

**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).

2016 IL App (4th) 131092-U

NO. 4-13-1092

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

February 4, 2016

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

JOSHUA MICHAEL WILLIAMS,

Defendant-Appellant.

) Appeal from  
) Circuit Court of  
) McLean County  
) No. 09CF537  
)  
) Honorable  
) Charles G. Reynard,  
) Judge Presiding.

---

JUSTICE POPE delivered the judgment of the court.

Presiding Justice Knecht and Justice Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in dismissing defendant's postconviction petition during the second stage of postconviction proceedings.

¶ 2 In November 2013, the trial court dismissed defendant Joshua Michael Williams's postconviction petition at the second stage of postconviction proceedings. Defendant appeals, arguing the trial court erred because his petition made a substantial showing of a constitutional violation where defendant pleaded facts alleging a violation of his right to the effective assistance of counsel during plea bargaining. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On June 25, 2009, the State charged defendant by information with unlawful possession of a controlled substance (more than 15 grams but less than 100 grams of a substance containing cocaine) with the intent to deliver, a Class X felony (720 ILCS 570/401(a)(2)(A))

(West 2008)). At a hearing on September 11, 2009, the State noted defendant would probably be indicted on federal charges in the next two or three weeks. Later that month, on September 18, the parties appeared for a scheduled arraignment hearing on expected additional charges. The State noted it had planned to file two additional charges against defendant, but the parties had reached a plea agreement.

¶ 5 According to the agreement, defendant agreed to plead guilty to the charged Class X offense. Defendant told the trial court he understood the charge carried a sentencing range of 6 to 60 years in prison and was nonprobationable. The court stated:

"Your agreement goes on to describe, it indicates the [S]tate's [A]ttorney is going to be dismissing the petitions to revoke in 07-CF-284 and you would be discharged unsuccessfully from your probation term in that case, you would be sentenced to pay a \$10,000 street value fine, \$3,000 drug treatment assessment, \$100 drug trauma fund fine, \$100 Illinois State Police lab fee, \$200 [deoxyribonucleic acid] fee, plus court costs, otherwise, the sentence is undetermined at this point. It's called an open or blind plea without any agreement as to the sentencing recommendation.

There is also an indication here that the plea is pursuant to an agreement with Assistant United States Attorney John Campbell wherein it is understood that you will receive no federal drug or weapons charges relating to Bloomington Police Department Report 2009-17003."

The State then provided the factual basis for the charge:

"This was a Bloomington Vice Unit investigation into cocaine sales in Bloomington. There were several controlled buys with an informant from a middleman, co-conspirator, with one of the buys being on June 23rd supporting the intent to deliver. There was a controlled buy of cocaine with the middleman where the undercover officer had contact with [defendant], who basically had confirmed the price, the search warrant was obtained and executed for his residence. Inside the residence was found 90 grams of powdered cocaine and other indications of intent to deliver, including over \$7,700 in cash, and in that cash was buy money from the two controlled buys[,] further confirming he was the source supplier that the undercover officer dealt with middleman further supporting the intent to deliver allegation."

¶ 6 In December 2009, a sentencing hearing was held. Detective Steven Brown of the Bloomington police department testified he helped search defendant's apartment. Brown testified \$7,749 in cash was found in the apartment and 90 grams of cocaine in defendant's bedroom. Brown also found empty plastic Baggies with suspected cocaine residue and a large scale. Police also found 84 grams of cannabis, three semiautomatic handguns, and brass or chrome knuckles. The Bureau of Alcohol, Tobacco, Firearms and Explosives took possession of the guns, and the case was referred for federal prosecution.

¶ 7 Todd McClusky testified he was the case agent and was involved when the search warrant was served. McClusky testified defendant was identified as the source supplier on three controlled drug buys. During one of the controlled buys, McClusky had direct communication

with defendant over the price of the cocaine. The trial court sentenced defendant to 35 years in prison.

¶ 8 On May 3, 2013, defendant filed the postconviction petition at issue. The petition contained several claims of ineffective assistance of counsel. As defendant's appeal focuses on his counsel's alleged actions during plea bargaining, we focus on those allegations. In the petition, defendant stated:

"Defense (trial) counsel advised defendant to plead guilty to the state charge of possession which carried less time than what the defendant would face on the Federal charges, in exchange for [defendant's] guilty plea, the Federal prosecutor would not charge the defendant for the weapons.

