

No. 1-11-1554

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
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 16999
)	
DONALD HAYWOOD,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Connors and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's postconviction petition was properly dismissed when it failed to make a substantial showing of a constitutional violation.

¶ 2 Defendant Donald Haywood appeals from the second stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). Defendant contends the circuit court erred by dismissing his petition because it made a substantial showing that he was denied effective assistance of appellate counsel by counsel's failure to challenge his sentence as excessive on direct appeal. We affirm.

¶ 3 After a jury trial, defendant was convicted of first degree murder on the basis of accountability and sentenced to 55 years in prison. The evidence at defendant's trial established, in part through defendant's inculpatory statement, that defendant agreed to act as a "look out" for his brother Karl during the robbery of a cab driver in July 2003. Defendant hid a gun, given to him by Karl, in the waistband of his pants. The two men were then picked up by the victim who drove them to a relative's home. Later, en route to another location, Karl gave defendant a signal, defendant handed him the gun, and Karl instructed the victim to drive to a vacant lot. After Karl took the victim's valuables, he told defendant to shoot the victim. Defendant refused. Despite the victim's repeated pleas for mercy, Karl took the gun from defendant and fatally shot her. Although the defense argued that defendant had only agreed to be a look out and refused to kill the victim, the jury found defendant guilty of first degree murder based upon a theory of accountability.

¶ 4 A presentence report was then completed. The report indicated that defendant was a former member of the Four Corner Hustlers gang, and that he had no prior felony convictions. In the report, defendant characterized his childhood as "OK" until the death of his father. His mother later became addicted to cocaine.

¶ 5 At the sentencing hearing, the State presented the testimony of Officer David Hickey, who testified that he observed defendant fire a semiautomatic handgun at Benny Hunter. This was the same weapon which had been used to fatally shoot the victim earlier that evening. Based on this testimony, the State argued that defendant, a former gang member, had no concern or feelings toward his fellow human beings and should be sentenced to the statutory maximum of 60 years in prison. The defense responded the defendant was only 17 years old at the time of the crime, lost his father at an early age and had a drug-addicted mother. Thus, defendant was "pretty much raised" by Karl, "probably the worst influence somebody could have." The defense argued that defendant only shot at Hunter because he had something to prove after he refused to

shoot the victim, and asked that he be sentenced to the statutory minimum because he could be rehabilitated. Defendant then apologized to the victim's family.

¶ 6 In sentencing defendant to 55 years in prison, the court indicated that it had intended to sentence him to the statutory maximum, but had decided against it because he had shown repentance. The defense then filed a motion to reconsider sentence which the trial court denied.

¶ 7 On appeal, defendant contended that he was denied effective assistance of counsel by trial counsel's acknowledgment, during closing argument, of the veracity of defendant's statement. This court rejected defendant's contention finding, in pertinent part, that counsel's strategy was to minimize defendant's participation in the robbery and murder of the victim, *i.e.*, he only agreed to act as a look out, and refused to shoot the victim. See *People v. Haywood*, Nos. 1-05-4075, 1-06-0200 (Cons.) (2008) (unpublished order under Supreme Court Rule 23).

¶ 8 In February 2009, defendant filed a *pro se* petition for postconviction relief. The petition was docketed and counsel was appointed. In January 2011, postconviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984), and a supplemental postconviction petition. The supplemental petition alleged that defendant was denied effective assistance of appellate counsel by counsel's failure to challenge defendant's sentence as excessive in light of his age and potential for rehabilitation. The State filed a motion to dismiss, which the court granted after a hearing.

¶ 9 On appeal, defendant contends that he was denied effective assistance of appellate counsel when counsel failed to challenge defendant's 55-year prison sentence as excessive.

¶ 10 The Act provides a mechanism through which a criminal defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2008); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the second stage, it is the defendant's burden to make a substantial showing of a constitutional violation; all well-pled facts in the petition that are not positively rebutted by the trial record are taken to be

true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). This court reviews the dismissal of a postconviction petition without an evidentiary hearing *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 11 Ineffective assistance of counsel claims are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). In order to succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that he was prejudiced by this deficient performance. See *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). The first prong is satisfied when counsel's performance was "objectively unreasonable under prevailing professional norms," and the second is satisfied when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Petrenko*, 237 Ill. 2d at 496-97. This test applies equally to claims of ineffective assistance of appellate counsel. *Petrenko*, 237 Ill. 2d at 497. Therefore, a defendant who contends that he was denied effective assistance of appellate counsel by counsel's failure to argue an issue on direct appeal must show that the failure to raise the issue was objectively unreasonable and that, but for this failure, his conviction or sentence would have been reversed. *People v. Dobbey*, 2011 IL App (1st) 091518, ¶ 37. Unless the underlying issue is meritorious, a defendant cannot establish that he was prejudiced by counsel's failure to raise it on direct appeal. *Dobbey*, 2011 IL App (1st) 091518, ¶ 37.

