

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).

2015 IL App (3d) 130563-U

Order filed December 9, 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 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0563
)	Circuit No. 09-CF-2086
RANDALL W. SYLER,)	Honorable
Defendant-Appellant.)	Daniel J. Rozak, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in summarily dismissing defendant's *pro se* postconviction petition where the petition stated the gist of a claim of ineffective assistance of counsel.

¶ 2 Defendant, Randall W. Syler, appeals the summary dismissal of his postconviction petition. We find that defendant's petition stated an arguable claim of ineffective assistance of counsel where defendant alleged that defense counsel failed to advise him during plea negotiations that he was eligible for extended-term sentencing and, as a result, he rejected a plea

offer for half the prison time to which he was ultimately sentenced. Consequently, we reverse and remand for further postconviction proceedings.

¶ 3

FACTS

¶ 4

Defendant was charged with residential burglary (720 ILCS 5/19-3(a) (West 2008)). At defendant's arraignment, the trial court advised defendant that he could be sentenced to a term of 4 to 15 years' imprisonment for residential burglary but did not advise defendant that he was extended-term eligible. The trial court then appointed the public defender, who was present in court. Defendant pled not guilty through counsel. Following a trial, a jury found defendant guilty of residential burglary.

¶ 5

At the sentencing hearing, the prosecutor advised the trial court that defendant was extended-term eligible. Defense counsel requested that the trial court not sentence defendant to an extended term but rather sentence him to under 15 years' imprisonment. The trial court took the matter under advisement.

¶ 6

At the next hearing, the trial court noted that defendant had two prior felonies that were Class 2 or greater and asked if defendant was subject to Class X sentencing, *i.e.*, 6 to 30 years' imprisonment with no probation. The prosecutor and defense counsel agreed that defendant was subject to Class X sentencing. Defense counsel then asked if the trial court would pass the case so that she could speak to defendant about the sentencing range. The trial court agreed to pass the case. When the case was recalled, the prosecutor conceded that defendant was not subject to Class X sentencing. Rather, the prosecutor stated, defendant was subject to extended-term sentencing on a Class 1 felony, *i.e.*, 4 to 30 years' imprisonment. Defense counsel agreed. The trial court sentenced defendant to 20 years' imprisonment.

¶ 7

Defendant filed a motion to reconsider sentence, which was denied.

¶ 8 On direct appeal, defendant argued that: (1) the trial court committed plain error in failing to conduct a fitness hearing; (2) he was denied a fair trial due to the prosecutor's improper remarks during closing arguments; and (3) his 20-year prison sentence was excessive. *People v. Syler*, 2012 IL App (3d) 100913-U, ¶ 2. We affirmed defendant's conviction and sentence. *Id.*

¶ 9 Defendant filed a *pro se* postconviction petition in which he argued that his trial counsel was ineffective in failing to inform defendant that he was subject to extended-term sentencing, which caused him to reject a plea offer for 10 years' imprisonment. Defendant claimed that he had been told by the trial court at arraignment that he faced a sentencing range of 4 to 15 years' imprisonment if convicted and did not learn until his sentencing hearing that he could be sentenced from 4 to 30 years' imprisonment. Defendant further claimed that his due process rights were violated by the trial court's failure to hold a fitness hearing and that his trial counsel was ineffective for failing to insist that said hearing be held.

¶ 10 The trial court summarily dismissed defendant's petition, finding it to be frivolous and patently without merit. The trial court reasoned that defendant's claims regarding the failure to hold a fitness hearing were barred by the doctrine of *res judicata* because they were addressed on direct appeal. With regard to defendant's ineffective assistance of counsel claim based on defense counsel's failure to advise defendant regarding his extended-term eligibility, the trial court reasoned that defendant failed to show that defense counsel's performance was deficient or that he was prejudiced by it. The trial court noted that the only sentencing-range issue at the sentencing hearing was whether defendant was subject to Class X or extended-term sentencing. Either way, defendant faced a maximum of 30 years' imprisonment. The trial court also noted that defendant did not offer an affidavit stating that the State ever offered a 10-year plea deal. The trial court went on to state: "More importantly, by what [extra sensory perception]

ESP/fortune telling can he be so certain that the court would have concurred [with the plea agreement]."

