2015 IL App (4th) 131107-U

NO. 4-13-1107

FILED
December 18, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
JAMAL T. WILLIAMS,	)	No. 08CF1124
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court
Presiding Justice Knecht and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in dismissing defendant's postconviction petition at the second stage.

¶ 2 Defendant, Jamal T. Williams, appeals the trial court's second-stage dismissal of his postconviction petition. We reverse and remand for third-stage proceedings.

¶ 3 I. BACKGROUND

¶ 4 In March 2009, a jury found defendant, Jamal T. Williams, guilty of two counts of home invasion (720 ILCS 5/12-11(a)(3) (West 2008)), two counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2008)), and one count of residential burglary (720 ILCS 5/19-3(a) (West 2008)). The trial court sentenced defendant to a total of 75 years' imprisonment.

¶ 5 On direct appeal, defendant argued (1) the State failed to prove him guilty beyond a reasonable doubt, (2) he received ineffective assistance of counsel because his defense attorney failed to subject his case to adversarial testing, (3) the trial court was biased at sentencing, and (4) the court improperly imposed consecutive sentences. We affirmed defendant's convictions in part but vacated defendant's convictions and sentences regarding the home invasion in count II and residential burglary in count V, and we remanded for issuance of an amended sentencing judgment. *People v. Williams*, No. 4-09-0159 (Oct. 14, 2010) (unpublished order pursuant to Illinois Supreme Court Rule 23) (petition for leave to appeal denied at No. 11140, 962 N.E.2d 488 (table) (Nov. 30, 2011) (convictions on count II and count V vacated on basis of one-act, one-crime rule). On January 20, 2012, the trial court entered a corrected sentencing judgment. Defendant remained subject to three consecutive 25-year terms of imprisonment.

¶ 6 On May 29, 2012, defendant, represented by attorney Robin Marie Bright, filed a petition for postconviction relief, arguing, *inter alia*, his trial counsel, E. Duke McNeil, was ineffective for failing to advise him about a 20- to 23-year guilty plea offer the State's Attorney made prior to trial. In support of the claim, defendant attached affidavits from his parents attesting defendant's counsel told them about the offer after the sentencing hearing. Defendant also attached his own affidavit, in which he stated he never received any information from his attorney regarding the plea offer. According to his affidavit, he did not learn about the offer until after sentencing. Defendant stated he learned about the plea offer from his parents, not trial counsel. Defendant stated, "I would have seriously considered the plea offer had I been aware of all sentencing parameters and the possibility of spending the rest of my life in prison." Defendant noted his codefendants were all serving "approximately" 21-year sentences for the

same offenses. Defendant argued he was prejudiced by his attorney's deficient performance because he was sentenced to 75 years in prison.

¶ 7 On July 5, 2012, attorney Bright, citing defendant's failure to abide by the terms of his agreement with counsel, moved to withdraw as his postconviction counsel.

¶ 8 On August 6, 2012, the State filed a motion to dismiss defendant's petition. The State argued defendant could not establish prejudice because his affidavit only claimed he would have "seriously considered" the plea offer and not that he would have accepted it.

¶ 9 On September 6, 2012, the trial court granted attorney Bright's motion to withdraw as defendant's postconviction counsel. Thereafter, defendant, proceeding *pro se*, filed a motion seeking appointment of new counsel. The trial court informed defendant he was not entitled to appointed counsel at the first stage of the proceedings, but it permitted him an extension of time to file a written response to the State's motion to dismiss.

¶ 10 In May 2013, defendant filed his *pro se* response to the State's motion to dismiss. Defendant attached an affidavit in which he stated, "without a doubt, I would have accepted the State's offer had I been informed [o]f the direct consequence of being found guilty of more than one charge."

¶ 11 On June 19, 2013, the trial court denied the State's motion to dismiss, finding defendant's petition stated the gist of a constitutional claim. The court then appointed the Champaign County public defender to represent defendant during the postconviction proceedings. The court afforded defendant's new counsel 60 days to file any amended pleadings.

¶ 12 On August 13, 2013, defendant's counsel informed the trial court she would not be filing an amended petition and would instead be proceeding on the original petition and

defendant's *pro se* response to the State's motion to dismiss. On December 5, 2013, the trial court entered an order denying defendant's petition. The court found, to show he was prejudiced, defendant needed to demonstrate he would have accepted the plea offer had counsel's performance not been deficient. According to the court, defendant's statement in his original affidavit he would have "considered" the offer was insufficient. The court found defendant's statement "failed to demonstrate he would have accepted the plea offer and plead [*sic*] guilty—only that he would have thought about it."

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues the trial court erred in dismissing his postconviction petition at the second stage of the proceedings. Specifically, defendant contends his trial counsel's failure to inform him of a plea offer from the State amounted to ineffective assistance of counsel. For the following reasons, we reverse the court's dismissal of defendant's petition and remand for third-stage proceedings.

¶ 16 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)) provides a mechanism by which a defendant may raise a claim his conviction was the result of a substantial violation of his constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2012). The postconviction petition is a collateral proceeding where a defendant may raise issues that were not, and could not have been, raised on direct appeal. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456, 793 N.E.2d 609, 619 (2002). The Act establishes a three-stage process for adjudicating a postconviction petition. 725 ILCS 5/122-1 (West 2012). At the first stage, the trial court may dismiss a petition only if it is frivolous or patently without merit. *People v. Harris*, 224 Ill. 2d

115, 125-26, 862 N.E.2d 960, 967 (2007). If the petition survives dismissal at this initial stage, it advances to the second stage, where counsel may be appointed to an indigent defendant and the State may move to dismiss the petition. *Harris*, 224 Ill. 2d at 126, 862 N.E.2d at 967. The defendant must then make a substantial showing of a constitutional violation in order to proceed to an evidentiary hearing, which is the third and final stage of the postconviction proceedings. *Harris*, 224 Ill. 2d at 126, 862 N.E.2d at 967.

