

No. 1-12-1320

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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. 01 CR 19064
)	
DAVID HILL,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices LAMPKIN and REYES concurred in the judgment.

O R D E R

¶ 1 *Held:* Where defendant made a sufficient showing of cause and prejudice for the filing of a successive post-conviction petition, the trial court's denial of leave to file the petition is reversed.

¶ 2 Defendant, David Hill, appeals from an order of the circuit court of Cook County denying him leave to file a successive *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et. seq.* (West 2008)). He contends that he demonstrated cause and prejudice for the filing of his successive petition, where he alleged that his guilty plea was

involuntary and unknowing because it was based on misinformation as to his eligibility for an extended-term sentence.

¶ 3 The record shows that defendant was charged by indictment with multiple offenses including aggravated kidnapping and aggravated vehicular hijacking. The charges stemmed from an incident in which defendant drove off in the victim's van, which the victim exited, leaving it running and with her 23-month old son in the backseat. After being pursued by the police, defendant crashed the van and was apprehended. He later gave a written statement admitting that he took the van, and that he continued to flee after he heard and saw the child in the backseat.

¶ 4 Following a conference pursuant to Supreme Court Rule 402 (Ill. S. Ct. R. 402 (eff. July 1, 1997)), defendant agreed to plead guilty to one count of aggravated vehicular hijacking and one count of aggravated kidnapping in exchange for a sentence of 29 years' imprisonment on December 5, 2001. As part of the admonishments, the trial court advised defendant that both offenses were Class X felonies and carried sentencing ranges of 6 to 30 years' imprisonment.

¶ 5 The court inquired of the parties, "We determined at the [Rule 402] conference, that he was eligible for an extended term, is that right?" Both the State and defense agreed, and the court advised defendant that he was eligible for an extended-term sentence, which increased the penalty range to 30 to 60 years' imprisonment. Defendant acknowledged that he understood the court's admonishments and the terms of the plea agreement, that the agreement was acceptable to him, and that he was pleading guilty "freely and voluntarily[.]"

¶ 6 Defendant did not file a motion to withdraw his plea or a notice of appeal from that judgment. On December 8, 2003, defendant filed an initial *pro se* post-conviction petition,

claiming that he was denied the effective assistance of counsel where counsel allowed him to plead guilty to aggravated kidnapping even though he could not have been convicted of that offense, and where counsel failed to object to the factual basis for defendant's guilty plea to aggravated kidnapping. Defendant maintained that the use of the child's age both to elevate the offense from kidnapping to aggravated kidnapping and to establish the element of confinement against the victim's will for purposes of the kidnapping statute (720 ILCS 5/10-1(b) (West 2000)) constituted a double enhancement and violated his right to due process. He further asserted that the confinement or asportation of the child was merely incidental to his taking of the van.

¶ 7 In reversing the summary dismissal of defendant's petition, this court concluded that defendant had stated the gist of a meritorious claim of actual innocence to the kidnapping charge, and a violation of his right to effective representation where counsel's advice to plead guilty was objectively unreasonable. *Hill*, slip order at 20. Upon remand, defendant was appointed counsel, who filed an amended post-conviction petition. In that amended petition, defendant maintained that defense counsel was ineffective for allowing him to plead guilty to aggravated kidnapping and aggravated vehicular hijacking because the State could not prove the offenses beyond a reasonable doubt, and because the factual basis for his guilty plea to the charges was insufficient. Defendant further alleged that he would not have pleaded guilty but for counsel's urging to do so. Because defendant had plausible defenses to both charges, he maintained that defense counsel's erroneous advice prejudiced him.

¶ 8 During the evidentiary hearing that followed, defendant testified that he was riding his bike when he saw an unattended van, jumped inside, and drove off. After driving about 10 to 15

minutes, defendant turned left on 21st Street, lost control of the van and crashed into a wall. At no time did defendant see or hear a child in the back seat. He acknowledged meeting with an assistant State's Attorney who made a written record of his statement, but denied telling her that he had seen or heard the child. He contended that he been injured in the crash, and had not been provided medical care at the time he made the statement. He alleged that he did not read the statement because he was in a lot of pain and his eyes were blurry, and he merely signed and initialed the statement where he was told to do so.

