2015 IL App (5th) 130026-U

NOS. 5-13-0026 & 5-13-0135 cons.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 90-CF-781
	)	
TIMOTHY HAYDEN,	)	Honorable
	)	Julie K. Katz,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justices Goldenhersh and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: In case number 5-13-0026, the trial court did not err in denying the defendant's motions for leave to file successive postconviction petitions, and his appeal in case number 5-13-0135 is dismissed for lack of jurisdiction.

¶ 2 BACKGROUND

¶ 3 In July 1990, the defendant, Timothy Hayden, stabbed his estranged wife to death inside a Belleville bar that she had gone to with some friends. In April 1991, rejecting the defendant's insanity defense, a St. Clair County jury found him guilty of first-degree murder (Ill. Rev. Stat. 1989, ch. 38, ¶ 9-1).

¶ 4 In June 1991, the trial court sentenced the defendant to a 55-year term of imprisonment. In December 1993, the defendant's conviction and sentence were affirmed on direct appeal. *People v. Hayden*, No. 5-91-0560 (1993) (unpublished order under Supreme Court Rule 23). In that appeal, we noted that "the evidence against [the] defendant was overwhelming since he committed the offense in front of numerous witnesses." *Id*. at 24.

¶ 5 In October 1994, represented by attorney Clyde L. Kuehn, the defendant filed his first petition for postconviction relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 1994)). The defendant's petition raised numerous ineffective-assistance-of-counsel claims directed at his trial attorney, James Gomric. In February 1995, a supplemental petition raising additional ineffective-assistance-of-counsel claims was filed on the defendant's behalf by attorney Brian Trentman. In May 1999, following a remand (see *People v. Hayden*, 288 Ill. App. 3d 1076 (1997)), the defendant filed an amended postconviction petition prepared by attorney Alan Cohen. In August 1999, Cohen filed a second amended postconviction petition on the defendant's behalf, which was supplemented with additional claims in April 2000. In August 2000, the trial court entered a written order granting the State's motion to dismiss the defendant's second amended petition, and in March 2003, this court affirmed the trial court's judgment (*People v. Hayden*, 338 Ill. App. 3d 298 (2003)).

¶ 6 In August 2002, the defendant *pro se* filed his second postconviction petition. In February 2003, he *pro se* filed an amended second petition, which he supplemented in March 2003. In November 2003, the defendant *pro se* filed a third postconviction

petition. In February 2004, appointed counsel filed a second amended version of the defendant's second postconviction petition, which was followed by a third amended version filed in April 2004. In July 2004, the trial court entered a written order granting the State's motions to dismiss the defendant's second and third postconviction petitions. In January 2007, noting that the defendant would need leave of the trial court before filing a fourth postconviction petition, this court affirmed the trial court's judgment dismissing his second and third petitions. *People v. Hayden*, No. 5-04-0512 (2007) (unpublished order under Supreme Court Rule 23).

¶ 7 In May 2009, again represented by attorney Kuehn, the defendant sought leave of court to file a fourth postconviction petition. In June 2009, the State filed a motion to dismiss the request, but the trial court never ruled on the matter.

¶ 8 In September 2012, the defendant wrote the trial court a letter referencing a "40[-] year plea bargain offer" that his trial attorney had allegedly failed to convey to him. In October 2012, the defendant filed a *pro* se motion for leave to file a fifth postconviction petition and a *pro* se motion for leave to file a sixth postconviction petition. The latter alleged that the trial court had violated the defendant's due process rights by failing to advise him that a 3-year term of mandatory supervised release (MSR) would follow his 55-year term of imprisonment and that the appropriate remedy was to reduce his sentence. The former alleged that the defendant had been denied the effective assistance of trial counsel because attorney Gomric had failed to "convey to the defendant a 40[-] year plea bargain offer by the State's Attorney prior to trial."

¶ 9 In support of his motion for leave to file a fifth postconviction petition, the defendant attached a personal affidavit stating, among other things, that "[four] or [five] years ago," former State's Attorney John Baricevic had told Kuehn that he had offered the defendant a 40-year sentence recommendation in exchange for a guilty plea to first-degree murder and had relayed the offer to Gomric prior to trial. The defendant's attached affidavit asserts that he would have accepted Baricevic's offer had he been aware of it, but Gomric had failed to convey it to him. The defendant's affidavit further states that Kuehn had not previously disclosed to him what Baricevic had said about the alleged offer.

