

2014 IL App (2d) 121265-U
No. 2-12-1265
Order filed May 19, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 06-CF-2371
)	
STEVEN CAPTAIN,)	Honorable
)	Allen M. Anderson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Burke and Justice Birkett concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly dismissed defendant’s postconviction petition, which alleged ineffective assistance of counsel: counsel’s allegedly erroneous advice about the sentencing range was cured by the trial court’s correct admonishments; counsel’s allegedly erroneous advice about sex-offender registration did not cause prejudice, as defendant did not show that he would not have pleaded guilty otherwise; and counsel’s alleged failure to investigate was neither unreasonable nor prejudicial.
- ¶ 2 Defendant, Steven Captain, appeals the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). The petition alleged that defendant’s trial attorney was ineffective. We affirm.

¶ 3 On September 27, 2006, defendant was indicted on nine counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)), B.K., and eight counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2006)) of B.K. On March 21, 2007, the State notified the trial court and defendant that it intended to introduce statements that B.K., who was under 13 years old at the time of the alleged offenses, made (1) on July 13, 2006, to David Berg and Kathy Byrne at the Elgin field office of the Department of Children and Family Services (DCFS) and (2) on July 4, 2006, to Carrie K., her mother, at their home. See 725 ILCS 5/115-10 (West 2006). On June 13, 2007, after an evidentiary hearing, the court ruled that B.K.'s out-of-court statements would be admissible at trial.

¶ 4 On October 11, 2007, the parties appeared in court with a proposed plea agreement. Defendant was represented by Rachel Conant. The trial judge admonished defendant that he had agreed to plead guilty to one count of predatory criminal sexual assault of a child, a Class X felony with a mandatory prison sentence of 6 to 30 years and a term of mandatory supervised release (MSR) that would be at least 3 years and could be as much as natural life. Defendant said that he understood. The judge then admonished defendant that he had also agreed to plead guilty to one count of aggravated criminal sexual abuse, a Class 2 felony, with a sentence of either probation for as much as 4 years or imprisonment for 3 to 7 years plus an MSR term of no more than 2 years. Defendant said that he understood. The judge then stated that, under the plea agreement, defendant would serve consecutive prison terms of 6 years for predatory criminal sexual assault (with no more than 15% good-time credit) and 4 years for aggravated criminal sexual abuse (with eligibility for 50% good-time credit), with a total of 367 days of credit for pretrial custody. Defendant said that this was his understanding of the plea agreement.

¶ 5 The judge then admonished defendant about his plea agreement in a separate case; about the rights that he was waiving by pleading guilty; and of his appeal rights. The judge said nothing about an obligation to register under the Sex Offender Registration Act (Registration Act) (730 ILCS 150/1 *et seq.* (West 2006)) and no party raised the matter. Defendant stated that he was pleading guilty voluntarily. The State presented a factual basis for the pleas.

¶ 6 On July 13, 2010, defendant filed a *pro se* petition under the Act, claiming that Conant had rendered ineffective assistance that induced him to enter his guilty pleas. The petition alleged specifically as follows. Conant had “convinced” defendant to tell the trial court that he had been promised nothing other than what was in the agreement. However, Conant had incorrectly told him that, under the agreement, he would have to serve “a maximum of five years because [he] would be eligible for Good Conduct Credit and Supplemental Meritorious Good Time.” Further, she had told defendant that he would have to register as a sex offender under the Registration Act for only 10 years. Once defendant entered prison, he learned that he was ineligible “for any E.G.C.C. or S.M.G.T. due to the nature of his offense” and that he would have to register for life as a sex offender. Thus, he had been misled into pleading guilty.

¶ 7 The petition alleged that Conant had been ineffective on another basis: she had failed to investigate potentially exculpatory evidence. As pertinent to this appeal, the petition addressed “cell phone messages” that Carrie had left, in which she apologized to defendant and admitted that “it was all staged out of anger because the defendant had ended their relationship and that she wish[ed] she could stop the proceeding but was afraid of the repercussions for doing so.” The petition alleged that defendant had told Conant about the messages but that she told him that the messages would be inadmissible at trial and thus did not warrant investigating.

¶ 8 The trial court appointed counsel for defendant (see 725 ILCS 5/122-2.1(b), 122-4 (West 2010)). On January 12, 2012, defendant filed his affidavit in support of the petition, stating as follows. Conant had made various misrepresentations to defendant, and these misrepresentations had “caused [defendant] to enter [his] pleas of guilty.” Conant had misrepresented the timing of defendant’s eligibility for MSR; she said that his minimum prison term was 5 years, but, after entering prison, he had learned that the minimum was 7 years and 1 month. Conant had misrepresented how much good-conduct credit and supplemental meritorious good-conduct credit would be available. She also told defendant that he would have to register as a sex offender for only 10 years; in reality, he “might have to register for life.” Thus, when defendant pleaded guilty, he did not understand the sentences that he faced.