¶ 9 In preparing for his case, defendant was informed by trial counsel, Calvin Aguilar, that his case would be very difficult to try and that he had no defense to the charges. Aguilar told him that the judge had offered him a 60-year sentence to plead guilty, but defendant refused. On cross-examination, defendant testified that Aguilar discussed possible defenses to the charges, including that he did not know that there was a child in the van, and that he did not use force when he took it.

¶ 10 Aguilar testified that during his first meeting with defendant, he explained to defendant his options of seeking a plea deal or going to trial, either before a jury or the bench, and discussed possible defenses to the charges. Aguilar further explained to defendant that the offenses with which he was charged generally carried sentences of 6 to 30 years, but that he was eligible for an extended term. Aguilar stated that he showed defendant his "statute book" to let him see the statute showing that he was extendable, and informed him that the State had offered him a sentence of 60 years' imprisonment. Defendant refused that offer, and asked Aguilar to see if he could get a lesser sentence.

¶ 11 On October 31, 2001, Aguilar, the State, and the circuit court participated in a Supreme Court Rule 402 (Ill. S. Ct. R. 402 (eff. July 1, 1997)) conference. During that conference, the parties and the court discussed defendant's eligibility for an extended sentence. They concluded that defendant was eligible for an extended sentence based on the age of the child, and that he was not otherwise eligible for an extended sentence based on his criminal history. The circuit court indicated that it believed the State's offer of 60 years' imprisonment was "too high[.]" and instead, extended an offer of 30 years' imprisonment. Aguilar attempted to persuade the court into offering a lower term, but the court declined, describing 30 years as a "lenient offer[.]"

¶ 12 The next time Aguilar met with defendant, he informed him of the court's offer. Defendant told Aguilar that he had heard from other inmates that the judge assigned to his case would sentence him to a significant sentence, and he asked Aguilar if he believed that was true. Aguilar counseled defendant "to consider that you were offered 30 [years] on a plea. If you did go to trial and lose, there's a substantial likelihood you will get a lot more time in the Department of Corrections."

¶ 13 On December 5, 2001, Aguilar was able to persuade the court to reduce the offer by one year, so that the final offer was 29 years' imprisonment. Aguilar relayed this offer to defendant, they discussed the offer, and defendant decided to take it. Aguilar stated that he believed 29 years was a "high amount of time" because if defendant "elected a trial, *** we had a bonafide issue of knowledge and force." Defendant, however, chose to plead guilty because he was "under the fear of getting convicted and sentenced to a high number of years."

¶ 14 Aguilar further testified that during the court's inquiry into defendant's plea, defendant initially responded that he wished to plead "not guilty." At that point, defendant stepped back for

a moment, and asked Aguilar if he thought he could get a lower sentence by having a bench trial. Aguilar responded, "in all likelihood, no" but that if defendant wished to try the case, he still had that option. Defendant told Aguilar, "no, I can't risk it. I will take the plea." He then stepped back before the court and changed his plea from not guilty to guilty.

¶ 15 At the conclusion of the evidentiary hearing on defendant's post-conviction petition, the circuit court noted that the matter was before the court for a determination of whether Aguilar provided ineffective assistance of counsel based on the claims set out in defendant's petition. It initially noted its credibility findings, finding defendant "wholly incredible," whereas defense counsel testified in a "highly credible fashion." The court then found that Aguilar fully advised defendant of "possible defenses," "the consequences if those defenses were not successful" and "how he thought [the judge] might rule if he rejected the offer of 30 years and went to a bench trial." The court further found that defendant participated in the negotiations and was present in court and heard the factual basis, including his admission that he knew there was a child in the van but continued to flee. The court concluded that defendant had made a choice to plead guilty but, after being in the penitentiary, he had "buyer's remorse."

