2011 IL App (1st) 090110-U

FIFTH DIVISION
September 2, 2011

No. 1-09-0110

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 10001
	)	
CLEARTHUR HALE a/k/a JAMES HALE,	)	Honorable
	)	Sharon M. Sullivan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.

Presiding Justice Epstein and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

¶ *1* *HELD*: Defense counsel was constitutionally ineffective for failing to inform defendant during plea negotiations of the maximum consecutive-term sentence he faced. Counsel's deficient performance prejudiced defendant. This court reversed the judgment of the trial court finding counsel constitutionally effective.

¶ 2 Following a jury trial, defendant Clearthur (also known as James) Hale was found guilty of two counts of attempted murder, aggravated battery with a firearm, and aggravated discharge of a firearm towards an occupied vehicle. He was sentenced to consecutive terms of 30 and 10

years' imprisonment on the two counts of attempted murder. On appeal, he contends trial counsel was constitutionally ineffective during plea negotiations for failing to inform him of the mandatory consecutive sentences. We reverse and remand the case.

¶ 3 Trial evidence showed that defendant fired approximately eight shots at a car containing Marvin Tankson, the driver, and Jassandra Booker, the passenger, because it was slowing traffic on the expressway. Defendant, in his Pathfinder, pulled up near Tankson's car, and inquired why it was idling. When Tankson responded that he was notifying another car about its loose bumper, defendant replied he did not care, stated "[d]o you know who the f***k I am?," then brandished a gun. Booker was shot as Tankson attempted to speed away. As a result of her injury, Booker underwent surgery and thereafter was in a coma for three weeks.

¶ 4 Tankson viewed a security tape from the nightclub where he had seen defendant earlier that evening and positively identified defendant as the shooter. Tankson also identified defendant in both a photographic array and physical lineup. Booker identified defendant as the shooter from a photographic array.

¶ 5 Latisha Wheeler testified for the defense that on the night in question she was in the Pathfinder along with her now-deceased boyfriend, Jeffrey Smith, when Smith started shooting at Booker and Tankson. At trial, Wheeler recanted her statement made to an assistant State's Attorney (ASA) after the crime, wherein she identified defendant as the shooter. She claimed she lied so that her boyfriend would not go to jail.

¶ 6 In rebuttal, the ASA who took Wheeler's signed, handwritten statement read it into evidence.

¶ 7 The jury found defendant guilty of the above-stated offenses, and the case proceeded to sentencing. Given his criminal background and the nature of the offense, defendant was sentenced to 30 years for the attempted murder of Booker and 10 years for the attempted murder

of Tankson, to be served consecutively. The court determined that the counts of aggravated battery with a firearm and aggravated discharge of a firearm merged with the attempted murder counts under the one-act, one-crime rule.

¶ 8 Defendant filed a direct appeal. He claimed, *inter alia*, that the court erred in failing to further entertain his *pro se* posttrial allegations of ineffective assistance of trial counsel under *People v. Krankel*, 102 Ill. 2d 181 (1984). This court agreed and remanded the case for the limited purpose of allowing the trial court inquiry into the matter. *People v. Hale*, No. 1-04-0070 (2006) (unpublished order under Supreme Court Rule 23).

¶ 9 Defendant was appointed new counsel. A hearing was held on defendant's 2003 *pro se* motion, in which defendant claimed counsel was constitutionally ineffective for failing to file a pretrial motion to suppress and challenge other trial evidence. The hearing also addressed defendant's 2008 supplemental motion for a new trial, filed by his new attorney, in which defendant claimed that trial counsel was constitutionally ineffective for failing to inform him of the maximum prison term during plea negotiations.

¶ 10 Defendant testified that prior to trial, counsel informed him that the State had offered him 15 years in exchange for his guilty plea. Counsel stated that the sentencing range for the offenses was 6 to 30 years at 85%. Defendant asked what his sentence would be if convicted on all counts and counsel responded: " 'Don't worry about that. It's just carry 6 to 30. It all run together.' " Defendant understood this to mean his sentences would be concurrent. He did not know he was subject to consecutive sentences or that he was potentially subject to an extended term.

¶ 11 Defendant stated that in light of the plea offer, he asked counsel to make a counteroffer of 12 years. Counsel told him that the State's Attorney had not even wanted to offer 15 years, but rather 20. Defendant responded: "Well, tell him 50 percent, and they got some action." Defendant asked the State's Attorney about the counteroffer, but the State's Attorney rejected it.

¶ 12 Defendant testified that, given the plea offer and his understanding that the sentences would be concurrent, he believed he "might as well go to trial then ***." Defendant stated that had he known he was subject to consecutive sentences, he "would have been inclined" to accept the State's 15-year plea offer.