\* \* \*

24.) Trial counsel's failure to properly advise and illustrate to the defendant ... that the possible Federal charges, if convicted on every count on the high end was eleven to thirteen years, a significantly less amount of time than the 'some where' in the middle range of six to sixty years if convicted on the state charges ... which trial counsel recommended to the Court."

(In fact, we note trial counsel recommended a sentence in the midrange of the unextended 6 to 30 year penalty.)

"25.) Trial counsel's failure to follow normal standard and ethical protocols [*sic*], (preserving defendant's procedural due process rights to challenge his guilty plea), whereas defendant in

'good faith' entered a non-negotiated plea relying on trial counsel's advice to plead guilty was his best option was erroneous from its inception ... where clearly the basis for the defendant's guilty plea (as written therein) was to avoid Federal charges, in exchange for lesser state time.

26.) Trial counsel's complete failure to investigate and conduct a minimum inquiry into the possible amount of time pursuant to the federal charges in order to properly (his client) [sic] advise the best scenario for a guilty plea.

\* \* \*

31) Trial counsel's performance thoroughly failed to ensure defendant's constitutional rights were protected by allowing the defendant to unintelligently enter a non-negotiated guilty plea based entirely upon trial counsel's advice ... (that the state charge carried less time than the Federal charges) ... without full knowledge that trial counsel's advice was blatantly erroneous[. If] defendant had been convicted on every Federal charge, the top end of the Federal sentencing guidelin[es] was 13 years ... which was less time than what trial counsel asked the trial Court to impose upon defendant's guilty plea pursuant to the state charge which was 'somewhere' mid-range of 6 to 60 years, resulting in an extended term of 35 years ... a difference of 22 years is simply not logical nor intelligent ... and there is a reasonable probability, that had it

not been for trial counsel's misguided advice, defendant certainly would not have plead [*sic*] guilty and insisted upon a trial."

As we noted above, trial counsel did not recommend a sentence in the midrange of 6 to 60 years. Rather, counsel recommended a sentence in the midrange of the unextended term of 6 to 30 years.

¶ 9 According to defendant, his trial counsel completely failed "to investigate and conduct a minimum inquiry into the possible amount of time pursuant to the federal charges" so counsel could advise defendant of the best plea scenario. On June 6, 2013, the court sent the parties a letter stating the petition was advanced to the second stage of postconviction proceedings.

¶ 10 On July 3, 2013, the State moved to dismiss the petition, arguing the petition was untimely and failed to allege any meritorious claims of a constitutional violation. The trial court held a hearing on the State's motion to dismiss on November 12, 2013. The court denied the State's motion with regard to the timeliness of defendant's petition. However, the court dismissed the petition, finding no evidentiary basis existed for any of the claims of ineffective assistance of counsel.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 Defendant argues the trial court erred in dismissing his postconviction petition during the second stage of postconviction proceedings because his petition made a substantial showing of a constitutional violation of his right to the effective assistance of counsel during plea bargaining. According to his brief:

"[Defendant] pled facts alleging the following: counsel gave him affirmative misadvice concerning the advantages of the plea agreement, he pleaded guilty on the basis of the erroneous advice, and he would not have pleaded guilty had it not been for the misadvice. Through these allegations, [defendant's] petition made a substantial showing of a constitutional violation of his right to effective assistance of counsel during plea bargaining."

Defendant asks this court to reverse the dismissal and remand the case for an evidentiary hearing.

¶ 14 We review *de novo* the dismissal of a postconviction petition. *People v. Stewart*, 381 Ill. App. 3d 200, 203, 887 N.E.2d 461, 464 (2008). During the second stage of postconviction proceedings, the trial court "must determine whether the petition and any accompanying documentation make a 'substantial showing of a constitutional violation.' "

*People v. Domagala*, 2013 IL 113688, ¶ 33, 987 N.E.2d 767 (quoting *People v. Edwards*, 197 Ill. 2d 239, 246, 757 N.E.2d 442, 446 (2001)).

"At the dismissal stage of a post-conviction proceeding, all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true. The inquiry into whether a post-conviction petition contains sufficient allegations of constitutional deprivations does not require the circuit court to engage in any fact-finding or credibility determinations. \*\*\* [A] motion to dismiss raises the sole issue of whether the petition being attacked is proper as a matter of law." *Id.* ¶ 35 (quoting *People v. Coleman*, 183 Ill. 2d 366, 385, 701 N.E.2d 1063, 1073-74 (1998)).

