2019 IL App (2d) 170083-U
No. 2-17-0083
Order filed June 14, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN W. RILEY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 08-CF-2174 Honorable Mark L. Levitt, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in dismissing defendant's postconviction petition, which made a substantial showing that appellate counsel was ineffective for failing to argue that the court committed plain error by increasing defendant's sentence in violation of section 5-5-4(a).

¶ 2 Defendant, John W. Riley, appeals from an order granting the State's motion to dismiss his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) for relief from his 27½-year sentence for home invasion (720 ILCS 5/12-11(a)(3) (West 2008)). We reverse and remand for further proceedings under the Act.

¶ 3 I. BACKGROUND

¶ 4 Defendant was originally charged with two counts of home invasion (*id.* § 12-11(a)(2), (a)(3)), two counts of aggravated kidnapping (*id.* § (a)(1), (a)(2)), and one count of residential burglary (*id.* § 19-3(a)). The parties agreed that defendant's guilt would be determined at a stipulated bench trial and that both parties would recommend that, if found guilty, defendant would be sentenced to a 23-year prison term. The parties also agreed that no presentence investigation report (PSI) would be prepared.

¶ 5 The parties stipulated to evidence that three men entered the home of Lisa Weeks while she was in bed recovering from "tummy tuck" surgery. One of the intruders pulled her out of bed, causing her to injure her head and bite her lip. He pointed a gun at her and put duct tape over her mouth. He then pulled her to her feet and held her hands behind her back while she led the intruders to a safe in the basement. At first, she had difficulty opening the safe and one of the intruders attempted to open it while another held Weeks at gunpoint. Eventually, the safe was opened. The intruders took guns, coins, and other items from the safe. They also took Weeks's purse. One of the intruders took Weeks to a different part of the basement and put a blanket over her head. Weeks waited for the intruders to leave and then went to a neighbor's house for help. Defendant's DNA matched a sample taken from a latex glove found in Weeks's driveway. Defendant spoke to the police and admitted that he participated in the crime.

¶ 6 The trial court found defendant guilty of a single count each of home invasion and aggravated kidnapping and sentenced him to concurrent 23-year prison terms. Defendant appealed, arguing that the State failed to prove him guilty beyond a reasonable doubt of aggravated kidnapping and that the trial court erred in sentencing him without the benefit of a PSI and without making a finding as to his history of delinquency or criminality. We reversed the aggravated kidnapping conviction and remanded for resentencing on the home invasion

conviction. *People v. Riley*, 2012 IL App (2d) 110054-U. We stated, "We express no opinion as to the parameters of resentencing, as the matter is within the discretion of the trial court." *Id.* ¶ 16.

¶ 7 On remand, a PSI was prepared. It indicated that, in 2006, defendant was arrested for mob action and disorderly conduct. That same year, he was convicted of aggravated battery and unlawful possession of fireworks. Defendant was placed on probation for aggravated battery and on court supervision for unlawful possession of fireworks. Both the probation and the court supervision were revoked. In 2008, defendant pleaded guilty to aggravated fleeing and driving under the influence of drugs or alcohol. He successfully completed a two-year term of probation. He was also arrested for (1) driving an all-terrain vehicle on a road; (2) lack of valid registration; and (3) driving while his license was suspended. Judgment was entered on a bond forfeiture.

¶ 8 The PSI indicated that, in February 2011, while in the Department of Corrections, defendant received a citation for "theft/unauthorized property for having a bundle of 100 salt and pepper packets." Defendant was placed in segregation for 30 days. The PSI also noted that defendant took an Adult Basic Education test while in the Department of Corrections.

¶ 9 Evidence admitted at defendant's sentencing hearing indicated that defendant passed the GED test. Defendant's stepfather testified that he operated an HVAC/electrical business and that, when defendant was released from prison, there would be a job waiting for him. John Dax testified that he had known defendant and his family for nearly 20 years. According to Dax, when defendant was in grammar school, he was a nice young man. He was courteous and friendly. He was also athletic, playing baseball and football in high school. Dax testified that defendant's family would support him when he was released from prison.