¶ 9 Defendant’s affidavit asserted further that Conant had failed to investigate the charges or prepare for the case, causing him to believe that his position was “hopeless.” As pertinent here, defendant had specifically requested that Conant investigate a “voice-mail message” that Carrie had left him, in which she had admitted that the charges had been “staged” as “the direct result of her anger” toward him and that she was afraid of the “repercussions” if she attempted to stop the proceedings. Conant never followed through with defendant’s request to investigate.

¶ 10 The State moved to dismiss the petition, arguing as follows. At sentencing, the trial court had clearly admonished defendant that he would have to serve consecutive prison terms of six years with no more than 15% good-time credit on the Class X charge and four years with no more than 50% good-conduct credit on the Class 2 charge; defendant had stated that he understood the admonishments. Any error that Conant might have made in calculating his total term was corrected by the admonishments. Next, although defendant’s offenses required him to register for life as a sex offender, the registration requirement was proper and was not

punishment. Finally, Conant had prepared sufficiently: she had obtained several continuances in order to investigate and had strongly contested the admissibility of B.K.'s out-of-court statements.

¶ 11 Moreover, the State continued, defendant's claim about Carrie's allegedly exculpatory voice-mail message lacked specifics. He did not indicate that the message still existed or that it existed when Conant was representing him; at the hearing on B.K.'s statements, defendant could have told Conant about the voice-mail message but apparently did not do so. Conant could not have been ineffective for failing to pursue a defense based on nonexistent evidence. Thus, the State concluded, defendant had not made a substantial showing either that Conant had performed unreasonably or that her errors had induced defendant to plead guilty.

¶ 12 On June 15, 2012, after hearing arguments, the trial court granted the State's motion to dismiss the petition. The court explained as follows. Defendant's claim that Conant's incorrect advice about sentencing induced his guilty plea was refuted by the record: the trial court had admonished defendant correctly as to the lengths of the prison and MSR terms, and defendant had stated that he understood. The sex-offender registration requirement was civil, not punitive, and thus, under *People v. Downin*, 394 Ill. App. 3d 141 (2009), was "not subject to consideration" under the Act. As to Conant's treatment of Carrie's voice-mail message to defendant, although defendant had named the source of the information, he had omitted "the additional detail of when the information became known or when trial counsel was informed about it," and there was no affidavit from anyone who had heard the message or who could verify its existence. Thus, the petition did not make a substantial showing that Conant had been ineffective.

¶ 13 Defendant timely appealed, but, with the court's permission, he withdrew the appeal and moved *pro se* to reconsider the judgment. Alleging that his postconviction counsel had failed to amend the petition by including two affidavits, he also filed the affidavits.

¶ 14 The first affidavit was from Rosemary Barnes and was dated July 1, 2012. Barnes stated as follows. "A few months" after defendant was arrested, his sister Stephanie Captain showed Barnes a mobile phone that had a recording of defendant asking Carrie why she was "doing this to him." Carrie responded that she had become tired of defendant "playing games" with her. Carrie also told defendant that "she dared her sister [*sic*] to do it to get even with [defendant]" and that "she didn't think that her sister would go along with it." In 2007, Barnes contacted the public defender about the phone message; she was told that someone would contact her, but nobody did. Barnes spoke to the public defender's office again and was told that the phone message "couldnt [*sic*] be used." Barnes told defendant about the matter, and he told her that his lawyer had told him that the message was illegal and could not be used. Barnes did not "turn the phone [*sic*]" and did not know now where it was. Defendant had told Barnes that he was "scared" of losing at trial and was tired of jail and that he took the plea offer "so that he could hurry back home."

¶ 15 Stephanie Captain's affidavit, dated June 30, 2012, stated as follows. "On or about September or August 2006," defendant "left a cell phone" that included a voice recording of defendant asking Carrie "why did she lie" by accusing him of improper relations with B.K. Carrie replied, "I told my sister [*sic*] to do it because you were playing games with me but I didn't think she would actually do it.'" At defendant's request, after his arrest, Stephanie gave the phone to Barnes. She did not know what had happened to it afterward.

¶ 16 Defendant's postconviction attorney withdrew. The trial court appointed a new attorney. On November 8, 2012, the court held a hearing on the motion to reconsider and denied it. The court noted that, even had the affidavits of Barnes and Stephanie been attached to the original petition, they would have made no difference. Defendant timely appealed.