¶ 16 Defendant appealed the denial of his post-conviction petition, alleging, *inter alia*, that the court's judgment was against the manifest weight of the evidence. *People v. Hill*, No. 1-09-2331, 1 (2011) (unpublished order under Supreme Court Rule 23). This court affirmed, finding that the court's denial of the petition was not manifestly erroneous. *Hill*, No. 1-09-2331, 8. In his brief, however, defendant also included a claim that he was denied effective representation due to the failure of post-conviction counsel to amend his petition to allege that his guilty plea was involuntary because it was based on an erroneous belief that he was eligible for an extended-term

sentence. *Hill*, No. 1-09-2331, 5. This court observed that the claim had not been raised below, and concluded that it was forfeited and that this court lacked authority to address it. *Hill*, No. 1-09-2331, 6. We noted, however, that "defendant is not without a remedy. The defendant may seek relief under section 122–1(f) of the Act (725 ILCS 5/122–1(f) (West 2002)), which provides the procedure for filing a successive petition for postconviction relief." *Hill*, No. 1-09-2331, 6 (citing *People v. Jones*, 213 Ill. 2d 498, 509 (2004)).

¶ 17 On February 21, 2012, defendant filed a motion for leave to file a successive post-conviction petition, and the petition itself. In it, he contended that he entered a negotiated guilty plea in exchange for a sentence of 29 years' imprisonment because his counsel and the court had misinformed him that he faced a maximum sentence of 60 years' imprisonment, when, in fact, he was not eligible for an extended term. He claimed that he had cause to file the successive petition because he only became aware that this advice was incorrect after consulting with appellate counsel. He contended that he established prejudice because, "had [he] known the true sentencing range applicable to him, he would not have pleaded guilty and would have gone to trial."

¶ 18 On March 30, 2012, the court denied defendant's motion for leave to file a successive post-conviction petition, finding, without further explanation, that "it does not cause him prejudice as set forth in the statute and case law." Defendant filed notice of appeal, and in this court, contends that the circuit court erred in determining that he had not adequately set forth cause and prejudice to bring a successive petition.

¶ 19 The Act provides a means by which a criminal defendant can assert that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her

rights under the Constitution of the United States or of the State of Illinois or both.” 725 ILCS 5/122–1(a)(1) (West 2008). It permits the filing of only one petition without leave of court (725 ILCS 5/122–1(f) (West 2008)), and expressly provides that any claim not raised in the original or amended petition is waived (725 ILCS 5/122–3 (West 2008)). Consequently, to initiate a successive post-conviction proceeding, a defendant must first obtain leave of court, which is granted when the defendant “demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure.” 725 ILCS 5/122–1(f) (West 2008).

¶ 20 This "cause-and-prejudice test" is the analytical tool used to determine whether fundamental fairness requires a court to make an exception to the waiver provision of the Act, and to consider a claim raised in a successive post-conviction petition on its merits. Under this test, procedural default will be excused if defendant can show (1) cause, defined as an objective factor external to the defense that impeded the defense's efforts to raise the claim earlier, and (2) prejudice, defined as an error so infectious to the proceedings that the resulting conviction violates due process. 725 ILCS 5/122–1(f) (West 2008). Our review of the trial court's denial of leave to file defendant's successive post-conviction petition is *de novo*. *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010).

¶ 21 Before considering whether defendant's claims meet the "cause-and-prejudice test, we must first analyze defendant's baseline contention: that he was not eligible for an extended-term sentence. Defendant contends that he was not eligible for an extended sentence based on his criminal history, and that, because the child victim's age was used to elevate the underlying offenses to aggravated crimes, subjecting him to an extended-term sentence on that basis would

violate the rule against double enhancement. The State admits that defendant's criminal background could not have served to qualify him for an extended term, and does not challenge defendant's contention that the age of the victim was used both to elevate the offenses and to qualify him for an extended term.

