

NOTICE
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NO. 5-08-0297
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Wayne County.
	)	
v.	)	No. 05-CF-45
	)	
ANTHONY R. MOORE,	)	Honorable
	)	Joe Harrison,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Donovan and Wexstten concurred in the judgment.

R U L E 2 3 O R D E R

Held: The circuit court erred in dismissing the defendant's postconviction petition at the second stage of proceedings where that petition and its supporting documentation made a substantial showing of a violation of his right to the effective assistance of counsel during plea negotiations with the State.

Anthony R. Moore (the defendant) was found guilty by a jury of three counts of aggravated discharge of a firearm, for firing at a police officer who was pursuing him, and one count of aggravated fleeing or attempting to elude a police officer. On March 23, 2006, the circuit court of Wayne County sentenced him to three concurrent 25-year terms of imprisonment on the aggravated-discharge-of-a-firearm convictions and a concurrent 3-year term of imprisonment on the aggravated-fleeing conviction. On August 21, 2007, this court granted the motion of the Office of the State Appellate Defender to withdraw from the defendant's direct appeal pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967), and affirmed the defendant's convictions and sentences. *People v. Moore*, No. 5-06-0173 (2007) (unpublished order under Supreme Court Rule 23 (eff. July

1, 1994)).

On January 22, 2007, the defendant filed a *pro se* petition pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2006)). At the same time, he filed an application to proceed as a poor person and for the appointment of counsel and a motion for the common law record and the trial transcript. On January 29, 2007, the circuit court granted the defendant's application to proceed as a poor person and appointed attorney Alan Downen to represent the defendant. The court reserved its ruling on the defendant's motion for the common law record and the trial transcript because these items were in the possession of, and being used by, the defendant's counsel on direct appeal. The court ordered the State to file an answer or other pleading responsive to the defendant's petition within 30 days, and the court set the petition for a status hearing on April 3, 2007.

On February 5, 2007, attorney Downen filed his appearance on the defendant's behalf. On March 14, 2007, Downen filed a motion to stay the postconviction proceedings pending the outcome of the defendant's direct appeal because he did not have access to the record on appeal. This motion was granted on March 15, 2007. Accordingly, the State never filed a responsive pleading to the defendant's petition.

On February 15, 2008, after the conclusion of the defendant's direct appeal, Downen filed an *Anders* motion to withdraw as the defendant's postconviction counsel and to dismiss the defendant's petition for the lack of substantial merit. The defendant filed a motion in response, to which Downen replied. A hearing was held on the motion to withdraw and dismiss on May 22, 2008, and the circuit court entered an order on May 29, 2008, dismissing the defendant's petition as frivolous and patently without merit and granting Downen's motion to withdraw as counsel on the petition. The defendant appeals.

The defendant's *pro se* postconviction petition alleges in pertinent part that his trial counsel failed to properly advise him concerning the plea bargain offered to him by the State.

It alleges that on October 24, 2005, the State offered the defendant a plea bargain of 10 years and that his counsel told him of this offer. However, his counsel failed to advise the defendant of the overwhelming case he was facing or of the severe sentence he would face if he proceeded to a trial. Further, his attorney led the defendant to believe that he was prepared for the trial and that he would present the defendant's alibi defense and supporting witness, Melissa Means, at the trial. Counsel told the defendant that he was very optimistic that he could win a jury trial. However, after rejecting the plea offer, the defendant learned that his counsel was not prepared to present the alibi defense and in fact had failed to comply with discovery regarding the alibi defense. Accordingly, the defendant was barred from presenting the defense or even testifying that he was not present when the offense was committed. The petition alleges that as a direct result of his attorney's failure to properly advise him concerning the plea offer, the defendant rejected the offer and that but for his attorney's failure to properly advise him, there exists a reasonable probability that he would not have proceeded to a jury trial but would have accepted the 10-year plea bargain offered by the State.

The petition is supported by the affidavit of the defendant, in which he states that his attorney never advised him of the minimum or maximum sentences he faced and did not so advise him when he was considering the State's plea offer. His attorney told the defendant that he felt very good about the defendant's chance of winning a jury trial and never advised him that he would be unable to present an alibi defense. His counsel's ability to present the alibi defense was one of the factors the defendant used to determine whether to accept or reject the State's plea offer. The defendant's attorney never advised the defendant of the overwhelming case he faced. The defendant claimed that had his attorney properly advised him regarding the State's plea offer, the defendant would have accepted it.

