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2015 IL App (3d) 140145-U

Order filed April 7, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 13th Judicial Circuit,
)	La Salle County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-14-0145
v.)	Circuit No. 09-CF-367
)	
ERNEST MONROE,)	Honorable
)	H. Chris Ryan, Jr.,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in denying defendant's postconviction petition alleging ineffective assistance of counsel following an evidentiary hearing where defendant failed to establish that he was prejudiced by counsel's performance.

¶ 2 Defendant, Ernest Monroe, filed a petition for postconviction relief alleging, among other things, that his trial counsel was ineffective. The petition was dismissed following an evidentiary hearing, and defendant appeals. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by information, later superseded by indictment, with unlawful delivery of a controlled substance, specifically between 15 and 100 grams of a substance containing heroin, in violation of section 401(a)(1)(A) of the Illinois Controlled Substances Act (720 ILCS 570/401(a)(1)(A) (West 2008)). Defendant pled guilty in exchange for the State's agreement to cap its sentencing recommendation at 16 years' imprisonment. Defendant was sentenced to 14 years' imprisonment in the Department of Corrections. At the sentencing hearing, the trial court advised defendant of his rights, including the need to file a motion to withdraw his guilty plea to preserve his right to appeal. Defense counsel filed a motion to reconsider sentence, which was denied on the merits.

¶ 5 Defendant filed a *pro se* postconviction petition alleging, among other things, that he received ineffective assistance of counsel where defendant requested that his trial counsel file a motion to withdraw his guilty plea and trial counsel failed to do so. The circuit court summarily dismissed the postconviction petition. Defendant appealed, and this court reversed the summary dismissal and remanded the case for further postconviction proceedings. *People v. Monroe*, 2013 IL App (3d) 110811-U.

¶ 6 On remand, a public defender was appointed to represent defendant, but defendant opted to proceed *pro se*. Defendant filed an amended petition, and the State filed a motion to dismiss the amended petition. The State's motion was denied, and an evidentiary hearing was held.

¶ 7 At the hearing, Byron Sloan, defendant's trial counsel, testified that, in representing defendant, he reviewed police reports, met with defendant several times, and discussed defendant's options in light of the evidence, including defendant's confession. Eventually, defendant entered into a partially negotiated guilty plea. Defendant was aware of the potential range of penalties.

¶ 8 Sloan discussed defendant's postsentencing rights with him numerous times. Defendant asked Sloan to file a motion to reconsider sentence. Sloan filed a motion to reconsider sentence "just to protect [defendant's] rights timely." Sloan believed that a motion to reconsider sentence was proper to challenge a sentence entered pursuant to a partially negotiated guilty plea even though the denial of such a motion could not be appealed under Illinois Supreme Court Rule 604(d) (eff. July 1, 2006).

¶ 9 Sloan discussed filing a motion to withdraw guilty plea with defendant, and defendant stated that he did not want to file such a motion. Defendant also sent Sloan a letter indicating that he did not want to withdraw his plea. The letter stated as follows:

"January 14, 2010 you clearly stated to me you would respresent [*sic*] me on my motion to reconsider and reduce sentence and you also said that you had told my mother "Nancy Monroe Waters" she wouldn't have to pay the remaining balance of \$5,000 inless [*sic*] I wanted to take back my guilty plea, which I won't be doing.

Yes I would like to pursue my motion with you or with a public defender, if it's going to cost my family more in legal fees. Byron I didn't go to trial or did you guys respresent [*sic*] me on my federal violation, is my motion that serious?"

(Emphases omitted.)

¶ 10 Sloan did not file a certificate as required by Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). He testified that a certificate was only necessary if defendant was filing a motion to withdraw his guilty plea. Sloan did not review the sentencing transcript because he was present for sentencing. Sloan testified that defendant "never asked to appeal [his] sentence or to withdraw [his] guilty plea." If defendant had wanted to appeal, then Sloan would have had to

file a motion to withdraw his guilty plea and a Rule 604(d) certificate.

¶ 11 Defendant attempted to introduce his own affidavit into evidence. The trial court refused to accept defendant's affidavit, stating that defendant would have to testify in person and be subject to cross-examination like all the other witnesses. Defendant did not testify.

¶ 12 At the conclusion of the evidentiary hearing, the trial court denied defendant's postconviction petition, holding that defendant had not met his burden. The trial court found Sloan to be a credible witness. The court believed that Sloan had discussed defendant's options with him and that defendant did not want to pursue a motion to withdraw his guilty plea. The court did not believe that Sloan's failure to file a motion to withdraw guilty plea "penalized [defendant] in an appeal right *** following the sentencing hearing." The court stated that it would have been "duplicitous" for Sloan to file a Rule 604(d) certificate because Sloan was present at sentencing and did not need to review the transcript.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant argues that the trial court erred in denying his postconviction petition following the evidentiary hearing because he sufficiently established that he received ineffective assistance of counsel in that Sloan failed to preserve his right to appeal by: (1) failing to file a Rule 604(d) certificate; and (2) filing a motion to reconsider sentence without also filing a motion to withdraw guilty plea. Because we find that defendant failed to establish that he was prejudiced by his counsel's alleged deficient performance, we affirm the circuit court's dismissal of the petition.

