

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).

2013 IL App (3d) 120855-U

Order filed September 19, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

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. 3-12-0855
) Circuit No. 06-CF-3106
)
R.J. KRIENHEDER,) Honorable
) Edward A. Burmila, Jr., and
Defendant-Appellant.) Richard C. Schoenstedt,
) Judges, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Wright and Justice O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* At the second stage of postconviction proceedings, defendant failed to establish a substantial showing that either: (1) trial counsel provided ineffective assistance by advising defendant to waive his right to a jury trial; or (2) his jury trial waiver was involuntary.
- ¶ 2 After a bench trial, defendant, R.J. Krieheder, was convicted of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2004)) and sentenced to six years' imprisonment. On direct appeal, his conviction and sentence were affirmed. *People v. Krieheder*, No. 3-09-0873 (2011)

(unpublished order under Supreme Court Rule 23). Defendant filed a petition for postconviction relief (725 ILCS 5/122-1 *et seq.* (West 2004)). Defendant claimed ineffective assistance of counsel and an involuntary jury waiver, both resulting from his decision to waive a jury trial in favor of a bench trial. The circuit court advanced the petition to the second stage. At the second stage, the court granted the State's motion to dismiss, finding that defendant had not established a substantial showing of a constitutional violation. Defendant appeals, and we affirm.

¶ 3

FACTS

¶ 4 Defendant was charged with aggravated criminal sexual assault (720 ILCS 5/12-16(b) (West 2004)), based on acts he allegedly committed during 2004 and 2005. Defendant signed a written jury trial waiver, which the court accepted, and the cause proceeded to a bench trial. Defendant was found guilty and sentenced to six years' imprisonment. His conviction was affirmed on direct appeal. *Kreinleder*, No. 3-09-0873.

¶ 5 Defendant filed a petition for postconviction relief. In the petition, defendant raised two claims: (1) his trial counsel was ineffective for advising defendant to waive his right to a jury trial; and (2) his jury trial waiver was involuntary, as it was predicated on counsel's erroneous advice. According to the petition, counsel advised defendant that if he proceeded to a bench trial, he would be found not guilty. Counsel further advised that even if defendant were found guilty, the court would sentence him to probation. In actuality, defendant was not eligible for probation. Defendant argued that he waived his right to a jury trial in favor of a bench trial, based upon counsel's erroneous advice. The petition claimed that had defendant known probation was not an available sentence, he would have proceeded to a jury trial.

¶ 6 The trial court advanced the petition to the second stage of postconviction proceedings.

Defendant stood on his initial petition. The State filed a motion to dismiss, which the trial court granted. Defendant appeals.

¶ 7

ANALYSIS

¶ 8 Defendant argues that the trial court erred in dismissing his petition at the second stage of postconviction proceedings. A circuit court's decision to dismiss a petition at the second stage is reviewed *de novo*. *People v. Childress*, 191 Ill. 2d 168 (2000). To survive a motion to dismiss at the second stage, the petition must demonstrate a substantial showing of a constitutional deprivation. *People v. Coleman*, 183 Ill. 2d 366 (1998). At the second stage, all well-pled allegations are taken as true unless positively rebutted by the record. *People v. Knight*, 405 Ill. App. 3d 461 (2010). In his petition, defendant claimed he had suffered two deprivations of his constitutional rights.

¶ 9

A. Ineffective Assistance of Counsel

¶ 10 Defendant first argues that his petition demonstrated a substantial showing that trial counsel provided him with ineffective assistance, in violation of his rights under the sixth amendment. U.S. Const., amend. VI. The petition alleged that counsel was ineffective for providing erroneous advice that caused defendant to waive his right to a jury trial.

¶ 11 To establish a claim of ineffective assistance of counsel in this context, defendant must show (1) that counsel's performance was deficient, *i.e.*, that it fell below an objective standard of reasonableness; and (2) a reasonable probability that, but for counsel's errors, defendant would not have waived his right to a jury trial. *People v. Hobson*, 386 Ill. App. 3d 221 (2008) (adapting the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)). On the first prong, defendant must overcome a strong presumption that counsel's performance was objectively reasonable. *People v. Sanchez*, 169 Ill. 2d 472 (1996).

