

**NOTICE**

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2016 IL App (4th) 131005-U

NO. 4-13-1005

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

May 13, 2016  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
KYLE J. FRYE,	)	No. 07CF761
Defendant-Appellant.	)	
	)	Honorable
	)	Leo J. Zappa,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.  
Justices Turner and Holder White concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in its second-stage dismissal of defendant's postconviction petition where defendant failed to make a substantial showing of a constitutional violation resulting from trial counsel's failure to preserve defendant's right to appeal his sentence as excessive.

¶ 2 I. BACKGROUND

¶ 3 On July 26, 2007, the State charged defendant by information with four counts of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006) (counts I and II); 720 ILCS 5/9-1(a)(2) (West 2006) (count III); 720 ILCS 5/9-1(a)(3) (count IV) (West 2006)); home invasion (720 ILCS 5/12-11(a)(2) (West 2006)) (count V); and residential burglary (720 ILCS 5/19-3 (West 2006)) (count VI). The charges stemmed from defendant's unlawful entry into the residence of Judith Tumulty, a person over the age of 60 years (see 730 ILCS 5/5-5-3.2(b)(4)(ii) (West 2006)), on July 5, 2007, after which defendant beat and stabbed Judith, causing her death.

¶ 4 On June 23, 2009, pursuant to a partially negotiated plea agreement, defendant pleaded guilty to first degree murder (count I). According to the agreement, the State agreed to recommend no more than a 40-year prison sentence and to dismiss all remaining counts, including charges pending against defendant in an unrelated case. Prior to accepting defendant's guilty plea, the trial court admonished defendant regarding his rights and addressed him as follows: "So, that means the minimum sentence is 20 and the maximum that [the State] will recommend and I will abide by as part of this conditional plea is I will give you no more than 40 since that's what the cap is going to be, all right?" Defendant responded, "[y]es." The following colloquy ensued:

"THE COURT: And then, [prosecutor], just for the record, the agreement or partial agreement you worked out with [defense counsel]?"

[PROSECUTOR]: Judge, the agreement is that the State will ask for no more than 40 years in the Department of Corrections and, additionally, there would be evidence at trial that Judith Tumulty was over the age of 60 when this crime occurred.

THE COURT: And then the balance of these charges which are lower felony cases would be dismissed per the plea to this main count of murder?

[PROSECUTOR]: That's correct, in this case, [case No.] 761. All of the other first degree murders would merge into this, and then in [case No.] 762, those charges would be dismissed per plea.

THE COURT: All right, [defense counsel], is that your understanding of the plea agreement? Well, it is a quasi plea agreement with a cap I should say.

[DEFENSE COUNSEL]: Yes, that's our understanding of the semi[-]negotiated plea agreement, Your Honor.

THE COURT: All right, [defendant], other than for the terms that have been outlined here in open court, has there been any pressure applied to you or have any threats or promises been made to you to cause you to make a motion to this Court to withdraw your plea of not guilty and to enter a plea of guilty to the crime with which you are charged in this case?

DEFENDANT FRYE: Not at all, Your Honor.

THE COURT: All right then, [defendant], knowing the nature of the charges against you and knowing the minimum and maximum penalties which can be imposed, and knowing of your rights that have been explained now in open court by the Court, do you still desire to waive all of those rights?

DEFENDANT FRYE: Yes, sir."

The court then accepted defendant's guilty plea.

¶ 5 On September 23, 2009, the trial court conducted a sentencing hearing in which the State requested a 40-year prison sentence and defense counsel requested "no more than [30] years" in prison. During his statement in allocution, defendant stated, in part, "[w]hatever sentence [the trial court] hands down to me, whether it is [20] years, whether it is [40] years or

somewhere in between, \*\*\* I am responsible and there is a price that I should pay." Prior to imposing sentence, the court heard testimony from Judith's son and from a psychiatrist who had examined defendant. The court noted it had reviewed the presentence investigation report, two "mitigation letters" and a sentencing memorandum filed by defense counsel reflecting certain mitigating factors, and factors in aggravation, including defendant's use of drugs and alcohol. The court then sentenced defendant to 35 years in prison.

¶ 6 The trial court admonished defendant regarding his appeal rights as follows:

"Prior to taking an appeal, you must file in this [t]rial [c]ourt within [30] days of the date the sentence is imposed a written motion asking the [t]rial [c]ourt to reconsider the sentence or to have the judgment vacated and for leave to withdraw your guilty plea, setting forth your grounds for the motion, as well as withdrawing judgment and sentence.

If that motion is allowed, your sentence would be modified, the plea of guilty, sentence[,] and judgment would be vacated, and a trial date would be set on the charges to which the plea of guilty was made.

Upon request of the State's Attorney, the charges that were dismissed as part of this partial plea agreement would be reinstated and also be set for trial.

If your [m]otion to [r]econsider [s]entence or [v]acate the [j]udgment is denied, you have the right to appeal.

If you desire to appeal, you would first have to file your [n]otice of [a]ppeal within [30] days of the day that I denied your motion."

Defendant did not file a postsentencing motion and took no direct appeal.