¶ 12 Appellate counsel is not obligated to raise every possible issue on appeal, and it is not incompetence for counsel to choose not to raise an issue which she determines is nonmeritorious, unless, of course, counsel's judgment regarding the merits of the issue is patently wrong. *People v. Smith*, 195 Ill. 2d 179, 190 (2000); *People v. Rogers*, 197 Ill. 2d 216, 223 (2001) (if the underlying issue is nonmeritorious, a defendant suffers no prejudice). Appellate counsel's decisions as to which issues to raise on direct appeal are generally entitled to substantial deference. *Rogers*, 197 Ill. 2d at 223. Because appellate counsel is not required to raise nonmeritorious issues on appeal (*Smith*, 195 Ill. 2d at 190), the success of defendant's

constitutional claim of ineffective assistance of appellate counsel depends on whether his underlying substantive claim of error has merit. If it does not, then his appellate counsel cannot be faulted for not raising that issue on direct appeal, and his petition would therefore fail to make a substantial showing of a constitutional violation.

¶ 13 Here, defendant contends that there is a reasonable probability that outcome of his direct appeal would have been different had counsel argued that the trial court abused its discretion when it sentenced defendant to 55 years in prison because his role in the offense was limited, he did not have a criminal history, and he was only 17 years old at the time of the offense.

¶ 14 A trial court has broad discretion in determining the appropriate sentence for a particular defendant and its determination will not be disturbed absent an abuse of that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). A sentence within the statutory range will not be considered excessive unless it varies greatly from the spirit of the law or is manifestly disproportionate to the nature of the offense. *People v. Brazziel*, 406 Ill. App. 3d 412, 433-34 (2010). When balancing the retributive and rehabilitative aspects of a sentence, a court must consider all factors in aggravation and mitigation including, *inter alia*, a defendant's age, habits, credibility, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime. *People v. Raymond*, 404 Ill. App. 3d 1028, 1069 (2010). It is presumed that the trial court properly considered all mitigating factors before it; it is the defendant's burden to affirmatively show the opposite. *Brazziel*, 406 Ill. App. 3d at 434. A reviewing court will not substitute its judgment for that of the trial court merely because it may have analyzed the sentencing factors differently. *People v. Streit*, 142 Ill. 2d 13, 19 (1991).

¶ 15 Here, defendant was convicted of first degree murder pursuant to an accountability theory. The sentencing range for a first degree murder conviction is between 20 and 60 years in prison. See 730 ILCS 5/5-8-1(a)(1)(a) (West 2002).

¶ 16 The record reveals that at sentencing, the parties presented evidence in aggravation and mitigation including, defendant's lack of parental involvement, Karl's influence, defendant's prior gang affiliation, and the fact that defendant was seen firing the gun used to kill the victim at another person. In sentencing defendant, the court stated that it had considered defendant's repentance and apology to the victim's family in mitigation. This court cannot say that a prison sentence of 55 years was an abuse of discretion when defendant agreed to act as his brother's look out during a robbery, transported the firearm used in the offense, and then permitted Karl to take the gun and shoot the victim. See *Patterson*, 217 Ill. 2d at 448 (a trial court has broad discretion in sentencing).

¶ 17 Although the record indicates the defendant was 17 years old at the time of the offense, lacked parental guidance, and did not have a criminal record, he points to nothing in the record to indicate that the trial court did not take these factors into consideration when determining his sentence. While a defendant's potential for rehabilitation must be considered, the court is not required to give more weight to a defendant's chance of rehabilitation than to the nature of the crime (*People v. Evans*, 373 Ill. App. 3d 948, 968 (2007)), or to explain the value the court has assigned to each factor in mitigation and aggravation (*Brazziel*, 406 Ill. App. 3d at 434). It is presumed that the court properly considered the mitigating factors presented and the defendant's potential for rehabilitation; it is the defendant's burden to show otherwise. *Brazziel*, 406 Ill. App. 3d at 434. In the case at bar, defendant has not met that burden, as he points to nothing in the record to indicate that the court did not take his youth and lack of criminal background into consideration when imposing sentence. See *Brazziel*, 406 Ill. App. 3d at 434. Ultimately, the trial court did not abuse its discretion when, after properly considering factors in mitigation and aggravation (*Brazziel*, 406 Ill. App. 3d at 433-34), it sentenced defendant to 55 years in prison (*Patterson*, 217 Ill. 2d at 448).

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¶ 18 As the trial court did not abuse its discretion when it sentenced defendant, this court cannot say that appellate counsel's failure to raise this issue on appeal was objectively unreasonable (*Petrenko*, 237 Ill. 2d at 496-97). Because the underlying issue was not meritorious, defendant cannot show how he was prejudiced by defendant's failure to raise it on direct appeal. See *Dobbey*, 2011 IL App (1st) 091518, ¶ 37 (unless the underlying issue is meritorious, a defendant cannot establish that he was prejudiced by counsel's failure to raise it on direct appeal). Therefore, because defendant has failed to make a substantial showing that he was denied the effective assistance of appellate counsel (*Pendleton*, 223 Ill. 2d at 473), the circuit court properly granted the State's motion to dismiss.

¶ 19 The judgment of the circuit court of Cook County is affirmed.

¶ 20 Affirmed.