

2012 IL App (2d) 110656-U
No. 2-11-0656
Order filed September 21, 2012

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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 05-CF-3597
)	
JESSE T. PATTERSON,)	Honorable
)	Joseph G. McGraw,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: The trial court properly dismissed defendant's postconviction petition, which alleged that counsel was ineffective for failing to move to withdraw defendant's guilty plea, as such a motion would not have succeeded: having told the trial court that he had received no promises in exchange for his plea, he could not withdraw his plea on the alleged ground that counsel had made him a promise.

¶ 1 Defendant, Jesse T. Patterson, appeals from an order of the circuit court of Winnebago County granting the State's motion to dismiss his petition under the Post-Conviction Hearing Act (Act) (720 ILCS 5/122-1 *et seq.* (West 2010)). Defendant sought relief from his conviction of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2004)). The conviction was based on a negotiated guilty

plea. Defendant's agreement with the State provided that he would serve a 60-year prison term. (It is undisputed that, under the law in effect when defendant entered his plea, there were possible grounds upon which defendant could have received the death penalty if the matter had proceeded to trial.) Defendant argues that his trial attorney's failure to timely move to withdraw the guilty plea amounted to a deprivation of defendant's constitutional right to the effective assistance of counsel and that his postconviction petition should not have been dismissed. We affirm.

¶ 2 Before accepting defendant's plea, the trial court questioned defendant to determine, pursuant to Illinois Supreme Court Rule 402(b) (eff. July 1, 1997), whether the plea was voluntary. That rule requires the trial court to "determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea." *Id.* More than 30 days after sentence was imposed, defendant moved to withdraw his plea. The trial court denied the motion on the basis that it was untimely and that the court therefore lacked jurisdiction to consider it. Defendant subsequently filed a *pro se* petition for relief under the Act. The trial court appointed an attorney to represent defendant. That attorney filed an amended postconviction petition alleging, *inter alia*, that "[defendant's] Sixth Amendment right to effective assistance of counsel was violated when trial counsels did not timely file a Motion to Withdraw Guilty Plea after having been instructed to do so by [defendant] and his family." In an affidavit attached to the amended petition, defendant averred, "prior to my guilty plea, my attorney told me he would file a motion for reconsideration of sentence after my guilty plea and my sentence would be reduced to at least 40 to 45 years." Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) authorizes a motion for reconsideration of a sentence imposed after a guilty plea, but only when there is no agreement between the State and the defendant as to the defendant's sentence. See *People v. Richard*, 2012 IL App (5th) 100302, ¶¶ 21-22. The State moved

to dismiss the amended petition. The trial court granted the motion, and defendant filed a timely notice of appeal.

¶ 3 Under the Act, a person imprisoned for a crime may mount a collateral attack on his conviction and sentence based on violations of his constitutional rights. *People v. Erickson*, 183 Ill. 2d 213, 222 (1998). Except in cases where the death penalty has been imposed, proceedings under the Act are divided into three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). During the first stage, the trial court independently examines the petition. If the petition is frivolous or patently without merit, it will be summarily dismissed. 725 ILCS 5/122-2.1(a)(2) (West 2008). If the petition survives first-stage review, it proceeds to the second stage, at which an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. *Gaultney*, 174 Ill. 2d at 418. This appeal arises from the second-stage dismissal of defendant's petition, as amended by counsel. Dismissal is proper at the second stage of a proceeding under the Act "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. Alberts*, 383 Ill. App. 3d 374, 376 (2008). Our review is *de novo*. *People v. Hall*, 217 Ill. 2d 324, 334 (2005).

¶ 4 Defendant contends that his amended petition makes a substantial showing of a violation of his constitutional right to the effective assistance of counsel. The alleged violation stems from the failure to move for withdrawal of defendant's guilty plea. We note that the State has argued that the claim asserted in this appeal differs from what defendant alleged in his amended petition and is therefore forfeited. See 725 ILCS 5/122-3 (West 2010) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived."). We need not

reach this procedural argument. Even if the claim asserted in this appeal was properly raised below, it was insufficient to survive the State's motion to dismiss.

¶ 5 Under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant claiming a deprivation of the right to the effective assistance of counsel must establish 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. "[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." *People v. Graham*, 206 Ill. 2d 465, 476 (2003). Defendant argues that prejudice exists because, had his attorney moved to withdraw the guilty plea, there is a reasonable probability that the motion would have been granted. We disagree.