A petition is legally sufficient to survive the second stage of postconviction proceedings if the well-pled allegations in the petition, if proven at the evidentiary hearing, would entitle the defendant to relief. *Id.* ¶¶ 34-35.

¶ 15 "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). To establish ineffective assistance of counsel, a defendant must first establish his counsel's performance was deficient and fell below an objective standard of reasonableness. *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012). In addition, a defendant must establish he was prejudiced by counsel's deficient performance. *Id.* "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Id.*

¶ 16 According to defendant, the alleged inaccurate advice at issue in this case involved the punishment defendant faced pursuant to potential federal charges. Defendant argues:

"Since *Padilla*, our Supreme Court has recognized 'that where [collateral] consequences are severe, certain to occur, enmeshed in the criminal process, and are of predictable importance to a defendant's calculus, they are not categorically excluded from *Strickland*'s purview despite being traditionally categorized as collateral.' *Hughes*, 2012 IL 112817, ¶ 49. Nevertheless, even before *Padilla*, Illinois courts had held that *affirmative misadvice* concerning a collateral consequence of a plea qualifies as deficient performance under *Strickland*. See, e.g., *People v. Correa*, 108 Ill. 2d 541, 550-53 (1985) (holding that a



defense counsel's affirmative misadvice concerning a collateral consequence of a defendant's plea constituted ineffective assistance of counsel); *Stewart*, 381 Ill. App. 3d at 203 (holding, in the context of the Post-Conviction Hearing Act, 'that when defense counsel affirmatively misrepresents to the defendant the collateral consequences of his guilty plea and the defendant pleads guilty based on the affirmative misrepresentations, the defendant alleges a constitutional violation that warrants an evidentiary hearing')."

(Emphasis in original.)

¶ 17 According to defendant, his counsel was deficient because he (1) failed to investigate the sentencing ramifications of a federal conviction in this case and (2) advised him the State charge carried less time than the federal charges when, according to defendant, the State charge had a longer potential sentence than the federal charges. According to defendant, counsel presented the plea agreement as being more advantageous than it actually was. Defendant alleged he would not have pleaded guilty if he had been properly informed by his trial counsel. Based on the record and the context of this case, defendant cannot establish he received constitutionally ineffective assistance of counsel.

¶ 18 According to defendant's petition:

"Defense (trial) counsel advised defendant to plead guilty to the state charge of possession which carried less time than what the defendant would face on the Federal charges, in exchange for [defendant's] guilty plea, the Federal prosecutor would not charge the defendant for the weapons."

For the sake of reviewing the dismissal of defendant's petition, we must accept this allegation as true. While inartful, defense counsel's advice reflected the potential reality of defendant's situation in this case. The idea defendant would have been more likely to reject this plea agreement had his attorney provided a clearer assessment of the potential penalties in this case is not tenable.

¶ 19 Defendant approaches this situation as if he could have chosen to be prosecuted in state or federal court. That is not the case. The record contains no indication the State had any intent to dismiss its case against defendant in favor of federal prosecution. As a result, defendant potentially faced prosecution in state court and then federal court, as well as consecutive state and federal prison sentences. See 18 U.S.C. § 3584 (2006) ("If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively \*\*\*."). According to the United States Supreme Court, a defendant may be subjected to successive prosecutions in state and federal court for the same conduct without violating the fifth amendment's double jeopardy clause. *Bartkus v. Illinois*, 359 U.S. 121, 133 (1959).

¶ 20 We note, pursuant to section 3-4 of the Criminal Code of 1961 (720 ILCS 5/3-4 (West 2008)), the State may not always prosecute defendants who have already been prosecuted in federal court. However, the record provides no indication defendant would have been prosecuted in federal court prior to being convicted in state court. Further, section 3-4 provides statutory protection, not constitutional protection.

¶ 21 Defendant was not prejudiced by the alleged inartful advice he received from trial counsel. An accurate assessment of the collateral consequences of the potential federal

prosecution would have been even more incentive to accept the plea bargain in this case, especially considering the strength of the State's case against defendant. In other words, no reasonable probability exists the outcome of this case would have been different had defense counsel provided defendant a clearer explanation of the possible consequences of both state and federal convictions.

¶ 22

### III. CONCLUSION

¶ 23

For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 24

Affirmed.