The petition is also supported by portions of the report of proceedings of the trial of

the cause, in which the defendant's attorney admitted that he had failed to properly apprise the State of the defendant's alibi defense and stated that he would like to present it but if the State objected, he would not. The defendant's attorney admitted that he had not complied with Supreme Court Rule 413 (eff. July 1, 1982), which required that he notify the State of the specific information regarding where the defendant maintains he was at the time of the offense. The State did object to the presentation of the alibi defense without first having the opportunity to investigate it. After conferring off the record with the prosecutor and his client, the defendant's counsel stated that he would not be presenting an alibi defense.

Also attached to the petition were identical affidavits from four individuals stating that the defendant had been offered a 10-year plea bargain at the beginning of the jury trial. The affiants further stated: "I do not believe that [the defendant] was competently advised, about whether to accept or reject this plea offer, by his court appointed counsel. I do not believe that [the defendant] would have turned this 10 year plea down if his attorney had competently advised him of what he was facing if he went to jury trial on this case."

Finally, attached to the petition was the affidavit of Melissa Means, stating that she was supposed to be called as an alibi witness at the defendant's jury trial, that the defendant's attorney had never formally interviewed her, that the defendant's attorney decided not to use her as a witness, that she was the defendant's only alibi for the night in question, and that the defendant's attorney prepared an alibi defense based on her expected testimony.

Attorney Downen's motion to withdraw as postconviction counsel alleges that Downen sent the defendant's trial counsel a copy of the postconviction petition and asked him to respond to it, that trial counsel denied the allegations of the petition that he had misled the defendant during the plea negotiations or failed to present a valid alibi defense, and that trial counsel stated that if called to testify he would refute the defendant's postconviction allegations. The motion to withdraw also points out that the circuit court's docket entries

indicate that on May 24, 2005, the defendant was given his first advisement rights (725 ILCS 5/109-1(b) (West 2004)) and that on May 26, 2005, the defendant, through his court-appointed counsel, waived a formal arraignment. These allegations are supported by the record on appeal. Finally, the motion alleges that the defendant made a posttrial admission of guilt to the probation officer who was preparing the presentence investigation report, in which he stated that he had not meant to shoot at the police officer but was shooting at the ground. The defendant did not contradict this statement at his sentencing hearing, although it was included in the presentence report. These allegations are also supported by the record on appeal.

The defendant filed a *pro se* response to Downen's motion, to which Downen replied. Attached to Downen's reply is the letter he received from the defendant's trial counsel. A hearing was held on Downen's motion on May 22, 2008.

On May 29, 2008, the circuit court entered an order dismissing the defendant's postconviction petition. The court concluded, "[T]he allegations contained in the defendant's pro-se Petition for Post Conviction Relief, when taken as true and liberally construed, do not present the gist of any constitutional claims." The court found that the evidence at the defendant's trial had not been closely balanced, that he had been twice identified by an eyewitness, and that a corroborating witness had testified concerning the defendant's incriminating statements. The court found that the defendant had failed to demonstrate that but for any errors by his trial counsel there would have been a substantial probability that he would have been found not guilty. Finally, the circuit court noted that the defendant had made admissions to the probation officer during the presentence investigation and that at sentencing the defendant had not retracted or sought to amend those admissions, which admissions were inconsistent with his position in his postconviction petition. Accordingly, the circuit court found that the defendant's petition was frivolous and patently without merit.

The court granted attorney Downen's motion to withdraw and dismissed the defendant's petition. We note that the circuit court's order fails to address the allegations of the defendant's postconviction petition that his counsel was ineffective in advising him regarding the State's plea offer and that but for his counsel's ineffectiveness he would have accepted the State's offer.

The Post-Conviction Hearing Act establishes a three-step procedure for handling petitions filed thereunder. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, the circuit court must independently review the petition within 90 days of its filing, determine whether it is frivolous or is patently without merit, and if so, dismiss it. *Edwards*, 197 Ill. 2d at 244.

If the petition is not dismissed as frivolous or patently without merit within 90 days of its filing, it advances to the second stage. *Edwards*, 197 Ill. 2d at 245. This is what happened in the case at bar. At this stage, counsel is appointed if necessary, and the State is allowed to file a responsive pleading. *Edwards*, 197 Ill. 2d at 245-46. The circuit court must now determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *Edwards*, 197 Ill. 2d at 246. If no such showing is made, the petition is dismissed. *Edwards*, 197 Ill. 2d at 246. If a substantial showing of a constitutional violation is set forth, the petition is advanced to the third stage, where an evidentiary hearing is held. *Edwards*, 197 Ill. 2d at 246.