¶ 17 "The relevant question raised during a second-stage postconviction proceeding is whether the petition's allegations, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional deprivation, which requires an evidentiary hearing." *People v. Brown*, 2015 IL App (1st) 122940, ¶ 44, 30 N.E.3d 307 (citing *People v. Coleman*, 183 Ill. 2d 366, 381, 701 N.E.2d 1063, 1072 (1998)). While all well-pleaded facts in the petition and affidavits are taken as true, nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act. *Coleman*, 183 Ill. 2d at 381, 701 N.E.2d at 1072. A second-stage dismissal of a defendant's petition presents a legal question, which we review *de novo*. *People v. Whitfield*, 217 Ill. 2d 177, 182, 840 N.E.2d 658, 662 (2005).

¶ 18 A defendant has the right to decide whether to plead guilty. *People v. Hernandez*, 2014 IL App (2d) 131082, ¶ 15, 20 N.E.3d 484 (citing *People v. Trujillo*, 2012 IL App (1st) 103212, ¶ 9, 972 N.E.2d 184). "A defendant's sixth amendment right to the effective assistance of counsel applies to the plea-bargaining process." *People v. Hale*, 2013 IL 113140, ¶ 15, 996 N.E.2d 607 (citing *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1406-07 (2012); *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)). "This right to effective

assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial." *Hale*, 2013 IL 113140, ¶ 16, 996 N.E.2d 607 (citing *People v. Curry*, 178 Ill. 2d 509, 518, 687 N.E.2d 877, 882 (1997)). "[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*." (Internal quotation marks omitted.) *Hale*, 2013 IL 113140, ¶ 15, 996 N.E.2d 607.

¶ 19 To establish ineffective assistance of counsel, a defendant must prove (1) the conduct of counsel fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant such that a reasonable probability exists the result would have been different but for the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). To show prejudice in the context of a plea bargain, a defendant must demonstrate a reasonable probability (1) he would have accepted the offer, (2) the State would not have rescinded the offer, and (3) the trial court would have accepted the offer. *Hale*, 2013 IL 113140, ¶ 19, 996 N.E.2d 607 (quoting *Frye*, 132 S. Ct. at 1409). "Absent defendant's demonstration of [the first] factor, prejudice cannot be proven and there is no need to address the additional factors ***." *Hale*, 2013 IL 113140, ¶ 21, 996 N.E.2d 607.

¶ 20 "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution." *Frye*, 132 S. Ct. at 1408. A trial counsel's failure to inform a defendant of a plea offer presents an arguable claim of deficient performance. *Trujillo*, 2012 IL App (1st) 103212, ¶¶ 9-10, 972 N.E.2d 184; *Frye*, 132 S. Ct. at 1409 (finding counsel's performance deficient where the defendant showed counsel did not inform him of a formal offer from the State). Here, defendant's petition adequately alleges a plea offer was extended by the State's Attorney but not communicated to him by his trial counsel. We note defendant's claim is not

rebutted by the record. In fact, at no point in these postconviction proceedings has the State denied defendant's claim. "Under *Strickland*, the question then becomes what, if any, prejudice resulted from the breach of duty." *Frye*, 132 S. Ct. at 1409.

¶ 21 As to the first factor of the prejudice prong, the record developed thus far suggests defendant would have accepted the plea offer had his counsel brought it to him and explained the consequence of being found guilty of more than one charge. While defendant stated in his original affidavit he "would have seriously considered the plea offer," his subsequent pleadings clearly state he would have accepted the plea. Indeed, in the affidavit attached to his *pro se* response to the State's motion to dismiss, defendant states, "without a doubt, I would have accepted the State's offer." As such, defendant has sufficiently raised a reasonable probability he would have accepted the offer.

¶ 22 Regarding the two remaining factors of the prejudice prong, the same trial judge who sentenced defendant accepted guilty pleas from the other three defendants in the underlying matter. Nazeer Smith and Isaiah Evans were sentenced to 26 and 21 years' imprisonment respectively after entering open guilty pleas to a single charge. Chad Todd received a 21-year sentence as part of his fully negotiated guilty plea. Defendant claims the State's Attorney's offer was for 20 to 23 years' imprisonment. In light of the similar sentence ranges, we can infer a reasonable probability exists a plea agreement for a similar sentence would have been entered without the State rescinding the offer or the trial court rejecting it.

¶ 23 In sum, defendant's postconviction petition alleged his trial counsel failed to inform him of a plea offer made by the State's Attorney. The State does not argue an offer was not made. We note such fact-finding determinations are to be made at the third stage of

postconviction proceedings, *i.e.*, at an evidentiary hearing. *Coleman*, 183 Ill. 2d 366, 385, 701 N.E.2d at 1073-74. Defendant stated he would have accepted the plea offer had his counsel advised him of it. The 75-year sentence defendant received after proceeding to trial was substantially greater than the alleged 20- to 23-year plea deal he maintains was not communicated to him. Defendant should be given the opportunity to present his ineffective-assistance-of-counsel claim to the trial court during a third-stage evidentiary hearing. As such, we reverse the trial court's dismissal of defendant's postconviction petition and remand the matter for appointment of counsel and further proceedings pursuant to the Act. We express no opinion as to the merits of defendant's petition, only that it should advance to the third stage of postconviction review.

¶ 24 III. CONCLUSION

¶ 25 For the foregoing reasons, we reverse the trial court's second-stage dismissal of defendant's postconviction petition and remand for further proceedings pursuant to the Act.

¶ 26 Reversed and remanded.