¶ 10 Speaking in allocution, defendant apologized to Weeks. He acknowledged that he had been selfish and had not considered how his actions would affect Weeks and his own family. Defendant indicated that he was working on controlling problems with alcohol and that he thought that, when released, he could help others who were struggling with alcohol. He also thought he could reach out to juveniles to help them avoid a life of crime.

¶ 11 In pronouncing sentence, the trial court stated as follows:

> "I have consulted on—the reason you're back in front of me, and that is the decision of the Second District Appellate Court in which they indicate that it is back to the court for a resentencing hearing, and they specifically said, and I quote, 'We express no opinion as to the parameters of resentencing as the matter is within the discretion of the trial court.'
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> My own research and hearing that from the Appellate Court clearly tells me that they are not limiting anything that this Court is going to do by way of sentencing, and, certainly, that in some instances, the term of years that was previously imposed in the given case stands as a ceiling in the case. *I do not believe, and the Appellate Court has told me, that that is not the case here* because this is the same as if you were convicted of only one offense rather than two." (Emphasis added.)

¶ 12 The trial court noted that defendant had put Weeks through a terrifying experience. The court recounted defendant's criminal history, as described in the PSI. The court stated that it had considered that, while defendant was in the Department of Corrections, his conduct "ha[d] not been the best," because defendant "did spend some time in segregation with respect to a theft in the Department of Corrections." The court stated that it was "gratifying" to see the support defendant had from his family and that his family would support him when he was released from

prison. The court found defendant's apology to Weeks, and his desire to turn his life around and help others, to be mitigating. The court sentenced defendant to a 27½-year prison term.

¶ 13 Defendant's attorney filed a motion to reconsider defendant's sentence, arguing that "the sentence imposed is excessive given the applicable factors in mitigation as well as Defendant's history, family situation, and other factors suggesting that the Defendant is amenable to rehabilitation." The trial court denied the motion, stating that "[t]he Court was not bound in any way by the recommended disposition at the time of the sentencing act [*sic*] with the stipulated bench trial in light of the fact that it was brought back for a new sentencing hearing."

¶ 14 Defendant appealed. He argued that the trial court committed plain error by sentencing him to 27½-year prison term without advising him that it was not bound by the parties' agreement that he be sentenced to a 23-year prison term. We held that defendant failed to establish plain error. *People v. Riley*, 2014 IL App (2d) 130094-U, ¶ 17 (*Riley II*). Defendant also argued that the increased sentence violated section 5-5-4(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-4(a) (West 2012)), which provides, "Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied unless the more severe sentence is based upon conduct on the part of the defendant occurring after the original sentencing." We rejected the argument, noting that defendant forfeited it by failing to raise it in his motion to reconsider *and* that he had not argued that the issue was reviewable under the plain-error rule. *Riley II*, 2014 IL App (2d)130094-U, ¶ 17.

¶ 15 On September 3, 2015, defendant filed the postconviction petition giving rise to this appeal. He claimed that he did not receive the effective assistance of counsel in connection with

the motion to reconsider his sentence to a 27½-year prison term. Defendant contended that trial counsel should have argued that the sentence violated section 5-5-4(a). Defendant also argued that appellate counsel's failure to seek plain-error review deprived him of the effective assistance of counsel on appeal. The trial court appointed postconviction counsel, who filed a supplemental postconviction petition. The trial court granted the State's motion to dismiss the petition, and this appeal followed.

¶ 16 II. ANALYSIS

¶ 17 We begin our analysis with a brief summary of the principles governing proceedings under the Act:

> "The Act provides a three-stage process for adjudicating postconviction petitions. At the first stage, the circuit court determines whether the petition is 'frivolous or is patently without merit.' [Citation.] *** If the court determines the petition is frivolous or patently without merit, the court dismisses the petition. [Citation.] If the petition is not dismissed, it will proceed to the second stage.
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> At the second stage, the court may appoint counsel to represent an indigent defendant, and counsel may amend the petition if necessary. [Citation.] The State may then file a motion to dismiss the petition. [Citation.] If the State does not file a motion to dismiss or if the court denies the State's motion, the petition will proceed to the third stage and the court will conduct an evidentiary hearing on the merits of the petition. [Citation.]" *People v. Hommerson*, 2014 IL 115638, ¶¶ 7-8.