¶ 10 In support of his motion for leave to file a fifth postconviction petition, the defendant also attached a letter that Kuehn had sent him, dated June 12, 2012. The letter states that "four or five years ago," Baricevic had "confirmed" to Kuehn that he had "offered [the defendant] a 40-year recommendation in return for a guilty plea." The letter further states that Baricevic's memory "had since faded," however, and he could not seem to recall "whether or not an offer had indeed been made to Jim Gomric." The letter further notes, "[W]e do not know what Gomric will say about having received the offer or having conveyed it." The letter also advises that establishing whether the defendant would have accepted the offer presented "a hurdle in light of other things people have said about [his] attitude regarding any kind of plea of guilty back then."

¶ 11 In December 2012, the trial court entered a written order denying the defendant's motion for leave to file a fifth postconviction petition and his motion for leave to file a sixth postconviction petition. With respect to the defendant's motion for leave to file a

sixth petition, the trial court noted that although in *People v. Whitfield*, 217 Ill. 2d 177 (2005), the supreme court had held that a reduction in sentence was the appropriate remedy where the defendant had not been advised that his term of incarceration would be followed by a term of MSR, *Whitfield*'s holding and reasoning were only applicable to cases involving fully negotiated guilty pleas. Citing *People v. Morris*, 236 Ill. 2d 345 (2010), the trial court further noted that even if *Whitfield* were applicable to the defendant's case, the supreme court had subsequently "held that the *Whitfield* decision could only provide relief to [d]efendants whose convictions were not finalized prior to December 20, 2005, which was the date of the *Whitfield* decision."

¶ 12 With respect to the defendant's motion for leave to file a fifth postconviction petition, the trial court determined, among other things, that the defendant had failed to establish that he had been prejudiced by not being advised of the State's alleged 40-year offer. The court noted that other than his own affidavit, the defendant had offered nothing in support of his claim that he would have accepted the State's offer had he known about it. Referencing Kuehn's observation that establishing that the defendant would have accepted the offer presented a "hurdle," the court further noted that Kuehn's letter "totally" failed to support the defendant's claim "that he was prejudiced by not being advised that an offer had been made." The court stated, "If the court is being asked by the [d]efendant to consider Mr. Kuehn's letter as evidence of the fact that an offer had been made to his attorney, the entire letter will be considered, not just the portion that supports the [d]efendant's claim."

¶ 13 In January 2013, the defendant filed a timely notice of appeal from the trial court's order denying his motion for leave to file a fifth postconviction petition and his motion for leave to file a sixth postconviction petition. That appeal was subsequently assigned case number 5-13-0026. In February 2013, the defendant filed a motion for appointment of counsel to amend his May 2009 motion for leave to file a fourth postconviction petition and to answer the State's June 2009 motion to dismiss the motion for leave. After the trial court entered an order stating that it had taken "no action" on the defendant's motion for appointment of counsel, the defendant filed a notice of appeal from that order as well. That appeal was assigned case number 5-13-0135. In June 2013, we consolidated both of the defendant's present appeals for briefing, argument, and disposition.

¶ 14 DISCUSSION

¶ 15 The defendant's sole contention on appeal is that the trial court erred in denying his motion for leave to file a fifth postconviction petition because the motion set forth a meritorious claim with respect to the State's alleged plea offer that he could not have previously raised. We disagree and conclude that even assuming that the defendant could not have previously raised his plea-offer claim, he is unable to sufficiently establish that the State actually made the offer or that if the offer had been made, he was prejudiced by not being advised of its existence.

¶ 16 The Post-Conviction Hearing Act

¶ 17 The Act sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial

denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2012). "A postconviction proceeding is not a substitute for a direct appeal, but rather is a collateral attack on a prior conviction and sentence." *People v. Davis*, 2014 IL 115595, ¶ 13.

¶ 18 The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). At the first stage, the trial court independently reviews and assesses the defendant's petition, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). A *pro se* petition for postconviction relief is considered frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009).

¶ 19 If a postconviction petition is not dismissed at the first stage, it advances to the second stage, where an indigent defendant can obtain appointed counsel and the State can move to dismiss the petition. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2012). At the second stage, the trial court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed. *Edwards*, 197 Ill. 2d at 245.