¶ 22 The record shows that defendant was charged with aggravated kidnapping, which was aggravated by the fact that the victim was a child under the age of 13 years old; and aggravated vehicular hijacking, which was aggravated by the fact that a passenger of the vehicle was a child under the age of 16 years old. Although the court did not indicate the basis for extended sentencing in the transcript of the plea proceedings, Aguilar testified at the evidentiary hearing that the court and parties determined during the Rule 402 conference that defendant was eligible for an extended term based on the age of the child. The record also shows that defendant had not previously been convicted of a Class X felony, and was therefore not eligible for an extended sentence on the basis of his criminal record. It thus appears, as testified to by Aguilar, that the parties and court were under the impression that defendant was extendable because of the age of the child victim. That conclusion was incorrect. Where the child's age was used to aggravate the underlying offenses, its use to qualify defendant for an extended-term sentence would constitute an impermissible double enhancement. *People v. Thomas*, 171 Ill. 2d 207, 223 (1996).

¶ 23 That said, defendant contends that this erroneous belief established cause for his successive post-conviction petition, because he was actively misadvised by counsel and the court regarding his eligibility for extended-term sentencing, and had no reason to become aware of the mistake until he was informed by appellate counsel. The State disagrees, and contends that defendant cannot show cause because he could have discovered and raised this issue on direct

appeal, or in his initial post-conviction petition. It argues that "[d]efendant is essentially asking this Court to find 'cause' because he was unaware of the law regarding extended term sentencing *** [when] 'all citizens are charged with knowledge of the law[.]'" (citations omitted).

¶ 24 As noted above, the record shows that the parties mistakenly concluded that defendant was eligible for an extended sentence. In fact, at the evidentiary hearing that followed defendant's initial post-conviction petition, the parties and court appeared to remain under that same mistaken impression, and, it was only after defendant's petition was denied and defendant appealed, that appellate counsel attempted to add raise the issue regarding defendant's eligibility for an extended sentence. This court determined that we lacked jurisdiction to hear that issue, as it was not brought before the circuit court, but that defendant's remedy was to bring the issue in a successive post-conviction petition. Defendant has done so here.

¶ 25 The State, however, observes that, at the time of his guilty plea and his initial post-conviction petition, defendant was aware that counsel and the trial court believed he was eligible for an extended-term sentence, and that defendant "certainly knew his own criminal history" which did not support an extended term. It thus concludes that the basis for defendant's claim was available to him, and his ignorance of the law is not an objective factor that impeded his ability to raise the instant claim sooner.

¶ 26 In support of this contention, the State cites *People v. Evans*, 2013 IL 113471. In that case, defendant requested leave to file a successive post-conviction petition alleging that the court did not inform him that he would have to serve a period of mandatory supervised release (MSR) upon his release from prison. *Evans*, 2013 IL 113471, ¶ 5. The trial court denied the request, and the supreme court affirmed, finding that the Unified Code of Corrections expressly

provided that, by operation of law, every Class X sentence “shall include as though written therein a [three-year term of MSR] in addition to the term of imprisonment” and that defendant's subjective ignorance of the provision was not “an objective factor that impeded” his ability to raise the MSR claim sooner. *Evans*, 2013 IL 113471, ¶¶ 13, 17 (citation omitted).

¶ 27 We find this case readily distinguishable from *Evans*, as defendant here does not claim to have been *uninformed*, but rather *misinformed* as to the consequences of his guilty plea. We conclude that where, as here, defendant was actively misinformed by the prosecutor, the judge, and defense counsel as to the maximum sentence available, and there is no reason for defendant to have discovered the error sooner, he sufficiently established cause to file a successive post-conviction petition.

¶ 28 In so holding, we find *People v. Gutierrez*, 2011 IL App (1st) 093499, ¶ 7 (2011), persuasive. In that case, defendant filed a motion for leave to file a successive post-conviction petition alleging that he was a Mexican citizen living in the United States as a resident alien, and that counsel was ineffective where he failed to notify defendant that his guilty plea would subject him to deportation. *Gutierrez*, 2011 IL App (1st) 093499, ¶ 7. Defendant explained that he did not raise these issues in a previous post-conviction petition because he was “uneducated, [and] he didn't know that these issues existed at the time of his first [petition].” *Gutierrez*, 2011 IL App (1st) 093499, ¶ 8. This court found that defendant had sufficiently established cause for failing to raise this issue in a previous post-conviction petition.