¶ 12 The petition alleges that counsel's advice was deficient because it was erroneous—defendant was found guilty after a bench trial and was sentenced to incarceration rather than probation. In fact, because of defendant's criminal history, he was not eligible for probation. See 730 ILCS 5/5-5-3(c)(2)(F) (West 2004). Defendant further claims that he was prejudiced by counsel's deficient performance because, had he known that he might be found guilty after a bench trial and that probation was not an available sentence, he would have taken a jury trial.

¶ 13 We begin by clarifying which aspects of counsel's performance were deficient. First, counsel did not guarantee that defendant would be found not guilty after a bench trial. Although counsel predicted that the court would find defendant not guilty, he tempered that advice by telling defendant, "even if [you are] convicted, [you are] eligible for probation." Counsel's advice was therefore that defendant was likely, but not certain, to be found not guilty after a bench trial. Such advice constitutes a strategic prediction; as a matter of trial strategy, it cannot constitute deficient performance. See *Hobson*, 386 Ill. App. 3d 221.

¶ 14 On the other hand, counsel's advice that defendant was eligible for probation was deficient. That statement of fact was not true. It constituted deficient performance because a criminal defense attorney has the duty to inform his client of the minimum and maximum sentences that may be imposed. *People v. Curry*, 178 Ill. 2d 509 (1997).

¶ 15 To determine whether prejudice occurred, we ask whether there is a reasonable probability that, but for counsel's erroneous advice that defendant was eligible for and would receive probation if he were found guilty after a bench trial, defendant would have taken a jury trial. Defendant claims that "[h]ad [he] known he was looking at a mandatory prison sentence, he would not have left his fate to a judge alone and would have insisted on a jury trial."

¶ 16 However, defendant's claim fails because he has not established why he would have chosen a jury trial if he had known the correct sentencing range, and why, had he known prison time was mandatory, he would have pursued that trial option as affording him the greatest chance of acquittal. Defendant has not shown what, if any, the odds of acquittal at a bench trial would be compared to a jury trial. As a result, he has not pled sufficient facts to establish a reasonable probability that he would have chosen a jury trial over a bench trial had he known he was ineligible for probation. He has not established a substantial showing that counsel provided ineffective assistance.

¶ 17 **B. Voluntariness of Jury Trial Waiver**

¶ 18 Defendant argues that his right to a jury trial under the United States and Illinois constitutions was violated where his jury trial waiver was not voluntary because it was predicated on counsel's erroneous advice. U.S. Const., amends VI, XIV; Ill. Const. 1970, art. I, §§ 8, 13.

¶ 19 A criminal defendant is entitled to the right to a jury trial. U.S. Const., amends VI, XIV; Ill. Const. 1970, art. I, §§ 8, 13. A defendant's waiver of the right must be made knowingly and voluntarily. *People v. Bannister*, 232 Ill. 2d 52 (2008). The determination of whether a jury waiver is valid cannot rest on a precise formula, but rather depends on the facts and circumstances of each particular case. *Id.* The crucial information that the defendant must understand is that the facts of the case will be determined by a judge and not a jury. *Id.* Whether a defendant knowingly and voluntarily waived his right to a jury trial is reviewed *de novo*. *People v. Victors*, 353 Ill. App. 3d 801 (2004).

¶ 20 In reaching our decision, we rely on *People v. McCleary*, 353 Ill. App. 3d 916 (2004), where defendant waived a jury trial in favor of a bench trial. He argued that his right to a jury trial was violated because, during his jury waiver admonishments, the trial court improperly advised him of

the penalties he faced at trial. The appellate court held that, despite the erroneous admonishments, defendant's jury waiver was knowing and voluntary because defendant understood what a jury trial was and that it was his choice whether to waive his right to a jury trial. *Id.* The court's reasoning was sound because "[r]egardless of who serves as the trier of fact, the defendant's possible sentences would be the same." *Bannister*, 232 Ill. 2d at 69.

¶ 21 In the present case, defendant was misadvised as to the sentencing range, but this was not relevant to his decision to waive his right to a jury trial. Defendant knew that a judge, rather than a jury, would decide the facts at a bench trial. Therefore, his jury trial waiver was knowing and voluntary; defendant has failed to establish a substantial showing that his right to a jury trial was violated.

¶ 22

CONCLUSION

¶ 23 The judgment of the circuit court of Will County is affirmed.

¶ 24 Affirmed.