¶ 7 On June 3, 2010, defendant filed a *pro se* postconviction petition alleging that he was denied the effective assistance of counsel because trial counsel failed to file a "motion to reduce sentence" and, as a result, defendant "was denied his right to appeal his sentence as excessive." Defendant alleged trial counsel had "told him that due to the mitigating factor's [*sic*] in his case h[e] would not be sentenced to more than 30 years['] imprisonment, but if [defendant] was sentenced to a term w[h]ich exceeded 30 years[, counsel] would file [a] motion to reduce sentence." Defendant further explained he was "not trying to withdraw his guilty plea. [He] simply wants the opportunity to have a court of review adjudicate whether or not his sentence is excessive in light of all the mitigating factors presented during the sentencing hearing."

¶ 8 On June 9, 2010, the trial court advanced defendant's postconviction petition to the second stage and appointed attorney Sarah Mayo to represent defendant.

¶ 9 On June 23, 2010, the State filed a motion to dismiss defendant's postconviction petition.

¶ 10 On August 27, 2013, Mayo filed a motion for leave to withdraw as postconviction counsel, asserting defendant's postconviction petition was without merit and was insupportable as a matter of law.

¶ 11 On November 8, 2013, the trial court held a hearing on the State's motion to dismiss. At the beginning of the hearing, Mayo informed the court that she had filed a motion to withdraw as counsel because she did not believe defendant had an arguable claim under the Post-

Conviction Hearing Act. 725 ILCS 5/122-1 to 122-7 (West 2010)) (Postconviction Act). The court explained Mayo's motion to defendant and then stated:

"So what I can do, though, she can stand on that, and we'll make that part of the record.

What I will do, though, is if you want to, for purposes of an appeal, if you don't agree with her, I will allow you today, on the State's [m]otion to [d]ismiss, argue your case, and then you can take that up, if you feel there are still issues that you think are still relevant, even though Mayo says that she didn't find any issues."

¶ 12 The State then argued its motion, noting that the court sentenced defendant within the cap negotiated and pointing out that the court had admonished defendant his sentence would be no less than 20 years in prison and no more than 40 years in prison and that defendant acknowledged he understood the sentencing range. Mayo informed the court she had spoken with defendant's trial counsel regarding defendant's claims and he "was adamant that he would never have advised any client in that manner, because it's not appropriate, it's not what the law says." The trial court addressed defendant as follows:

"Well, if you persist to think that something was done, you can—you filed—you got a *pro se* petition on file. What I'll do here is, based upon what I've heard today, I'll dismiss the petition, I'll allow you to appeal, and then the [a]ppellate [c]ourt can make a determination based upon [Mayo's motion to withdraw as counsel], and based upon your allegations as to whether or not this should go to the next step, being an evidentiary hearing, okay?"

The court then noted for the record "that the [m]otion to [d]ismiss is granted." The docket entry further indicates Mayo was allowed to withdraw.

¶ 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 because he made a substantial showing of a constitutional violation.

¶ 16 The Postconviction Act (725 ILCS 5/122-1 to 122-7 (West 2010)) provides a mechanism by which a criminal defendant may challenge his conviction or sentence based on a substantial deprivation of his constitutional rights. *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1074-75 (2010). A postconviction proceeding is collateral in nature and is limited to constitutional issues that could not have been addressed on direct appeal. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56, 793 N.E.2d 609, 619 (2002). In noncapital cases, postconviction proceedings take place in three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471-72, 861 N.E.2d 999, 1007 (2006).

¶ 17 "At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether 'the petition is frivolous or is patently without merit.' " *People v. Tate*, 2012 IL 112214, ¶ 9, 980 N.E.2d 1100 (quoting *People v. Hodges*, 234 Ill. 2d 1, 10, 912 N.E.2d 1204, 1208-09 (2009), quoting 725 ILCS 5/122-2.1(a)(2) (West 2006)). If the circuit court does not dismiss the postconviction petition within 90 days as "frivolous or patently without merit," it automatically advances to the second stage. *Id.* ¶ 10. Alternatively, the circuit court may affirmatively advance the petition to the second stage within 90 days. 725 ILCS 5/122-2.1(b) (West 2010). At the second stage, counsel may be appointed to represent the defendant and counsel may amend the defendant's petition to ensure his contentions are

adequately presented. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Further, the State may file a motion to dismiss a petition or an amended petition pending before the court. *Id.* at 472, 861 N.E.2d at 1008. "If [the State's] motion [to dismiss] is denied, or if no motion to dismiss is filed, the State must answer the petition, and, barring the allowance of further pleadings by the court, the proceeding then advances to the third stage [evidentiary hearing] wherein the defendant may present evidence in support of the petition." *Id.* at 472-73, 831 N.E.2d at 1008. In this case, the State filed a motion to dismiss and the court granted that motion.