¶ 11

ANALYSIS

¶ 12

I. Counsel's Failure to Inform Defendant of Extended-Term Eligibility

¶ 13

On appeal, defendant initially argues that his petition stated the gist of a claim of ineffective assistance of counsel based on defense counsel's failure to advise defendant that he was subject to extended-term sentencing, *i.e.*, 4 to 30 years' imprisonment, during plea negotiations. Defendant believed the maximum sentence he could receive was 15 years' imprisonment because the trial court had advised him at arraignment that he faced a sentencing range of 4 to 15 years' imprisonment. As a result, defendant rejected a plea offer for 10 years' imprisonment.

¶ 14

At the first stage of postconviction proceedings, a circuit court may summarily dismiss a postconviction petition if the court determines that the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). A petition is frivolous or patently without merit if it has no "arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). The petitioner faces a low threshold at the first stage of postconviction proceedings where "[t]he allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim." *People v. Brown*, 236 Ill. 2d 175, 184 (2010). Our review of the trial court's first-stage summary dismissal of defendant's petition is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 15

We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel cannot be summarily dismissed by the circuit court if "(i) it is arguable that counsel's performance fell below an objective standard of

reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17.

¶ 16

A. Deficient Performance

¶ 17

Here, defendant's petition stated an arguable claim that defense counsel's performance fell below an objective standard of reasonableness where defense counsel allegedly failed to advise defendant that he was eligible for extended-term sentencing at the time of plea negotiations. Our supreme court has held:

"A criminal defendant has the constitutional right to be *reasonably* informed with respect to the direct consequences of accepting or rejecting a plea offer. [Citations.] Concomitantly, a criminal defense attorney has the obligation to inform his or her client about the maximum and minimum sentences that can be imposed for the offenses with which the defendant is charged." (Emphasis in original.) *People v. Curry*, 178 Ill. 2d 509, 528 (1997).

¶ 18

In *Curry*, the court held that defense counsel's performance was constitutionally deficient where, during plea negotiations, counsel misadvised the defendant of the probable sentence he would receive if convicted at trial because counsel was unaware of a statute which provided that the defendant was subject to mandatory consecutive sentencing for the charged offenses. *Id.*; see also *People v. Barghout*, 2013 IL App (1st) 112373, ¶ 15 (holding that the defendant stated the gist of an ineffective assistance of counsel claim in his postconviction petition where defendant alleged that he rejected the State's offer to recommend a 12-year sentence in exchange for a guilty plea because trial counsel failed to inform him that he faced up to 60 years' imprisonment if he were found guilty at trial); *People v. Paleologos*, 345 Ill. App. 3d 700, 705 (2003) (holding that the defendant's postconviction petition stated the gist of a constitutional claim for ineffective

assistance of counsel where the petition alleged that the defendant rejected a plea offer of 22 years' imprisonment because counsel advised him that the maximum sentence was 30 years' imprisonment when the maximum sentence was actually 60 years' imprisonment due to mandatory consecutive sentencing).

¶ 19 Like *Curry*, *Barghouti*, and *Paleologos*, defendant alleged in his petition that counsel failed to inform him during plea negotiations of the maximum sentence he faced if convicted, and, as a result, defendant was not adequately informed of the consequences of accepting or rejecting the 10-year plea offer. We find that counsel's alleged failure during plea negotiations to advise defendant that he would be eligible for extended-term sentencing if convicted at trial constituted an arguably deficient performance.