At this second stage of the proceedings, the circuit court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act. *Coleman*, 183 Ill. 2d at 380. The circuit court is foreclosed from engaging in any fact-finding at a dismissal hearing because all well-pleaded facts are to be taken as true at this point in the proceeding. *Coleman*, 183 Ill. 2d at 380-81. Factual disputes raised by the pleadings require a determination of the truth or

falsity of the supporting affidavits or exhibits, a determination which cannot properly be made at a hearing on a motion to dismiss but rather can only be resolved through an evidentiary hearing. *Coleman*, 183 Ill. 2d at 381.

An evidentiary hearing is required whenever the petition makes a substantial showing of a violation of constitutional rights. *Coleman*, 183 Ill. 2d at 381. The dismissal of a postconviction petition is warranted only when the petition's allegations of fact, liberally construed in favor of the petitioner and in light of the original trial record, fail to make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d 382.

The inquiry at the second stage of the proceedings does not require the circuit court to engage in any fact-finding or credibility determinations. *Coleman*, 183 Ill. 2d at 385. Those determinations will be made at the evidentiary stage, not the dismissal stage, of the proceedings. *Coleman*, 183 Ill. 2d at 385. Accordingly, our review of a second-stage dismissal is *de novo*. *Coleman*, 183 Ill. 2d at 388.

We note at the outset that, as in *People v. Greer*, 212 Ill. 2d 192, 202 (2004), the defendant in this case arrived at the second stage of postconviction proceedings without there ever having been a determination at the first stage that his *pro se* petition presented the gist of a meritorious claim. Simply because it was not dismissed within 90 days of its filing, the petition advanced to the second stage of postconviction proceedings, at which counsel was appointed. In such an instance, the petition may well be frivolous or patently without merit, and the defendant is appointed counsel only because the circuit court failed to dismiss it within 90 days of its having been filed. See *Greer*, 212 Ill. 2d at 204. An attorney who is appointed to represent a defendant after the 90-day default provision of the Act is applied may well find that he represents a client attempting to advance arguments that are patently without merit or wholly frivolous, a client whose petition would have been summarily dismissed had the circuit court timely considered the merits of the petition. *Greer*, 212 Ill.

2d at 207. The fulfillment of postconviction counsel's obligation to his client does not require counsel to advance frivolous or spurious claims on the defendant's behalf. *Greer*, 212 Ill. 2d at 205. Accordingly, postconviction counsel may move to withdraw, and the circuit court may grant that motion, when it is determined that the petition is indeed frivolous or patently without merit. *Greer*, 212 Ill. 2d at 211-12.

This is what happened in the case at bar. Accordingly, the question before us is whether the defendant's *pro se* petition's allegations of fact, liberally construed in favor of the petitioner and in light of the original trial record, fail to make a substantial showing of a constitutional violation. As was the circuit court, we are foreclosed from engaging in any fact-finding, because all well-pleaded facts are to be taken as true. *Coleman*, 183 Ill. 2d at 380-81. Even factual disputes raised by the pleadings require a determination of the truth or falsity of the supporting affidavits or exhibits, a determination which cannot properly be made at a hearing on a motion to dismiss but rather can only be resolved through an evidentiary hearing. *Coleman*, 183 Ill. 2d at 381. It stands to reason that facts not evident on the face of the record or facts not contained in the defendant's petition or supporting documents must not be considered in making this determination. Evidence outside of the record or the petition is to be considered only at the evidentiary hearing stage of the proceeding. Accordingly, we will not consider factual allegations contained in Downen's motion, or his reply to the defendant's response, that are not supported by the record on appeal, nor will we consider the contents of the letter to Downen from the defendant's trial counsel.

We reverse the circuit court's second-stage dismissal of the defendant's postconviction petition and remand this cause to the circuit court for a third-stage evidentiary hearing. It is our view that the petition, as supported by the affidavits and the record on appeal, does make a substantial showing of a constitutional violation.

The right to the 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). 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. Concomitantly, a criminal defense attorney has the obligation to inform his client about the maximum and minimum sentences that can be imposed for the offenses with which the defendant is charged. *Curry*, 178 Ill. 2d at 528.

In *Curry*, the defendant was charged with three separate counts. The State offered to dismiss two of the counts and recommend a sentence of 4½ years' imprisonment if he would agree to plead guilty to one of the counts. 178 Ill. 2d at 512. Unaware that consecutive sentences would be mandated, the defendant's counsel advised the defendant that even if he was convicted after a trial, he would receive only something close to a four-year sentence. 178 Ill. 2d at 516. Based on this information, the defendant rejected the plea. 178 Ill. 2d at 516. He was convicted of all three counts and was sentenced to three consecutive four-year prison terms. 178 Ill. 2d at 512.

