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2012 IL App (3d) 100867-U

Order filed July 23, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 12th Judicial Circuit,
Plaintiff-Appellee,) Will County, Illinois,
)
v.) Appeal No. 3-10-0867
) Circuit Nos. 02-CF-263
JASON C. NOVAK,)
) Honorable
Defendant-Appellant.) Robert P. Livas,
) Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice O'Brien dissented.

ORDER

- ¶ 1 *Held:* Defendant's postconviction petition was properly dismissed as being without merit.
- ¶ 2 Following a jury trial, defendant, Jason C. Novak, was found guilty of the Class X felony of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2002)), and was sentenced to 12 years' imprisonment. Defendant appealed, and this court affirmed his conviction and sentence. *People v. Novak*, No. 3-07-0329 (2009) (unpublished order under Supreme Court Rule 23).

found defendant guilty of aggravated battery to a child. The trial court sentenced defendant to 12 years of imprisonment. The defendant filed a direct appeal, and this court affirmed the defendant's conviction and sentence. *Novak*, No. 3-07-0329.

¶ 7 Defendant filed a postconviction petition, alleging his private counsel, Danielian, was ineffective. Defendant claimed the State offered him six years' imprisonment in exchange for a guilty plea, but he did not learn he would be required to serve 85% of his prison sentence until the sentencing hearing. According to defendant's affidavit, Danielian advised him to reject the State's offer, told him, "we got this," and advised defendant if the jury returned a guilty verdict, defendant would serve 50% of his sentence and could earn additional good time credit for attending counseling and education classes. Defendant stated more accurate information from private counsel "would have caused [him] to reconsider [his] decision to decline [the State's] offer."

¶ 8 Similarly, the attached affidavit of Christina M. Schafer, the mother of defendant's two children born during the pendency of this case, stated she was present during conversations between Danielian and defendant within the 30 days before trial. Schafer indicated Danielian advised defendant to reject the State's six-year plea offer because "we got this" and "there is no way they can rule against us." In addition, Schafer indicated Danielian advised defendant he could request a reduced charge which would not require the 6 to 30 year sentencing range and defendant would only be required to serve 50% of his sentence. According to Schafer, defendant told her the judge indicated, if defendant rejected the plea offer and lost at trial, the judge could guarantee defendant "would do at least twelve (12) years."

¶ 9 In her affidavit attached to the petition, defendant's sister indicated she was present during a conversation between Danielian and defendant, within the 30 days before trial, when

Danielian told defendant that defendant would only have to serve 50% of his prison term and could receive an additional reduction for attending counseling and education classes.

¶ 10 The trial court summarily dismissed defendant's postconviction petition. Defendant appealed.

¶ 11 ANALYSIS

¶ 12 On appeal, defendant alleges his postconviction petition stated the gist of a claim because private counsel was ineffective for advising him to reject the State's offer of six years' imprisonment in exchange for a guilty plea and misinforming him about the amount of applicable good time credit. Defendant contends that, if his private attorney properly advised him on the amount of applicable good time credit, he would have accepted the State's plea offer.

¶ 13 The Post-Conviction Hearing Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Hodges*, 234 Ill. 2d 1 (2009). At the first stage, the trial court must independently determine whether the petition is "frivolous or is patently without merit[.]" 725 ILCS 5/122-2.1(a)(2) (West 2008). A petition is frivolous or patently without merit only if it has no arguable basis in law or fact. *Hodges*, 234 Ill. 2d at 1. At this stage, the petition's allegations, liberally construed and taken as true, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115 (2007). We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 14 To succeed on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and the substandard performance prejudiced defendant. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). If a plea offer has been made, a defendant has the right to effective assistance of counsel in considering whether to accept it. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *People v. Curry*, 178

Ill. 2d 509 (1997). Where a defendant alleges he was prejudiced by choosing to stand trial and rejecting a plea offer based upon ineffective advice, he must show that, but for the ineffective advice of counsel: (1) there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, defendant would have accepted its terms and the offer would not have been withdrawn by the State); (2) the court would have accepted its terms; and (3) the conviction or sentence, or both, under the plea would have been less severe than under the judgment and sentence. *Lafler*, 132 S. Ct. 1376.

¶ 15 In this case, defendant argues his decision to proceed to trial was based upon his private attorney's erroneous information regarding the amount of applicable good time credit. We acknowledge that good time credit is a collateral matter and there is no requirement that a defendant be informed of the availability the credit. See *People v. Maury*, 287 Ill. App. 3d 77 (1997); *People v. Frison*, 365 Ill. App. 3d 932 (2006) (good conduct credit is not a direct consequence of a guilty plea because it is contingent on defendant's behavior in prison and is not definite, immediate, and automatic upon a defendant's punishment).