¶ 15 At an evidentiary hearing at the third stage of postconviction proceedings, "the defendant bears the burden of making a substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). We review the circuit court's denial of a postconviction

petition following an evidentiary hearing, where fact-finding and credibility determinations are involved, to determine whether the circuit court's decision was manifestly erroneous. *Id.* A decision is manifestly erroneous where an error is "clearly evident, plain, and indisputable." *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997). Absent manifest error, we defer to the trial court's credibility determinations "because the trial court is in the best position to observe and weigh the credibility of the witnesses." *People v. Jacobazzi*, 398 Ill. App. 3d 890, 912 (2009).

¶ 16 We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Manning*, 241 Ill. 2d 319, 326 (2011). To establish ineffective assistance of counsel, a defendant must show: (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-96. When an ineffective assistance of counsel claim is more easily disposed of on the ground of lack of sufficient prejudice, the court should do so. *Id.* at 697.

¶ 17 Initially, we note that there were several errors in the proceedings below. First, when a defendant enters a guilty plea in exchange for a sentencing cap, as in this case, the defendant may not seek reconsideration of a sentence imposed within the cap unless he also moves to withdraw his guilty plea. *People v. Linder*, 186 Ill. 2d 67, 74 (1999). If such a defendant fails to move to withdraw his guilty plea, the trial court should not reconsider the defendant's sentence and the appellate court must dismiss the defendant's appeal. *Id.* To the extent that Sloan advised defendant that he could file a motion to reconsider sentence without filing a motion to withdraw guilty plea and to the extent that the circuit court entertained the motion to reconsider sentence filed by Sloan, they were in error.

¶ 18 Additionally, under Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), an attorney must file a certificate of compliance even if: (1) the attorney continuously represented defendant throughout the sentencing hearing and postplea motions, see *People v. Hayes*, 195 Ill. App. 3d 957, 960-61 (1990), and/or (2) the attorney filed only a motion to reconsider sentence. See Ill. S. Ct. R. 604(d) (eff. July 1, 2006); *People v. Jordan*, 2013 IL App (2d) 120106, ¶ 18. To the extent that Sloan and the circuit court stated otherwise at the hearing on defendant's postconviction petition, they were in error. Despite these errors, the circuit court's denial of the postconviction petition was not manifestly erroneous because defendant did not establish that he was prejudiced by Sloan's errors.

¶ 19 To establish that a defendant was prejudiced by counsel's deficient failure to preserve his right to appeal, "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient [performance] ***, he would have timely appealed." *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) ("If the defendant cannot demonstrate that, but for counsel's deficient performance, he would have appealed, counsel's deficient performance has not deprived him of anything, and he is not entitled to relief."). In *People v. Edwards*, 197 Ill. 2d 239, 241-43 (2001), the defendant—who had pled guilty pursuant to a negotiated guilty plea—claimed in a postconviction petition that he received ineffective assistance of counsel due to counsel's failure to file a motion to withdraw guilty plea to preserve the defendant's right to appeal. In such a situation, the Illinois Supreme Court held that after the first stage of postconviction proceedings, a defendant must establish (1) "that he told his trial counsel to file a motion to withdraw his guilty plea"; and (2) "that counsel was constitutionally ineffective for failing to do so[.]" *Id.* at 257. A showing that counsel was constitutionally ineffective "will necessarily entail some explanation of the grounds that could have been presented in the motion to withdraw the plea."

Id. at 258.

¶ 20 Defendant failed to establish that he was prejudiced by Sloan's failure to file a motion to withdraw guilty plea and a Rule 604(d) certificate. Defendant failed to present evidence of any "grounds that could have been presented in the motion to withdraw the plea." *Edwards*, 197 Ill. 2d at 258. Additionally, defendant failed to present any evidence at the hearing that he ever told Sloan that he wanted to file a motion to withdraw guilty plea or that he wanted to appeal. Instead, we call attention to defendant's letter to Sloan that expressly provided that defendant did not want to withdraw his guilty plea.

¶ 21 We also note that Sloan testified that he advised defendant as to his postsentencing rights and that defendant wanted to file a motion to reconsider his sentence but he did not want to file a motion to withdraw guilty plea. Sloan testified that defendant never said he wanted to appeal his conviction. Although Sloan's testimony showed that he was confused as to the precise requirements of Rule 604(d), Sloan was not confused in his testimony that defendant did not wish to file a motion to withdraw guilty plea or to appeal. The circuit court found Sloan to be a credible witness, and we defer to the circuit court's credibility determination.

¶ 22 CONCLUSION

¶ 23 In light of the above facts, we cannot find that the trial court's denial of the petition was manifestly erroneous. The judgment of the circuit court of La Salle County is affirmed.

¶ 24 Affirmed.