¶ 6 A criminal defendant who has entered a guilty plea enjoys no absolute right to withdraw that plea. *People v. Feldman*, 409 Ill. App. 3d 1124, 1127 (2011). "To the contrary, the burden is on the defendant to demonstrate to the trial court 'the necessity of withdrawing the plea.'" *Id.* (quoting *People v. Dougherty*, 394 Ill. App. 3d 134, 140 (2009)). The trial court may permit a defendant to withdraw his or her plea "if it appears that (1) the plea was entered on a misapprehension of the facts or the law, (2) there is doubt as to the guilt of the accused, (3) the accused has a meritorious defense, or (4) the ends of justice will be better served by submitting the case to a jury." *Dougherty*, 394 Ill. App. 3d at 140.

¶ 7 Defendant contends that he was entitled to withdraw his guilty plea because "counsel promised him that counsel would file a motion to reconsider the negotiated sentence, and that the

judge would reduce the sentence to 40 or 45 years imprisonment.” There is no reasonable probability that the trial court would have granted a motion to withdraw based on such a promise by counsel. Before accepting defendant’s plea, the trial court specifically asked defendant, “[h]ave any threats *or promises* been made to get you to plead guilty?” (Emphasis added.) Defendant answered “no.” In his petition, he offered no explanation for his failure to inform the trial court of the promise he now claims that his attorney made to him. Given these facts, our supreme court’s decision in *People v. Jones*, 144 Ill. 2d 242 (1991), is controlling. In that case, a defendant sentenced to death after pleading guilty to multiple counts of murder argued that he received ineffective assistance of counsel in connection with his plea. He contended that his attorney had told him that the trial court owed him (the defendant’s attorney) a favor and that if the defendant pleaded guilty the trial court would not impose the death penalty. The *Jones* court rejected the argument, reasoning as follows:

“The record of the plea proceedings shows that, before accepting the defendant’s plea, the trial judge questioned the defendant in open court as to whether his plea was obtained by coercion, threats or promises. The trial court also repeatedly warned the defendant that he could receive the death penalty for his crimes. The defendant specifically advised the trial court that no threats or promises had been made to induce him to plead guilty and that he understood that death was a possible sentence. The defendant nevertheless claims that his expectation that the death sentence would not be imposed was permissible, given the alleged assurances of his counsel. To accept the defendant’s claim would require us to characterize the court’s lengthy and exhaustive admonitions as merely a perfunctory or ritualistic formality; a characterization we are unwilling to make. [Citation.] The court thoroughly questioned the defendant to determine that no promises or agreements had been made as to

his sentence and that he understood the consequences of his guilty plea. The defendant repeatedly stated that he understood the consequences of his plea and reiterated his desire to plead guilty. The defendant's acknowledgment at the plea proceeding that he understood that death was a possible sentence and that there were no agreements or promises regarding his sentence contradict the petitioner's current assertion that he pled guilty in reliance upon his counsel's promise that he would not receive the death sentence." *Id.* at 263.

¶ 8 Defendant does not claim that he was unaware that, pursuant to his agreement with the State, he would receive a sentence of 60 years' imprisonment. He claims only that his lawyer promised that the sentence would later be reduced. Because defendant appeared in open court and specifically denied that any promise had induced him to plead guilty, and because he offers no explanation of the inconsistency between what he told the trial court and what he now claims in his postconviction petition, there is no reasonable probability that a motion to withdraw defendant's guilty plea would have succeeded.

¶ 9 *People v. Edmonson*, 408 Ill. App. 3d 880 (2011), cited by defendant, does not lead to a different conclusion. In *Edmonson*, this court held that the defendant, whose plea agreement placed a cap on his sentence, should have been permitted to withdraw his plea because his attorney had misinformed him that he would be permitted to move for reconsideration of his sentence. The defendant's attorney stated, in open court, that the defendant was entering an "open" plea, suggesting that counsel was under the impression that defendant would be permitted to file a motion to reconsider his sentence. See *People v. Diaz*, 192 Ill. 2d 211, 225 (2000) ("A plea bargain which is silent as to sentencing is analogous to an 'open' plea, and the motion-to-reconsider-sentence clause of Rule 604(d) applies."). When the trial court inquired whether any promises had been made to the

defendant, his answer was not an unqualified “no” (as defendant’s response to the same inquiry in this case was). Rather, the defendant stated, “ ‘*except for the open plea, no.*’ ” (Emphasis added.) *Edmonson*, 408 Ill. App. 3d at 882. Because the defendant advised the trial court that he understood that he was entering an “open” plea, and because such a plea does not foreclose a motion to reconsider sentence, the defendant’s response to the trial court’s inquiry was entirely consistent with his argument that he had been misinformed that he could seek reconsideration of his sentence. In this respect, *Edmonson* is readily distinguishable from this case.

¶ 10 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 11 Affirmed.