To survive a second-stage motion to dismiss, the petition must make a substantial showing of a constitutional violation. *People v. York,* 2016 IL App (5th) 130579, ¶ 16.

¶ 18 It is well established that "[t]he Act is not a substitute for an appeal but, rather is a collateral attack on a final judgment." *People v. Jones*, 2017 IL App (1st) 123371, ¶ 40. In a postconviction proceeding, issues that were raised and decided on direct appeal are barred under the doctrine of *res judicata* and issues that could have been raised on direct appeal but were not are forfeited. *Id.* We note the State's argument that, because the section 5-5-4(a) issue was forfeited in *Riley II*, it cannot be raised in defendant's postconviction petition. The State's argument is meritless because "[t]he doctrine of [forfeiture] does not bar consideration of issues in postconviction proceedings where the alleged [forfeiture] stems from the incompetency of appellate counsel." *People v. Dalton*, 2017 IL App (3d) 150213, ¶ 31. As explained below, that principle applies here.

¶ 19 In his postconviction petition, defendant claimed that, on remand for resentencing following *Riley I*, he was deprived of his right to the effective assistance of counsel. Defendant argued that the trial court erroneously increased his sentence, in violation of section 5-5-4(a) of the Code, and that his attorney failed to raise the error in his motion to reconsider defendant's sentence. That failure resulted in the forfeiture of the issue on appeal from defendant's increased sentence. See *People v. Moore*, 359 Ill. App. 3d 1090, 1092 (2005). Defendant maintains, however, that appellate counsel in *Riley II* could have raised the issue under the plain-error rule (see Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)) and that, by failing to do so, appellate counsel did not provide effective assistance to defendant. Defendant maintains that, because the failure to raise the issue in *Riley II* stemmed from appellate counsel's incompetence, the issue may be raised in the postconviction proceeding.

¶ 20 Claims of ineffective assistance of counsel, both at trial and on appeal, are governed by the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland*

requires a showing that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance was prejudicial in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. Thus, to ultimately prevail in the postconviction proceeding, defendant would be required to establish that appellate counsel's failure to seek plain-error review of the section 5-5-4(a) issue was objectively unreasonable and that there is a reasonable probability that, if appellate counsel had sought plain-error review, the outcome of *Riley II* would have been different.

¶ 21 In this case, *Strickland*'s performance and prejudice prongs are not entirely discrete inquiries. Whether counsel's failure to seek plain-error review was objectively unreasonable depends, in part, on whether there was a meritorious basis for arguing that plain error occurred. The obligation to provide effective assistance does not entail raising arguments that cannot succeed. Accordingly, we first consider whether defendant's petition sufficiently alleged prejudice to warrant proceeding to the third stage, *i.e.* whether defendant made a substantial showing that there was a reasonable probability that the outcome of *Riley II* would have been different if counsel had sought plain-error review.

¶ 22 Our supreme court has explained the plain-error rule as follows:

> "The plain error doctrine permits a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of

the judicial process, regardless of the closeness of the evidence." *People v. McDonald*, 2016 IL 118882, ¶ 48.

¶ 23 Because the imposition of a more severe sentence on remand implicates fundamental rights, claims that the trial court did so *erroneously* are subject to review under the plain-error rule. *Moore*, 359 Ill. App. 3d at 1092. Accordingly, we consider whether the trial court erred by increasing defendant's prison term.

¶ 24 As noted, when a sentence has been set aside, section 5-5-4(a) forbids the trial court from imposing a more severe sentence unless it is based on conduct occurring after the original sentencing. Moreover, the trial court's reasons for imposing a more severe sentence must appear in the record and must "be based upon objective information concerning identifiable conduct of defendant occurring after the time of the original sentencing." *People v. Moore*, 177 Ill. 2d 421, 432 (1997).