¶ 16 However, there is a distinction between the passive conduct of counsel failing to discuss collateral consequences of a guilty plea and situations wherein counsel renders erroneous advice. *People v. Manning*, 227 Ill. 2d 403 (2008); *People v. Correa*, 108 Ill. 2d 541 (1985). A counsel's unequivocal and erroneous representation about the collateral consequences of a plea amounts to ineffective assistance. *Correa*, 108 Ill. 2d 541. Therefore, taking defendant's allegations as true for the purposes of this appeal, Danielian's erroneous information regarding good conduct credit fell below an objective standard of reasonableness.

¶ 17 Nonetheless, the record does not support defendant's contention that he was prejudiced by his private attorney's alleged deficient performance. Defendant was represented by appointed

counsel for over four years, from February 11, 2002, until October 16, 2006. We note that defendant does not allege his appointed counsel provided misinformation or erroneous advice regarding the range of punishment and the applicable good time credit for the charges filed against him before he first rejected the State's plea offer on June 8, 2005. He does not allege appointed counsel was ineffective during the four years appointed counsel represented defendant during the pretrial process.

¶ 18 On appeal, defendant claims only that Danielian misinformed him he would only be required to serve 50% of any prison term sentence after good time credit was applied. Defendant alleges that, based upon this misinformation, he rejected what he thought was an offer of three years' imprisonment if he received 50% good conduct credit in exchange for a plea of guilty.

¶ 19 We note that defendant rejected the six year offer while represented by private counsel. Since this was the minimum, mandatory, sentence available to the court, it would have been impossible for defendant to receive a sentence of less than the six year plea offer extended by the State. The only outcome that defendant could have thought would be more beneficial than the minimum sentence offered by the State, would be a not guilty verdict. Consequently, there is no indication that there was a reasonable probability defendant would have accepted the State's plea offer, even if he had correctly been informed that he was required to serve at least 85% of his sentence. Defendant gambled he would not receive a conviction at all when he rejected the State's offer while represented by private counsel.

¶ 20 Here, defendant knew the State was seeking the minimum sentence and chose to "gamble" his plea offer for the chance of being found not guilty and serving no time in prison. In fact, according to Schafer's affidavit, defendant knew the judge would sentence him to 12 years of prison time if the jury returned a guilty verdict. Thus, defendant was not prejudiced by

any misinformation his private counsel may have provided. Accordingly, defendant failed to state the gist of a constitutional claim of ineffective assistance in his petition, and the court did not err in summarily dismissing the petition for lack of merit.

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, the order of the Will County circuit court summarily dismissing defendant's postconviction petition is affirmed.

¶ 23 Affirmed.

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¶ 24 JUSTICE O'BRIEN, dissenting:

¶ 25 I respectfully dissent from the majority's decision for the following reasons.

¶ 26 In order for Mr. Novak to prove he had ineffective assistance of counsel, he must show his counsel provided an erroneous representation of the consequences of a plea. *People v. Correa*, 108 Ill. 2d 541 (1985). He must also show there was prejudice involved in his decision, and there was a reasonable probability that but for the error he would have accepted the plea offered to him. *People v. Curry*, 178 Ill. 2d 509, 529 (1997).

¶ 27 Mr. Novak's attorney gave him misleading representation regarding how much good conduct credit Mr. Novak would receive while serving his prison sentence, leading Mr. Novak to reject the plea offered by the State. Based on the information his attorney gave him at the time the State offered him the plea, Mr. Novak believed that if he rejected the deal, he could get 50% of his sentence reduced based on good time credit and only serve six years, when the law states that he would have to serve 85% of his sentence, which would be over ten years. It is reasonable that if Mr. Novak had known the difference in the time that he would have to serve, Mr. Novak

would have accepted the offer of 6 years. Because it is likely that Mr. Novak would reconsider the plea and accept the 6 years originally offered, it can be shown that the misleading representation of the possible good conduct credit that Mr. Novak could receive prejudiced Mr. Novak's decision to reject the State's offer.

¶ 28 When it has been determined that the defendant has received ineffective counsel, it is appropriate to place the defendant back in the position he would have been in had the misleading advice not been given to him. *Curry*, 178 Ill. 2d at 536. In the instant case, Mr. Novak's counsel gave him erroneous advice while the State's plea offer was still pending, thus Mr. Novak should be placed back in the position of choosing to either accept or deny the plea. I would reverse the trial court's order of dismissal and remand the matter to the trial court for further proceedings.