¶ 13 The State called defendant's trial counsel. Trial counsel confirmed that the State had offered defendant 15 years in exchange for his guilty plea to attempted murder and counsel had informed defendant that the maximum sentence was 30 years at 85%. Counsel added that he had explained the difference between concurrent and consecutive sentences to defendant. Counsel specifically stated: "I told him there was a chance, although I believed *** it was improper, that he could be sentenced consecutively on the other counts." Counsel told defendant that because the one-act, one-crime rule applied, and the crime "happened in two seconds," he did not believe the judge would sentence defendant to consecutive terms, but "told him the possibility existed." Defendant, according to trial counsel, was not interested in taking the plea offer but wanted a trial.

¶ 14 The court rejected defendant's ineffective assistance of counsel claim. In so doing, the court held that trial counsel testified credibly that he discussed the relevant sentencing range with defendant and that "it could be consecutive" and "extendable." The court stated that counsel "didn't believe it would run consecutive, but he certainly had those discussions with his client."

¶ 15 On appeal, defendant challenges the court's ruling with respect to counsel's effectiveness during plea negotiations. In reviewing this claim, we defer to the trial court's findings of fact unless they are against the manifest weight of the evidence; however, we review *de novo* the ultimate legal issue of whether counsel's actions support an ineffective assistance claim. *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008).

¶ 16 An ineffective assistance of counsel claim is controlled by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, a defendant must show both that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance prejudiced the defense. *People v. Hodges*, 234 Ill. 2d 1, 17 (2009), quoting *Strickland*, 466 U.S. at 687-88.

¶ 17 The right to effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial. *People v. Curry*, 178 Ill. 2d 509, 518 (1997). It follows that a criminal defendant has the constitutional right to be reasonably informed with respect to the direct consequences of accepting or rejecting a plea offer. *Curry*, 178 Ill. 2d at 528. As such, a criminal defense attorney must inform his client of the maximum and minimum sentences that can be imposed for the charged offenses. *Curry*, 178 Ill. 2d at 528.

¶ 18 Defendant contends that counsel did not fulfill this duty because he told defendant that, if convicted on all counts, he likely would not be subject to consecutive sentences. Defendant argues that consecutive sentences for the attempted murder of Tankson and Booker were mandatory under section 5-8-4(a) of the Unified Code of Corrections (730 ILCS 5/5-8-4(a) (West 2000)), and not precluded by the one-act, one-crime doctrine. He argues that counsel's misrepresentations prevented him "from making a fully informed decision" regarding the plea agreement. We agree.

¶ 19 Section 5-8-4(a) requires consecutive sentences where a defendant was convicted of a Class X or Class 1 felony and where severe bodily injury was inflicted during the commission of that felony. *People v. Causey*, 341 Ill. App. 3d 759, 771-72 (2003).

¶ 20 Here, defendant was convicted of two counts of attempted murder, a Class X felony, for shooting at Booker and Tankson. Each count carried a sentencing term of 6 to 30 years. See 720 ILCS 5/8-4(c) (West 2000); 730 ILCS 5/5-8-1(a)(3) (West 2000). The shooting of Booker

(Count 1) caused severe bodily harm and was clearly distinct from the attempted shooting of Tankson (Count 3). It was thus a separate act of attempted murder. Defendant's attempted murder sentences therefore were required to run consecutive to one another. See *Causey*, 341 Ill. App. 3d at 771-72.

¶ 21 The possible sentencing range for the two counts of attempted murder, running consecutively, was 12 to 60 years. However, defendant also was potentially subject to an extended term sentence of 30 to 60 years on one count based on his prior Class X felony conviction. See 730 ILCS 5/5-5-3.2(b)(1), 5-8-2(a)(2) (West 2000). With the extended term, the potential sentencing range defendant faced for the two counts of attempted murder, running consecutively, was 12 to 90 years.

¶ 22 Yet, according to counsel's own hearing testimony in this case, counsel informed defendant that he faced a maximum sentence of only 30 years. Counsel stated that, although possible, it would be "improper" for defendant to be sentenced "consecutively on the other counts." Counsel had an obligation to inform defendant of the maximum and minimum sentences that could be imposed for the charged offenses. See *Curry*, 178 Ill. 2d at 528. Counsel's statement that consecutive sentences were possible, when they were in fact mandatory, did not satisfy that obligation. See *People v. Hampton*, 249 Ill. App. 3d 873, 877 (1993) (defendant permitted to withdraw guilty plea where, at plea hearing, court stated consecutive sentences possible, when they were mandatory: "[t]o say that the possibility of consecutive sentences exists is simply not the same thing as saying that consecutive sentences must be imposed"). Here, counsel not only failed to inform defendant that a consecutive sentence encompassing the two counts of attempted murder was mandatory, but counsel affirmatively misrepresented the consequences of rejecting the State's plea offer by telling defendant that consecutive sentences would be legally "improper." See *Curry*, 178 Ill. 2d at 528-29. Based on

counsel's own hearing testimony, which the trial court found credible, we conclude that counsel's representation of defendant was objectively unreasonable under *Strickland*.