On appeal, the defendant argued that he had received ineffective assistance of counsel during plea negotiations. The defendant argued that, but for his attorney's ineffective assistance during plea negotiations with the State, he would have accepted the plea offer and avoided a trial. 178 Ill. 2d at 518. His trial attorney supported the defendant's claim in an affidavit in which he stated that during plea negotiations he had wrongfully assumed that the defendant was not subject to mandatory consecutive sentences. 178 Ill. 2d at 523. He did not inform the defendant that he might receive consecutive sentences if convicted of more than one offense. 178 Ill. 2d at 523. The defendant rejected the plea offer based on his counsel's erroneous advice. 178 Ill. 2d at 523.

The supreme court held that defense counsel's performance during plea negotiations

was objectively unreasonable and deficient within the meaning of *Strickland v. Washington*, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 694, 104 S. Ct. 2052, 2065 (1984). 178 Ill. 2d at 529. Defense counsel's deficient performance had deprived the defendant of his right to be reasonably informed of the direct consequences of accepting or rejecting the plea offer. 178 Ill. 2d at 530.

With respect to the prejudice prong of the *Strickland* test, the court stated that in order to establish prejudice, the defendant must demonstrate that there is a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer. 178 Ill. 2d at 531. The court found that the defendant had made this showing. 178 Ill. 2d at 531. The court held that the defendant's testimony, standing alone, is subjective, self-serving, and insufficient to satisfy the *Strickland* requirement of prejudice. 178 Ill. 2d at 531. However, there was additional evidence of record that corroborated the defendant's self-serving statements: the defendant's trial counsel had stated on the record at sentencing that his ignorance of the consecutive sentencing requirement had seriously impacted the plea negotiations, and he had elaborated on this statement in his affidavit attached to the motion to reconsider the sentence. 178 Ill. 2d at 531. The court concluded that defense counsel's affidavit provided independent, objective confirmation that the defendant's rejection of the proffered plea was based upon counsel's erroneous advice. 178 Ill. 2d at 532.

It is noteworthy that the court went on to provide several other examples of the type of evidence which might corroborate a defendant's self-serving claim that he would have accepted the plea offer absent his counsel's deficient advice. 178 Ill. 2d 532-33. For example, the court noted that a defendant's trial stance and testimony may be relevant factors in establishing whether he would have accepted a plea offer. 178 Ill. 2d 532-33. It might appear that a defendant's rejection of a plea offer was based not on his counsel's deficient performance but on his persistent, strong, and informed hope of an acquittal at a trial. 178

Ill. 2d at 532. However, where a defendant's case is not a strong one or could not have been won, this is less likely. 178 Ill. 2d at 532.

We note that *Curry* was before the court on direct appeal from his conviction, and the defendant had the burden of demonstrating his counsel's deficient performance and resulting prejudice in order to establish that he had been denied the effective assistance of counsel during plea negotiations. The case at bar is before us in a postconviction proceeding, on the second-stage dismissal of the petition as frivolous or patently without merit. As we have stated, to survive a dismissal at this stage of postconviction proceedings, the defendant need not establish the constitutional violation but need merely make a substantial showing, through the allegations of the petition, supporting affidavits, and the record on appeal, of a violation of his constitutional rights. We believe that the defendant has done that.

We believe that the defendant has pled sufficient facts supported by affidavit and the record to make a substantial showing of a constitutional violation of his right to the effective assistance of counsel during his plea negotiations. The defendant's affidavit, which at this stage we must take as true, states that his counsel never advised him of the minimum or maximum sentences he faced. Nothing in the record on appeal contradicts this assertion. The State argues that counsel's failure in this regard is harmless error because the record reflects that the defendant was advised of the potential penalties at his first appearance on May 24, 2005. The record does not so indicate. The record reflects that on May 24, 2005, the defendant did make his first appearance before the court and that some kind of "warning" was given, but the record does not legibly indicate of what that warning consisted. The record further indicates that a formal arraignment was waived. Nowhere in the record is it reflected that the defendant was advised of the minimum or maximum potential penalties he faced. A criminal defense attorney has the obligation to inform his client about the maximum and minimum sentences that can be imposed for the offenses with which the defendant is

charged. *Curry*, 178 Ill. 2d at 528.