¶ 17 We review *de novo* the second-stage dismissal of a petition under the Act. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). We may affirm the dismissal only if the petition's allegations, liberally construed in light of the trial record, failed to make a substantial showing of a constitutional violation. *Id.* We accept as true all factual allegations that are not positively rebutted by the record. *Id.*

¶ 18 To show ineffective assistance of trial counsel, a defendant must establish that counsel's performance was objectively unreasonable and that the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hall*, 217 Ill. 2d at 335. In the context of a conviction based on a guilty plea, to show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Hall*, 217 Ill. 2d at 335. A bare allegation to this effect is insufficient. *Hall*, 217 Ill. 2d at 335. Rather, the defendant must provide either a claim of innocence or a plausible defense that could have been raised at trial. *Id.* at 335-36. Whether counsel's deficient representation caused the defendant to plead guilty depends largely on whether the defendant likely would have succeeded at trial. *Hill*, 474 U.S. at 59; *Hall*, 217 Ill. 2d at 336.

¶ 19 We turn first to defendant's claim that Conant was ineffective for failing to advise him properly about the sentences that he faced under the plea agreement. Defendant's petition faulted Conant in two respects: (1) she erred in her advice about the minimum aggregate term

that defendant would serve; and (2) she erred in advising him that he would have to register under the Registration Act for 10 years, although he was actually required to register for life. The State does not contest defendant's assertion that Conant made unprofessional errors in both respects, but it contends that he failed to make a substantial showing that her errors prejudiced him. For the following reasons, we agree with the State.

¶ 20 At the guilty-plea hearing, the trial court admonished defendant about both his prison terms and the attendant MSR terms. Defendant stated that he understood the admonishments and that there were no agreements or promises other than those in the agreement. His petition did not assert that the admonishments were inaccurate. We agree with the State that the record rebuts defendant's assertion of prejudice, as Conant's alleged errors in this regard were cured by the trial court's explicit admonishments on the same subject matter. See *Hall*, 217 Ill. 2d at 339.

¶ 21 The same cannot be said of defendant's allegation that Conant erroneously advised him that, under the plea agreement, he would have to register for only 10 years as a sex offender. At the guilty-plea hearing, neither the trial court nor the parties mentioned the matter at all. Therefore, as Conant's alleged advice was indeed erroneous (see 730 ILCS 150/2(E)(1), (7) (West 2006)), we must decide whether defendant established prejudice.

¶ 22 In dismissing defendant's petition, the trial court reasoned that, under *Downin*, Conant's allegedly erroneous advice about the Registration Act could not support a claim of ineffectiveness. *Downin*, however, holds only that being required to register as a sex offender does not in itself make a defendant " 'imprisoned in the penitentiary' " (*Downin*, 394 Ill. App. 3d at 143, quoting 725 ILCS 5/122-1(a) (West 2006)) so as to give him standing under the Act (*id.*, at 146). It does not hold that a claim of ineffective assistance may not be based on an allegation that a defendant's trial attorney affirmatively misled him about his obligations under the

Registration Act and thereby induced him to plead guilty. Indeed, we have held that such an affirmative misrepresentation will support a claim of ineffectiveness if the defendant shows prejudice. *People v. Presley*, 2012 IL App (2d) 100617, ¶ 29.

¶ 23 Of course, the trial court's error of law does not affect our resolution of the merits of defendant's claim, as we are concerned with the trial court's judgment, not its reasoning, and may affirm the judgment on any basis called for by the record. See *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010). We therefore address whether defendant's allegation as to Conant's allegedly erroneous advice satisfied the prejudice prong of *Strickland*. We hold that it did not.

¶ 24 Defendant's petition had to show that, absent trial counsel's errors, defendant would have rejected the plea agreement and insisted on going to trial (*Hill*, 474 U.S. at 59; *Hall*, 217 Ill. 2d at 335) with the resolution of the prejudice inquiry depending largely on defendant's chances of success at trial (*Hill*, 474 U.S. at 59; *Hall*, 217 Ill. 2d at 336). We conclude that defendant's petition did not show prejudice under *Hill* and *Hall*.

¶ 25 We recognize that the prejudice issue does not depend solely on the petition's allegation that Conant misadvised defendant about the sex-offender registration requirement; the petition also alleged that Conant failed to investigate Carrie's voice-mail message and that this alleged error also influenced defendant's decision whether to accept the plea agreement. However, as we note later, defendant's claim about the voice-mail message was insufficient to satisfy the performance prong of *Strickland*, so defendant must rely on Conant's advice as to sex-offender registration in order to prevail on the prejudice issue. In any event, the reasoning that we set out in our discussion of prejudice in connection with the advice claim will also apply to the matter of prejudice in connection with the investigation claim.