¶ 25 Defendant contends that the trial court improperly relied on his prior criminal history as documented in the PSI. The State responds that, in *Riley I*, defendant argued that it was error to sentence him without a PSI, as required by section 5-3-1 of the Code (730 ILCS 5/5-3-1 (West 2008)). According to the State, "defendant cannot now argue that the trial court abused its discretion in ordering a PSI and reviewing it." That is true, but it is beside the point. The issue here is whether the trial court violated 5-5-4(a) by relying on defendant's prior criminal history. The State cites no authority, and we are not aware of any, that when a case is remanded for compliance with section 5-3-1, the trial court need not adhere to section 5-5-4(a).

¶ 26 It is presumed that "the legislature intended that two or more statutes which relate to the same subject are to be read harmoniously so that no provisions are rendered inoperative." *Knolls Condominium Ass'n v. Harms*, 202 Ill. 2d 450, 458-59 (2002). Section 5-3-1 and section 5-5-4(a)

relate to the same subject: sentencing. Reading those provisions harmoniously, we conclude that, when a case is remanded for compliance with section 5-3-1, the trial court may rely on the information in the PSI to impose either the same sentence that it originally imposed or a less severe sentence. However, the court may rely on the PSI to *increase* a sentence only if the PSI discloses conduct occurring after the defendant was originally sentenced that warrants the increase.

¶ 27 The trial court's findings at the resentencing hearing span about 4½ pages of the transcript. The court discussed how terrified the victim must have been. The court also detailed defendant's prior criminal history. The court noted that defendant had the support of his family and that he was remorseful. With respect to conduct occurring after defendant was originally sentenced, the only thing that the court mentioned was that defendant had committed a theft while in the Department of Corrections. The court's sole reference to that conduct was a single sentence: "The Court also considered the fact that, while you were in the Department of Corrections, your—your conduct has not been the best because certainly you spend some time in segregation with respect to a theft in the Department of Corrections." Notably, the court did not specifically identify that theft as the basis for increasing defendant's sentence, as it was required to do. *Moore*, 177 Ill. 2d at 432.

¶ 28 In pronouncing sentence, the trial court did not differentiate between conduct that occurred before defendant was originally sentenced and conduct that occurred thereafter. The court simply stated, "considering the crime that was committed in this case and the facts of that crime, along with all these other factors including the mitigation, I find the appropriate sentence in this case would be 27-and-one-half years in the Illinois Department of Corrections." Considering the court's remarks in their entirety, it is difficult to conclude that the court attached

much weight to defendant's theft of salt and pepper packets in the Department of Corrections and it does not appear that the theft alone could have been the basis for increasing defendant's sentence by 4½ years.

¶ 29 The State contends that whether to increase defendant's sentence because of the theft of the salt and pepper packets was a matter within the trial court's discretion. That argument misses the point because it presupposes that the trial court's decision to increase defendant's sentence was, in fact, based on the theft of the salt and pepper packets. By all appearances, however, the trial court also relied on conduct that occurred before defendant was originally sentenced.

¶ 30 We therefore conclude that the trial court committed reversible error by increasing defendant's sentence. For the reasons stated above, the error was reviewable under the plain-error rule. Having argued that defendant's sentence violated section 5-5-4(a), appellate counsel in *Riley II* was obliged to argue that the violation was plain error. Appellate counsel's failure to do so was not objectively reasonable. Thus, defendant's ineffective-assistance-of-counsel claim satisfies the performance prong of the *Strickland* test. Furthermore, defendant's claim satisfies the prejudice prong of the *Strickland* test because there is at least a reasonable probability that, had appellate counsel argued that the section 5-5-4(a) violation was plain error, we would have reversed defendant's sentence. Thus, defendant made a substantial showing that he did not receive the effective assistance of appellate counsel, and the trial court therefore erred in dismissing the petition.

¶ 31 III. CONCLUSION

¶ 32 For the foregoing reasons, we reverse the dismissal of defendant's postconviction petition and remand for further proceedings under the Act.

¶ 33 Reversed and remanded.