentiary hearing on his ineffective assistance claims, as those claims had not been ruled upon during the proceedings on the first petition.

¶ 12 At a hearing on the petition, Cohn testified about his representation of defendant. He explained that the State had offered a 19-year plea deal. Cohn advised defendant to accept the offer because the court would likely sentence defendant to more than 19 years' imprisonment if the cause proceeded to sentencing before the judge. Defendant was "adamant" that he would not accept the 19-year plea offer. Cohn communicated defendant's rejection to the State and made a counteroffer of 14 years' imprisonment. The State rejected that offer.

¶ 13 Approximately two months later, defendant entered a guilty plea to counts IV through VII. The plea included a recommended sentencing cap of 30 years' imprisonment. Cohn argued for a 20-year sentence at the sentencing hearing because he thought it was a realistic request given the State's argument for a 30-year sentence. Cohn thought an argument for less than 20 years' imprisonment would have been discounted by the court as too lenient.

¶ 14 Defendant testified that Cohn encouraged him to reject the 19-year plea offer because Cohn believed he could argue for and receive a lesser sentence from the court. According to

defendant, Cohn told him, "I'm going to try to get you less." Cohn promised that he would argue for 12 to 14 years' imprisonment before the court.

¶ 15 The court denied the petition, finding it would have sentenced defendant to 30 years' imprisonment no matter what sentence defense counsel requested at the hearing. Defendant appeals.

¶ 16 ANALYSIS

¶ 17 On appeal, defendant argues that Cohn provided ineffective assistance of counsel. To succeed upon a claim of ineffective assistance of counsel, a defendant must establish: (1) that his attorney's performance was deficient, *i.e.*, was unreasonable under prevailing professional norms; and (2) a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish deficient performance, a defendant must overcome the strong presumption that counsel's actions were the result of sound trial strategy. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007). A defendant must show that his counsel's performance was so deficient that he did not function as the counsel guaranteed by the sixth amendment. *Id.* at 342.

¶ 18 Both prongs of *Strickland* present mixed questions of law and fact. *Strickland*, 466. at 698. Hence, we review the circuit court's factual findings as against the manifest weight of the evidence and review its ultimate legal conclusions *de novo*. *People v. Coleman*, 2015 IL App (4th) 131045, ¶¶ 61-67.

¶ 19 Defendant argues that Cohn provided deficient performance at the sentencing hearing by requesting a sentence of 20 years' imprisonment after having (1) advised defendant to reject an offer of 19 years' imprisonment, and (2) promised his client that he would argue for 12 to 14 years' imprisonment at the sentencing hearing. As a remedy, defendant requests that we vacate

his sentence and plea and remand the cause with instructions for the State to reoffer the 19-year plea deal.

¶ 20 We begin by addressing the court's factual findings made based on the testimony provided at the evidentiary hearing. Defendant testified that Cohn advised him to reject the 19-year offer because he would get a lesser sentence if sentenced by the court. Cohn testified that he advised defendant to accept the 19-year offer because he thought defendant would receive a greater sentence from the court. The court found Cohn's testimony more credible: "I have testimony from Mr. Cohn who says he told [defendant] to take 19 years. And in hindsight he should have taken 19 years. But he refused 19 years. Legitimately." Whether to accept or reject a plea offer is defendant's decision to make, not counsel's. *People v. Brown*, 309 Ill. App. 3d 599, 605 (1999). Here, the circuit court found that defendant chose to reject the 19-year offer despite counsel's advice to the contrary. Therefore, the decision to reject the 19-year offer cannot serve as a basis for an ineffective assistance of counsel claim.

¶ 21 We must therefore determine whether counsel's recommendation at sentencing that the court sentence defendant to 20 years' imprisonment was deficient, when considering that defendant had previously rejected an offer of 19 years' imprisonment. We find that counsel's performance at sentencing was not deficient for two reasons.

¶ 22 First, counsel's decision to argue for 20 years' imprisonment at the sentencing hearing was a strategic decision. As such, it is "virtually unchallengeable." *People v. Gosier*, 165 Ill. 2d 16, 22 (1995). Cohn testified that he argued for 20 years fully aware that defendant had recently rejected an offer for 19 years. Cohn did so because "I believe[d] that to ask for 10 or 15 would be a foolish attempt. In negotiations you have to be realistic." He continued, "My experience in negotiations is the best way to get something close to what you want is to ask for something

close to what you think you can get." Cohn was aware that defendant preferred a sentence less than 19 years. However, Cohn did not think that the court would impose such a lenient sentence under the circumstances. Cohn therefore made the strategic decision to recommend 20 years, which he thought was the most realistic strategy to secure the least onerous sentence possible.

¶ 23 Second, circumstances had changed since defendant rejected the 19-year offer. At the time defendant chose to reject the offer, the State had not stated its intention to recommend 30 years' imprisonment before the court. When that change in circumstances happened, Cohn responded accordingly. Even if Cohn had believed that a sentence of less than 15 years was possible at the time defendant rejected the 19-year offer, changing circumstances may have made it foolish to argue for such a sentence at the sentencing hearing.

¶ 24 In addition, even if Cohn had performed deficiently at sentencing, defendant did not suffer prejudice. To establish prejudice in the present case, defendant must show a reasonable probability that, had Cohn recommended a sentence less severe than 19 years' imprisonment, the court would have imposed a lesser sentence than 30 years' imprisonment. Cohn argued for 20 years' imprisonment, and the court sentenced defendant to 30 years. It is hard to fathom how the court's sentence would have changed had Cohn argued for 12 to 14 years' imprisonment instead of 30 years. Indeed, in denying defendant's petition, the court stated that it was committed to a 30-year sentence, regardless of defense counsel's recommendation. Under such circumstances, there was not a reasonable probability that a different recommendation by Cohn would have affected defendant's sentence.

¶ 25 For the foregoing reasons, defendant's claim of ineffective assistance of counsel fails, and the court properly denied his petition for postconviction relief.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of La Salle County is affirmed.

¶ 28 Affirmed.