¶ 26 Defendant's petition did not make a substantial showing that, absent Conant's erroneous advice, he would have rejected the plea offer and insisted on going to trial. As the State notes, the charges against defendant were both numerous and serious. He faced nine counts of predatory criminal sexual assault of a child, Class X felonies (720 ILCS 5/12-14.1(b)(1) (West 2006)) carrying mandatory consecutive sentences (see 730 ILCS 5/5-8-4(a)(ii) (West 2006)) of 6 to 30 years' imprisonment each with no possibility of probation (see 730 ILCS 5/5-8-1(a)(3) (West 2006)), and eight counts of aggravated criminal sexual abuse, Class 2 felonies (see 720 ILCS 5/12-16(g) (West 2006)) carrying sentences of 3 to 7 years' imprisonment (see 730 ILCS 5/5-8-1(a)(5) (West 2006)) each.

¶ 27 Had defendant gone to trial and been convicted on all of the Class X felony counts, he would have been sentenced to *at least* 54 years' imprisonment on those counts alone. Even two Class X felony convictions (out of nine charges) would have meant at least 12 years' imprisonment on those counts alone. Instead, defendant pleaded guilty to one Class X charge and one Class 2 charge, and he agreed to a total of 10 years' imprisonment. It strains credulity past the breaking point to posit that he would have taken his chances on a trial had Conant only informed him that his nonpunitive obligation under the Registration Act would last for life instead of 10 years.

¶ 28 Defendant's prejudice argument might be more substantial had his petition alleged some plausible defense that could have been raised at trial (see *Hall*, 217 Ill. 2d at 335-36). However, aside from the possible defense based on the voice-mail message, which we shall later discuss and reject, the sole defense that the petition suggested is that B.K. was less credible than defendant. We note that the trial court ruled admissible B.K.'s out-of-court statements to both the DCFS investigative team and her mother. While the admissibility of the statements did not,

of course, ensure that the fact finder at trial would have credited them, the statements, along with facts known from the trial record (such as that defendant and B.K. knew each other well and that defendant was Carrie's intimate partner and a regular guest at her home), mean that the petition failed to set out a plausible defense that could have been raised at trial. Of course, the larger point is that the petition did not show that, absent Conant's erroneous advice about sex-offender registration, defendant would have rejected what could be called a generous plea offer and instead risked what was in effect life imprisonment even with lenient sentencing.

¶ 29 For the foregoing reasons, we hold that the trial court properly rejected defendant's claim that Conant was ineffective for failing to advise him properly about the consequences of entering into the plea agreement. We now turn to defendant's other claim of ineffectiveness: that Conant did not properly investigate Carrie's alleged voice-mail message and that, as a result, defendant pleaded guilty. We hold that defendant's petition showed neither deficient performance nor prejudice.

¶ 30 We first consider the performance prong. We agree with the trial court that, even considering the affidavits of Barnes and Stephanie Captain, the petition did not show that Conant made any unprofessional errors. As the court noted, the petition did not specify when defendant became aware of the recorded message or when he informed Conant about it. Indeed, the petition did not allege that, when defendant told Conant of the recording, it was even available or in the possession of an identifiable person. The reasonableness of an attorney's investigation depends heavily on what information her client provides her (and when he provides it). *People v. Tapia*, 2014 IL App (2d) 111314, ¶ 46. The affidavits did not supply the needed specifics.

¶ 31 Moreover, the petition, even with the affidavits of Barnes and Stephanie Captain, did not make a substantial showing of prejudice. First, the affidavits suffered from intrinsic defects.

Both implied that the recording itself had been lost or destroyed. At an evidentiary hearing, the trial court would have to rely on multiple hearsay—the testimony of Barnes, Stephanie Captain, and probably Carrie and defendant—as to what defendant and Carrie had said several years previously. Further, both affidavits referred to Carrie’s “sister”—a reference not clarified by the trial record. Notably, the affidavits did not refer to Carrie’s “daughter,” even though both Barnes and Stephanie Captain could easily have used that term. The affidavits did not show prejudice.

¶ 32 We turn next to the prejudice prong as it relates to Conant’s alleged failure to investigate. Here, the evidence against defendant was strong and going to trial would have exposed him to an aggregate sentence far greater than what he received by the plea agreement. Carrie’s alleged voice-mail message would have been an indirect form of recantation testimony—as defendant’s petition characterized the message, Carrie repudiated B.K.’s statements to her and to the DCFS investigators (apparently by admitting that she fraudulently induced them). As our courts have noted, recantation testimony is inherently unreliable and untrustworthy. *People v. Burrows*, 148 Ill. 2d 196, 228 (1992). (While we accept as true the factual allegations of defendant’s petition itself, we may consider the character of the evidence on which it relied as it bears on whether the petition showed prejudice.) Thus, we hold that defendant’s claim that Conant was ineffective for failing to investigate adequately did not make a substantial showing of a constitutional violation.

¶ 33 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 34 Affirmed.