

NOTICE

Decision filed 05/11/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 100534-U

NO. 5-10-0534

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,

Plaintiff-Appellee,

v.

QUENTIN D. HOLMES, a/k/a QUENTIN D.
FITZGERALD,

Defendant-Appellant.

)
)
)
)
)
)
)
)
)
)
)

Appeal from the
Circuit Court of
Saline County.

No. 91-CF-248

Honorable
Todd D. Lambert,
Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Welch and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly dismissed the defendant's petition for postconviction relief where the *Apprendi* rule is not retroactive, trial counsel was not ineffective because there was no support for the allegation that a plea deal was offered to the defendant, and consecutive sentencing was proper.

¶ 2 The defendant, Quentin D. Holmes, also known as Quentin D. Fitzgerald, appeals the dismissal of his petition for postconviction relief. The Office of the State Appellate Defender has been appointed to represent him. The State Appellate Defender has filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994).

¶ 3 The defendant was given proper notice and was granted an extension of time to file briefs, objections, or any other documents supporting his appeal. He has not

filed a response. We have considered the State Appellate Defender's motion to withdraw as counsel on appeal. We have examined the entire record on appeal and find no error or potential grounds for appeal. For the following reasons, we now grant the State Appellate Defender's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Saline County.

¶ 4

BACKGROUND

¶ 5

In 1994, the defendant was convicted of first-degree murder and theft over \$300. He was sentenced to an extended term of 100 years for murder and a consecutive term of 5 years for theft over \$300. On July 31, 1997, the defendant's convictions and sentences were affirmed on direct appeal. *People v. Holmes*, No. 5-94-0782 (1997) (unpublished order under Supreme Court Rule 23 (eff. July 1, 1994)). On March 1, 2001, the defendant filed a *pro se* postconviction petition. After several more *pro se* motions, the defendant's requests for postjudgment relief were denied. On August 5, 2005, the defendant filed another petition for relief from judgment. Counsel was appointed and filed an amended postconviction petition on November 20, 2006. On September 12, 2008, the circuit court granted the State's motion to dismiss. On appeal from the dismissal, this court reversed and remanded the cause due to ineffective assistance of counsel under Supreme Court Rule 651(c) (eff. Dec. 1, 1984), because counsel failed to attach any supporting documents to the amended petition. *People v. Holmes*, No. 5-08-0477 (2010) (unpublished order under Rule 23).

¶ 6

On remand, the court appointed the defendant new counsel. On August 27, 2010, appointed counsel filed a second-amended petition for postconviction relief. The petition alleged (1) that his extended-term sentence was imposed in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), (2) that he was never advised by

counsel or the circuit court of the possibility of an extended sentence, (3) that his appellate counsel was ineffective for failing to raise a claim of ineffectiveness against his trial counsel and for failing to allege plain error, and (4) that the judge erred in not ordering his sentences to run concurrently since they both stemmed from a single course of conduct. The petition was supported by two attached affidavits. The first affidavit, from the defendant stated, "[M]y attorney informed me that the State was going to make me an offer of 30 years on the murder charge." The affidavit further stated that his attorney did not inform him of the possibility of an extended-term sentence of 100 years and that if his attorney had informed him of the extended term, he would have accepted the State's 30-year deal.

¶ 7 The second affidavit, from the defendant's trial counsel, David W. Hauptmann, stated that he did represent the defendant in trial proceedings, but after reviewing his notes on the case, he found no notes or correspondence related to a plea deal. He further stated that he had no recollection of a verbal offer made by the State and that he normally advised all clients of all possible sentences.

¶ 8 In response, the State filed a motion to dismiss the second-amended postconviction petition, asserting that there was no finding by the court of brutal and heinous behavior and that the defendant was sentenced to an extended term because he was a repeat violent offender. The State further argued that the *Apprendi* holding did not apply retroactively. The State also asserted that there is no support for an ineffective assistance of counsel claim and that the issue concerning consecutive sentencing was barred because it was not raised in a postjudgment motion or on direct appeal.

¶ 9 On October 6, 2010, without a hearing, the circuit court granted the State's motion to dismiss. The defendant filed a motion to reconsider arguing that an

evidentiary hearing should have been held. The circuit court denied the motion to reconsider. The defendant filed this timely appeal, and the Office of the State Appellate Defender was appointed. The State Appellate Defender now seeks leave to withdraw as counsel, alleging (1) that the holding in *Apprendi* does not apply retroactively, (2) that there is no support for the claim that a 30-year plea deal was ever offered to the defendant and thus there is no support for the ineffective assistance of counsel claim, and (3) that consecutive sentences were proper because the acts were not committed in a single course of conduct.

¶ 10

ANALYSIS

¶ 11

The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2006)) provides a mechanism by which state prisoners may collaterally challenge their convictions and/or sentences for substantial violations of their federal or state constitutional rights that occurred at their trial and that were not, and could not have been, previously adjudicated. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). In noncapital cases, the Act provides for postconviction proceedings that may consist of as many as three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first stage, the circuit court has 90 days to examine the petition and to determine, without input from the State, whether it is frivolous and patently without merit and, if so, to summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2006). If the petition is not dismissed at the first stage or if the circuit court fails to rule on it within 90 days, the petition must be docketed for further consideration. 725 ILCS 5/122-2.1(b) (West 2006).