¶ 18 At the second stage of postconviction proceedings, the petitioner bears the burden of making a substantial showing of a constitutional violation. *Id.* at 473, 861 N.E.2d at 1008. At this stage, all well-pleaded facts not positively rebutted by the record must be taken as true. *Id.* The trial court is prohibited from engaging in any fact-finding at this stage, and dismissal of the petition is warranted only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 380-81, 701 N.E.2d 1063, 1071 (1998). "[T]he 'substantial showing' of a constitutional violation that must be made at the second stage [citation] is a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle petitioner to relief." (Emphasis in original.) *People v. Domogala*, 2013 IL 113688, ¶ 35, 987 N.E.2d 767.

¶ 19 We review *de novo* the trial court's dismissal of a postconviction petition at the second stage and may affirm on any basis supported by the record. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008; *People v. Johnson*, 208 Ill. 2d 118, 129, 803 N.E.2d 442, 449 (2003).

¶ 20 On appeal, defendant argues his "post[ ]conviction claim challenged the representation received in his guilty plea proceedings and rendered his plea involuntary."

However, the record refutes defendant's contention. The underlying claim in defendant's postconviction petition was that he was denied the effective assistance of counsel when trial counsel failed to file a "motion to reduce sentence" and, as a result, he "was denied his right to appeal his sentence as excessive." Nowhere in defendant's postconviction petition did he claim that his guilty plea was involuntary as a result of it being induced by trial counsel's promise to file a postsentencing motion if the sentence exceeded 30 years. In fact, defendant clearly stated in his *pro se* postconviction petition that he did not wish to withdraw his guilty plea; he simply wanted the opportunity to have a court of review determine whether his 35-year sentence was excessive. Accordingly, the issue before us is whether, accepting all well-pleaded facts in defendant's *pro se* postconviction petition as true, defendant made a substantial showing of a constitutional violation. In other words, we must determine whether trial counsel's failure to file a postsentencing motion preserving defendant's right to appeal his sentence as excessive amounted to ineffective assistance of counsel.

¶ 21 To prevail 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). Specifically, "a defendant must prove that defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance created a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Graham*, 206 Ill. 2d 465, 476, 795 N.E.2d 231, 238 (2003). It is appropriate for this court to apply the two-pronged *Strickland* test where the trial court has entered a second-stage dismissal of an ineffective-assistance-of-counsel claim. See *People v. Alberts*, 383 Ill. App. 3d 374, 377, 890 N.E.2d 1208, 1212 (2008); *Coleman*, 183 Ill. 2d at 400, 701 N.E.2d at 1080 ("[B]ecause defendant's allegations fail to make a substantial showing of a violation of defendant's right to

effective assistance with regard to this claim, the dismissal of this portion of defendant's petition without an evidentiary hearing was proper."). "[I]f an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient." *Graham*, 206 Ill. 2d at 476, 795 N.E.2d at 238.

¶ 22 In *People v. Evans*, 174 Ill. 2d 320, 332, 673 N.E.2d 244, 250 (1996), our supreme court noted, "[t]o permit a defendant to challenge his sentence [after entering a negotiated guilty plea] without moving to withdraw the guilty plea in these instances would vitiate the negotiated plea agreement he entered into with the State." Thus, the *Evans* court held, "following the entry of judgment on a negotiated guilty plea, even if a defendant wants to challenge only his sentence, he must move to withdraw the guilty plea and vacate the judgment so that, in the event the motion is granted, the parties are returned to the status quo." *Id.* The *Evans* court further held "the motion-to-reconsider-sentence provisions of Rule 604(d) apply only to open guilty pleas." *Id.*

¶ 23 In *People v. Linder*, 186 Ill. 2d 67, 74, 708 N.E.2d 1169, 1172 (1999), our supreme court extended its reasoning in *Evans* to cases where a defendant pleaded guilty in exchange for the State's agreement to cap its sentencing recommendation. The *Linder* court noted, "[b]y agreeing to plead guilty in exchange for a recommended sentencing cap, a defendant is, in effect, agreeing not to challenge any sentence imposed below that cap on the grounds that it is excessive." *Id.* Thus, under *Linder*, a defendant who wishes to challenge a sentence imposed within an agreed-upon cap must file a motion to withdraw his guilty plea and vacate the court's judgment. See also Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

¶ 24 Pursuant to the partially negotiated plea agreement in this case, defendant was sentenced to 35 years, which was below the agreed-upon cap. To challenge his sentence,

defendant was required to file a motion to withdraw his guilty plea and vacate the judgment. However, the record affirmatively establishes defendant told the trial court he did not wish to withdraw his guilty plea. Rather, defendant told the court he only wanted a court of review to determine whether his 35-year sentence, which was within the agreed-upon cap, was excessive in light of the mitigating factors he presented at the time of sentencing. Because defendant's postconviction claim is that trial counsel was ineffective for failing to file a motion to reduce his sentence—a motion which was not allowed under the circumstances, as explained in *Linder*—he cannot establish prejudice under the second prong of the *Strickland* analysis. Thus, he has failed to make a substantial showing of a constitutional violation which would warrant an evidentiary hearing.

¶ 25

### III. CONCLUSION

¶ 26 For the reasons stated, we affirm the trial court's second-stage dismissal of defendant's postconviction petition. As part of our judgment, we grant the State's request that defendant be assessed \$50 as costs for this appeal.

¶ 27 Affirmed.