¶ 23 The remaining question is whether this unreasonable assistance resulted in prejudice under *Strickland*. Citing *Curry*, the State contends defendant cannot establish that it did.

¶ 24 In *Curry*, the defendant testified that he would have accepted the State's plea offer of 4 ½ years had he known consecutive sentences, resulting in a minimum prison term of 12 years, were mandatory. The supreme court noted that the defendant's testimony, standing alone, was subjective, self-serving, and insufficient to satisfy *Strickland* prejudice. The court, however, found there was additional evidence, including defense counsel's statements from the sentencing hearing and counsel's uncontradicted affidavit, which corroborated defendant's claim. In finding prejudice, the court stated the significant factors included both defendant's weak case, wherein he admitted to every element of the sex offense save consent, and the disparity between the 12-year sentence and 4 ½-year plea offer. However, the court concluded that defense counsel's affidavit, stating that the defendant rejected the plea offer based on counsel's erroneous advice, was the most important factor showing prejudice.

¶ 25 The State argues that "[d]efendant [cannot] rely on such corroborating evidence in this case." We disagree. Defendant testified that he "would have been inclined" to accept the State's plea offer had he known consecutive sentences would be imposed. In this case, we do not have an affidavit corroborating that statement, but something actually more reliable – trial counsel's live hearing testimony under oath. Counsel admitted that he informed defendant of a maximum potential sentence that was 30 to 60 years below that which defendant faced for the attempted murders; that is, the maximum term defendant faced was not 30 years, as counsel stated, but 60 years non-extended, and 90 years extended. Counsel acknowledged his misunderstanding of the law by stating that consecutive sentences would be "improper," when they were in fact

mandatory in this case. Had defendant known he faced a maximum potential consecutive-term sentence of 60 to 90 years for the attempted murders, that information would have been highly persuasive. While counsel's testimony does not expressly support defendant's statement that he would have accepted the plea offer had he known about the consecutive sentences, such a conclusion is manifestly implicit. *Cf. People v. Miller*, 393 Ill. App. 3d 629, 636 (2009) (defendant failed to establish *Curry* claim, where "no erroneous information was provided by defense counsel *** that could have swayed the defendant's rejection of the purported plea deal."). This conclusion is strengthened by defendant's testimony that he made a close counteroffer to the State, thereby suggesting that competent advice would have closed the gap. See *Curry*, 178 Ill. 2d at 533. Based on counsel's own testimony, then, we find counsel's advice made it impossible for defendant to make a knowing and voluntary decision regarding the State's plea offer. See *People v. Brown*, 309 Ill. App. 3d 599, 607 (1999). Defendant has met the prejudice prong under *Strickland*.

¶ 26 In making this determination, we reject the State's argument that other *Curry* factors dictate a different result here. The State notes, for example, that unlike the defendant in *Curry*, defendant did not admit to the offense and he presented a defense. The State suggests this indicates defendant would have been less likely to accept the State's plea offer. Again, we disagree. Defense witness Latisha Wheeler testified that it was not defendant who shot the victims but her now-deceased boyfriend. But, this testimony was a recantation of Wheeler's earlier statement to an ASA identifying defendant as the shooter. With Wheeler, there were three eyewitnesses who identified defendant as the shooter. The evidence against defendant was overwhelming and in fact supports the reasonable inference that he would have accepted the State's plea offer. Likewise, although the 15-year plea offer was three years above the bare minimum potential consecutive sentence of 12 years for the two attempted murders, we reiterate

that defendant was subject to an extended-term sentence based on his criminal background. As noted, the extended-term sentence was substantially higher than the State's plea offer. That disparity, like the plea-to-sentence disparity in *Curry*, also supports the inference here that defendant would have accepted the plea offer.

¶ 27 For the reasons discussed, we conclude that counsel was constitutionally ineffective in representing defendant during plea negotiations and that the defendant therefore has satisfied both prongs of *Strickland*. We reverse defendant's convictions and remand the case for the resumption of plea negotiations and a new trial if necessary. See *Curry*, 178 Ill. 2d at 536-37.

¶ 28 Reversed and remanded.