¶ 12

At the second stage, the circuit court must determine whether the petitioner is indigent and, if so, whether he wishes to have counsel appointed to represent him. 725 ILCS 5/122-4 (West 2006). After appointed counsel has made any necessary

amendments to the petition, the State may file a motion to dismiss it. 725 ILCS 5/122-5 (West 2006). To survive a second-stage dismissal, the postconviction petition must make a substantial showing of a constitutional violation. *People v. Quigley*, 365 Ill. App. 3d 617, 618 (2006). A second-stage dismissal of a postconviction petition is reviewed *de novo*. *People v. Boyd*, 347 Ill. App. 3d 321, 327 (2004).

¶ 13 We will address each of the defendant's postconviction arguments in turn. First, he argues that his extended-term sentence was imposed in violation of *Apprendi*, 530 U.S. 466. The defendant argues that he was sentenced to an extended term because the court found that the offense involved brutal and heinous behavior, but the issue was not submitted to the jury and proved beyond a reasonable doubt. In *Apprendi*, the Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. *Apprendi* does not apply retroactively on collateral review to cases in which direct appeals had been exhausted before *Apprendi* was decided. *People v. De La Paz*, 204 Ill. 2d 426, 439 (2003).

¶ 14 Here, the record clearly indicates that the defendant's extended term was based upon his prior conviction of attempted murder. At the sentencing hearing, the court stated as follows:

"The law does provide and has been presented here for an extended term upon conviction of a prior conviction of First[-]Degree Murder within 10 years of a prior conviction of Attempt Murder ***.

The law sensibly recognizes that when you have a repeat violent offender like this, he's earned himself an especially severe sentence."

Therefore, the court clearly sentenced the defendant to an extended term based upon his prior conviction, which is an express exception to the *Apprendi* rule. Furthermore, the defendant's direct appeal was concluded when, following the affirmance of his conviction and sentence on direct appeal, he failed to pursue an appeal to the Illinois Supreme Court. *Apprendi* was issued almost three years after this court decided the defendant's direct appeal and, thus, does not apply to the defendant's case.

¶ 15 Next, we turn to the defendant's claim that he was never advised by counsel or the circuit court of the possibility of an extended-term sentence. He argues that if he had been properly advised he would have accepted the State's 30-year plea deal. We review claims of ineffective assistance under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that a defendant has been given ineffective assistance of counsel, the defendant must show (1) that counsel's representation fell below an objective standard of reasonableness and (2) that it is reasonably probable that the defendant was prejudiced by counsel's unprofessional error and the outcome would have been different absent counsel's errors. *Id.* at 687. The defendant bears the burden of overcoming a strong presumption in favor of finding that counsel's advocacy was effective. *People v. Richardson*, 401 Ill. App. 3d 45, 47 (2010).

¶ 16 However, here the defendant's argument fails. The defendant's affidavits that he provided to support the claim are actually detrimental to his argument. In the defendant's personal affidavit he stated that he was told by counsel that "the State was going to make [him] an offer of 30 years on the murder charge." The statement that counsel informed him that the State "was going" to make an offer does not provide any support for the claim that an actual plea offer was ever made. Moreover, the affidavit from trial counsel clearly states, "I have found no written notes or other

correspondence regarding any plea negotiations in this case." The record and the attached affidavits provide no support for the claim that a plea offer was ever made to the defendant. Even if there had been an error on the part of counsel, there is no support for the argument that there was any prejudice to the defendant, and thus, we do not find ineffective assistance of counsel. Since there is no finding of ineffective assistance on the part of trial counsel, the defendant's conclusory argument regarding the ineffectiveness of appellate counsel for the failure to raise a claim against trial counsel for ineffectiveness fails as well.

¶ 17 Lastly we examine the defendant's argument that the judge erred in not ordering his sentences to run concurrently since they both stemmed from a single course of conduct. The sentencing statute in effect at the time of the offense provided as follows:

"(a) *** The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective ***. ***

(b) The court shall not impose a consecutive sentence except as provided for in subsection (a) unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record." Ill. Rev. Stat. 1991, ch. 38, ¶¶ 1005-8-4(a), (b).

¶ 18 Here, the court sentenced the defendant to 100 years of imprisonment for first-degree

murder and a consecutive 5-year term for theft over \$300. However, the defendant maintained his claim that the act was self-defense even at the sentencing hearing. As the

court sentenced the defendant, the court specifically stated that "this sentence is necessary to protect the public from further criminal conduct by the defendant." It also noted that the basis for this was that the defendant was a repeat violent offender. Thus, since the court found that the sentence was necessary to protect the public, we are only left to determine whether the acts were committed as a single course of conduct.

¶ 19 "Courts determine if multiple acts were committed in a single course of conduct by assessing whether the acts were independently motivated or were part of an overarching criminal objective." *People v. Kirkpatrick*, 365 Ill. App. 3d 927, 931 (2006). In the instant case, the defendant committed murder, which is a violent act, and then afterwards decided to take items that belonged to the victim. The motivation for killing someone, whether it be first-degree murder or self-defense, is different than the motivation for theft, which is simply to permanently deprive the owner of his property. Moreover, the defendant testified that after the act of killing the victim, he then took items from the victim to make it look like a burglary. *People v. Holmes*, No. 5-94-0782 (1997) (unpublished order under Rule 23). Therefore, the theft was intended to be a cover-up, which would have involved separate intent and motive than the murder itself. We find that the acts were separate and not committed in a single course of conduct and that the circuit court's consecutive sentencing was proper. Consequently, the circuit court correctly ruled that the defendant's postconviction petition failed to make a substantial showing of a constitutional violation, and it properly granted the State's motion to dismiss the petition.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, the motion of the State Appellate Defender to withdraw as counsel is granted, and the judgment of the circuit court of Saline County is affirmed.

¶ 22 Motion granted; judgment affirmed.