¶ 20 B. Prejudice

¶ 21 Having found that defendant's petition established that defense counsel's performance was arguably deficient, we now consider whether the petition established that defendant was arguably prejudiced by counsel's alleged incorrect advice regarding the maximum sentence defendant could receive. Where defendants claim counsel's deficient performance has prejudiced them by their rejection of a plea offer, our supreme court has held:

" [D]efendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. *Defendants must also demonstrate a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law.* To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been

more favorable by reason of a plea to a lesser charge or a sentence of less prison time.' " (Emphasis in original.) *People v. Hale*, 2013 IL 113140, ¶ 19 (quoting *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012)).

¶ 22 Defendant's showing of prejudice must encompass more than defendant's own self-serving testimony. *Id.* ¶ 18. Rather, there must be " 'independent, objective confirmation that defendant's rejection of the proffered plea was based upon counsel's erroneous advice,' and not on other considerations." *Id.* (quoting *Curry*, 178 Ill. 2d at 532). "The disparity between the sentence a defendant faced and a significantly shorter plea offer can be considered supportive of a defendant's claim of prejudice." *Id.*

¶ 23 In the instant case, we find that defendant stated an arguable claim that he was prejudiced by counsel's failure to inform him of the correct maximum sentence that could be imposed. Taking defendant's allegations as true, had counsel informed defendant that he faced a maximum term of 30 years' imprisonment if convicted after trial rather than 15 years' imprisonment, he would have accepted the State's plea offer. We further note that defendant's actual sentence of 20 years' imprisonment was significantly longer than the 10 years allegedly offered by the State. Additionally, defendant's claims were not positively rebutted by the record. During arraignment, the trial court advised defendant that his sentencing range, if convicted, was 4 to 15 years' imprisonment.

¶ 24 We recognize that defendant has not made a showing in his initial postconviction petition that the plea agreement would have been accepted by the circuit court or that it would not have been canceled by the prosecution, as our supreme court required in *Hale*. *Id.* However, *Hale* was not decided at the first stage of postconviction proceedings, but rather was decided following an evidentiary hearing on claims of ineffective assistance of counsel alleged in the

defendant's motion for a new trial. *Id.* ¶¶ 10-11. At this stage of postconviction proceedings, defendant need only present the gist of a constitutional claim. *Brown*, 236 Ill. 2d at 184. We find defendant's un rebutted claim that he rejected a plea offer for substantially less prison time than he received after trial because defense counsel did not inform him that the maximum sentence stated the gist of a claim of ineffective assistance of counsel.

¶ 25 II. Counsel's Failure to Insist on a Fitness Hearing Before Sentencing

¶ 26 Defendant also argues on appeal that he stated the gist of a constitutional claim of ineffective assistance of counsel because defense counsel failed to insist that the trial court hold a fitness hearing after the trial court found that a *bona fide* doubt existed as to defendant's fitness to stand trial. Since we have found that defendant's petition stated the gist of a claim, the entire petition must be advanced for further postconviction proceedings, and we need not address the remaining claims in the petition. See *People v. Rivera*, 198 Ill. 2d 364, 371 (2001).

¶ 27 However, in the interest of judicial economy, we find that defendant's ineffective assistance of counsel claim is not barred. While the issue of whether the trial court's failure to hold the fitness hearing constituted plain error was decided on direct appeal, defendant did not argue on direct appeal that his counsel was ineffective for failing to insist on a fitness hearing. See *Syler*, 2012 IL App (3d) 100913-U, ¶ 18. As defendant would have to introduce evidence outside the trial record to establish that he was prejudiced by counsel's failure to insist on a fitness hearing, his ineffective assistance of counsel claim is more appropriately addressed on postconviction review. *People v. Kunze*, 193 Ill. App. 3d 708, 725-26 (1990) ("Where, as here, consideration of matters outside of the record is required in order to adjudicate the issues presented for review, the defendant's contentions are more appropriately addressed in proceedings on a petition for post-conviction relief.").

¶ 28

CONCLUSION

¶ 29

The judgment of the circuit court of Will County is reversed and the cause is remanded for further postconviction proceedings.

¶ 30

Reversed and remanded.