¶ 20 "[T]he Act contemplates the filing of only one post-conviction petition." *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002). "Where, as here, a defendant seeks to institute a successive postconviction proceeding, the defendant must first obtain leave of court."

People v. Wrice, 2012 IL 111860, ¶ 47. Until leave of court is granted, "a successive postconviction petition is not considered 'filed' for purposes of [the Act], and further proceedings will not follow." *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010).

¶ 21 The Act specifically provides that "[l]eave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2012). A petitioner "shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings" and "shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." *Id.* "[T]he cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard" (*People v. Smith*, 2014 IL 115946, ¶ 35), and "[b]oth prongs must be satisfied for the defendant to prevail" (*Davis*, 2014 IL 115595, ¶ 14).

¶ 22 When seeking leave to file a successive postconviction petition, "[t]he defendant has the burden to plead sufficient facts and submit supporting documentation sufficient to allow the circuit court to make its prejudice determination." *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25. "As with an initial postconviction filing, in considering a motion for leave to file a successive petition, all well-pleaded facts and supporting affidavits are taken as true." *Id.*

> "[L]eave of court to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentation

submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." *Smith*, 2014 IL 115946, ¶ 35.

"We conduct a *de novo* review of the trial court's denial of leave to file a successive postconviction petition." *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010).

¶ 23 The Defendant's Plea-Offer Claim

¶ 24 A criminal defendant is guaranteed the right to the effective assistance of counsel under both the United States Constitution and the Illinois Constitution. *People v. Mata*, 217 Ill. 2d 535, 554 (2005). To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice. *People v. Shaw*, 186 Ill. 2d 301, 332 (1998).

¶ 25 A defendant's right to the effective assistance of counsel applies to the plea-bargaining process. *People v. Hale*, 2013 IL 113140, ¶ 15. To establish prejudice with respect to an ineffective-assistance-of-counsel claim alleging that a plea offer was not accepted due to counsel's deficient performance, a defendant must demonstrate a reasonable probability that (1) he would have accepted the plea but for counsel's ineffectiveness, (2) the plea would have been entered without the State's canceling it, (3) the trial court would have accepted the plea, and (4) the plea would have resulted in a disposition more favorable than that which was ultimately imposed. *Id.* ¶¶ 19-20. Furthermore, to demonstrate a reasonable probability that a defendant would have

accepted a plea but for counsel's deficient performance, a defendant must offer more than his own self-serving statements. *Id*. ¶ 18. Rather, there must be independent, objective confirmation that the defendant's decision was based upon counsel's ineffectiveness and not on other considerations. *Id*.

¶ 26 Here, the defendant's plea-offer claim fails for several reasons. First of all, the defendant's letter from Kuehn is the only evidence supporting the defendant's contention that Baricevic actually tendered a 40-year plea deal that Gomric had failed to convey. The letter's contents are hearsay, however (*In re Marriage of Kutinac*, 182 Ill. App. 3d 377, 384 (1989)), which, as a general rule, is insufficient to support a claim under the Act (*People v. Brown*, 2014 IL App (1st) 122549, ¶¶ 56-58; *People v. Gray*, 2011 IL App (1st) 091689, ¶ 16). Moreover, hearsay considerations aside, the letter only indicates that there might have been a plea offer that trial counsel had failed to convey. As Kuehn noted, Baricevic had most recently stated that he could not recall whether an offer had been made, and "we do not know what Gomric [would] say about having received the offer or having conveyed it." Compare *Brown*, 2014 IL App (1st) 122549, ¶¶ 36, 56-61 (holding that the defendant's failure to sufficiently support her postconviction assertion that trial counsel had failed to advise her of a favorable plea offer justified summary dismissal of the claim), with *People v. Trujillo*, 2012 IL App (1st) 103212, ¶ 14 ("In sum, the defendant's allegation as supported by trial counsel's letter established that the State had made a guilty plea offer.").

¶ 27 Secondly, as previously indicated, to demonstrate a reasonable probability that a defendant would have accepted a plea but for counsel's ineffectiveness, a defendant must

offer more than his own self-serving statements. *Hale*, 2013 IL 113140, ¶ 18. Here, although the defendant's affidavit asserts that he would have accepted Baricevic's offer had he known about it, as the trial court noted, the defendant's affidavit is the only evidence he offers in support of that claim. Moreover, Kuehn candidly advised the defendant that establishing that the defendant would have accepted the offer presented "a hurdle in light of other things people [had] said about [the defendant's] attitude regarding any kind of plea of guilty back then."