The defendant's affidavit further states that his counsel told him during plea negotiations that he felt very good about the defendant's chance of winning a jury trial and failed to advise the defendant that he would be unable to present an alibi defense because of his failure to comply with discovery. The affidavit further states that the ability to present the alibi defense was one of the factors the defendant relied on in deciding to reject the State's plea offer. We note that the record on appeal supports the defendant's allegation that his counsel, through his own failure to comply with discovery, was foreclosed from presenting the defendant's alibi defense and that this was the reason it was not presented. 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.

We think the defendant has alleged sufficient facts to show that his counsel's performance during plea negotiations was deficient. The defendant must also allege sufficient facts to show that absent his counsel's deficient performance, he would have accepted the State's plea offer. We think the defendant has made this showing. Absent the alibi defense, the defendant did not have a strong case. Given the state of the evidence, it is not likely that the defendant would have believed he could have won a jury trial without the opportunity to present his alibi defense and without his counsel telling him he had a good chance of winning with the alibi defense. Furthermore, the disparity between the sentence offered by the State in plea negotiations (10 years' imprisonment) and the maximum sentence allowable under the statute (45 years' imprisonment) lends support to the defendant's claim that he would have accepted the State's offer had his counsel properly advised him.

We conclude that the defendant's postconviction petition and supporting documentation make a substantial showing of a constitutional violation and that the circuit court erred in dismissing the petition as frivolous or patently without merit. The fact that the

circuit court's order dismissing the petition is unresponsive to the defendant's petition lends support to our decision to reverse the order of the circuit court dismissing the petition and to remand this cause to the circuit court for an evidentiary hearing on the petition. Accordingly, we reverse the order of the circuit court of Wayne County that allowed the withdrawal of the defendant's postconviction counsel and dismissed the defendant's postconviction petition, and we remand this cause to that court for an evidentiary hearing on the petition.

We must address one final argument raised by the State on appeal. The State argues that the defendant is barred from raising any issue regarding his alibi defense because he essentially admitted his guilt to the probation officer preparing the presentence investigation report. The defendant told the probation officer that his actions were due to his methamphetamine use and that he had not meant to shoot at the police officer but had been shooting at the ground. He also stated he knew that what he had done was wrong and he was sorry.

Relying on *People v. Green*, 17 Ill. 2d 35, 42 (1959), and *In re C.T.*, 137 Ill. App. 3d 42, 44 (1985), the State argues that this out-of-court statement to the probation officer preparing the presentence investigation report was a "judicial confession" which is binding upon the defendant. The State contends that, accordingly, the defendant cannot claim that his counsel was deficient for failing to advise the defendant during plea negotiations that he would not be able to present an alibi defense which the defendant knew was false.

Green and *In re C.T.* are distinguishable from and inapposite to the case at bar. In *Green*, after being found guilty in a bench trial and immediately sentenced, the defendant asked permission to address the court. 17 Ill. 2d at 39. After being admonished by the court to tell the truth, the defendant made a detailed confession to the crime. 17 Ill. 2d at 39. On appeal, the defendant challenged the sufficiency of the evidence. The supreme court rejected the defendant's challenge based on his "judicial confession." 17 Ill. 2d at 41.

The court differentiated between a *judicial* confession and an *extrajudicial* confession. A judicial confession consists of a plea of guilty to an indictment or some similar action or conduct in a court or judicial proceeding, such as the testimony of an accused at a trial or a statement before a magistrate on a preliminary examination. 17 Ill. 2d at 41-42. An extrajudicial confession is one made other than in court or before a magistrate. 17 Ill. 2d at 42. The court held that a *judicial* confession, voluntarily made, is binding upon the accused, and this is true whether the confession takes the form of a plea of guilty or is found in other statements made in court in the course of legal proceedings. 17 Ill. 2d at 42. These statements are made under circumstances guaranteeing their reliability. 17 Ill. 2d at 42. Once the defendant so confesses, he may not thereafter question the legal sufficiency of the evidence against him. 17 Ill. 2d at 42.

Similarly, in *In re C.T.*, the defendant confessed in open court before a judge. 137 Ill. App. 3d at 43. Accordingly, the court held that the defendant was precluded on appeal from complaining about the sufficiency of the evidence against him. 137 Ill. App. 3d at 43.

The defendant's statement in the case at bar to the probation officer was not a judicial confession. It was not made in court or in a legal proceeding or before a magistrate. It was, instead, an extrajudicial admission. Thus, it was not binding on the defendant and does not prevent him from raising any issues in his postconviction proceeding.

For the foregoing reasons, the judgment of the circuit court of Wayne County granting the motion of the defendant's postconviction counsel to withdraw and to dismiss the petition is hereby reversed, and this cause is remanded to the circuit court for an evidentiary hearing on the petition.

Reversed; cause remanded.