¶ 28 Lastly, even assuming that Baricevic had offered the defendant a plea that he would have accepted had he known about it, the defendant has failed to demonstrate or allege a reasonable probability that the plea would have been entered without the State's canceling it, that the trial court would have accepted the plea, or that the plea would have resulted in a sentence less than 55 years, which are factors that must also be proven. See *Hale*, 2013 IL 113140, ¶¶ 19-20. On this point, we note that according to Kuehn's letter, Baricevic's alleged plea-offer was a 40-year "recommendation," which the trial court would not have been bound to honor. See *People v. Streit*, 142 Ill. 2d 13, 21-22 (1991); *People v. Collier*, 376 Ill. App. 3d 1107, 1111-12 (2007). Additionally, the record indicates that Baricevic's term as State's Attorney ended approximately five months after the defendant had been charged and that Robert Haida was subsequently appointed State's Attorney. The record further indicates that the defendant did not answer the State's motion for discovery until after Baricevic left office and that after the defendant answered the motion, the State filed motions regarding the defendant's insanity defense and the defendant's fitness to stand trial.

¶ 29 To satisfy the cause-and-prejudice test for leave to file a successive postconviction petition, "[t]he defendant has the burden to plead sufficient facts and submit supporting documentation sufficient to allow the circuit court to make its prejudice determination." *Edwards*, 2012 IL App (1st) 091651, ¶ 25. Here, the defendant has failed to do so, and his claim fails as a matter of law. Accordingly, we affirm the trial court's judgment denying the defendant's motion for leave to file a fifth postconviction petition.

¶ 30 The Defendant's Remaining Motions

¶ 31 The defendant concedes that he is not challenging the trial court's denial of his motion for leave to file a sixth postconviction petition. Any arguments that he might have raised with respect to the trial court's judgment on that motion are thus waived pursuant to Supreme Court Rule 341. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Waiver aside, the trial court rightfully determined that *Whitfield*'s due process analysis is only applicable where a defendant's conviction resulted from a fully negotiated guilty plea (see *People v. Thompson*, 375 Ill. App. 3d 488, 494 (2007)) and "where the conviction was not finalized prior to December 20, 2005, the date *Whitfield* was announced" (*Morris*, 236 Ill. 2d at 366). Here, as the trial court observed, the defendant was found guilty by a jury, and his conviction was finalized well before December 20, 2005. Accordingly, we affirm the trial court's judgment denying the defendant's motion for leave to file a sixth postconviction petition.

¶ 32 With respect to the defendant's motion for appointment of counsel to amend his May 2009 motion for leave to file a fourth postconviction petition and to answer the State's June 2009 motion to dismiss the motion for leave, the trial court entered an order

specifically stating that it had taken "no action" on the motion. The parties thus agree that the trial court did not enter a "final" judgment disposing of the defendant's request. We therefore dismiss the defendant's appeal in 5-13-0135 for lack of jurisdiction. See *People v. Baptist*, 284 Ill. App. 3d 382, 388 (1996) ("Subject to certain exceptions, appellate courts are without jurisdiction to review judgments, orders, or decrees which are not final."). We further note that even if the trial court had entered an order denying the defendant's motion, the order would not be appealable. "There is no constitutional right to the assistance of counsel in postconviction proceedings[.]" *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). "[T]he right to counsel is wholly statutory" (*id.*), and "the Act does not provide for appointment of counsel unless an indigent defendant's petition survives the first stage of postconviction proceedings" (*People v. Greer*, 212 Ill. 2d 192, 203 (2004)). Because there is no basis for a motion for appointment of counsel to amend a motion for leave to file a successive postconviction petition, there is no basis upon which a defendant could appeal a denial of such motion, and we would therefore lack jurisdiction to review the denial. See *People v. Salgado*, 353 Ill. App. 3d 101, 106-07 (2004).

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, we hereby affirm the trial court's judgment denying the defendant's motion for leave to file a fifth postconviction petition and his motion for leave to file a sixth postconviction petition. We further dismiss the defendant's appeal in 5-13-0135 for lack of jurisdiction.

¶ 35 No. 5-13-0026, Affirmed.

¶ 36 No. 5-13-0135, Appeal dismissed.