¶ 29 The State attempts to distinguish *Gutierrez*, by stating that “in *Gutierrez*, the defendant claimed that he did not learn that he was subject to deportation until after he filed his initial post-conviction petition [whereas, here] all the facts necessary to raise the extended-term sentencing

claim were available to defendant *before* he filed his initial *pro se* post-conviction petition." (emphasis in original). We disagree. The holding in *Gutierrez* clearly did not turn on whether the necessary facts were available to defendant, because defendant in *Gutierrez* "certainly knew" of his status as a Mexican citizen just as the State alleges that defendant "certainly knew" of his own criminal history. Moreover, the facts establishing cause in this case are even more compelling than those in *Gutierrez*, where defendant was misinformed rather than uninformed of information necessary for a voluntary and knowing guilty plea. Under these circumstances, we find that defendant has sufficiently established cause to bring a successive post-conviction petition.

¶ 30 Defendant next contends that he established prejudice because the erroneous advice regarding the maximum sentence caused his plea to be involuntary and unknowing, violating his rights to due process and to the effective assistance of counsel. He alleges that these constitutional errors caused him to plead guilty in exchange for a near-maximum term sentence, in fear of receiving a significantly longer sentence, which, in reality, he could not have received. The State contends that defendant's bare allegation that he would not have pleaded guilty and instead would have gone to trial is insufficient to establish prejudice.

¶ 31 As previously noted, "prejudice" is an error which is so infectious to the proceedings that the resulting conviction violates due process. 725 ILCS 5/122-1(f) (West 2008). To establish actual prejudice, a petitioner must show that the errors worked to his "actual and substantial disadvantage, infecting [the proceedings] with error of constitutional dimensions." *People v. Hudson*, 195 Ill. 2d 117, 124 (2001) (citations omitted).

¶ 32 For purposes of a plea offer or negotiations, " [a] criminal defendant has the constitutional right to be *reasonably* informed with respect to the direct consequences of accepting or rejecting a plea offer' " (emphasis in original) (*People v. Hale*, 2013 IL 113140, ¶ 16, quoting *People v. Curry*, 178 Ill. 2d 509, 528 (1997)), and, concomitantly, a criminal defense attorney is obligated to inform his client about the maximum and minimum sentences that can be imposed for the offenses with which his client is charged (*Curry*, 178 Ill. 2d at 528). Similarly, Supreme Court Rule 402 (Ill. S. Ct. R. 402 (eff. July 1, 1997)), requires the trial court to inform defendant of the minimum and maximum sentence prescribed by law before accepting a guilty plea.

¶ 33 Although the State contends that defendant's bare allegation that, absent the misinformation, he would not have pleaded guilty and instead would have gone to trial is insufficient to establish prejudice, we have far more than bare allegations here. *Curry*, 178 Ill. 2d at 531. Aguilar testified before the circuit court that the parties and court believed that defendant was eligible for an extended sentence. He stated that he informed defendant of this, and showed him a "statute book" to further explain his eligibility. Aguilar advised defendant that it was likely that he would get a sentence far longer than 30 years' imprisonment if he refused the plea offer and chose to go to trial. Even as the court was inquiring of defendant's plea, defendant hesitated, and asked Aguilar about the possibility of getting a lesser sentence if he went to trial. Aguilar testified that defendant ultimately chose to accept the plea offer because he was "under the fear of getting convicted and sentenced to a high number of years." Under the facts of this case, we find that defendant has provided more than bare allegations and has established sufficient prejudice to allow him to raise his claim in a successive post-conviction petition. See

Curry, 178 Ill. 2d at 531 (finding that, although defendant's testimony that he would have accepted a plea offer if he had been told that consecutive sentences were mandatory was not enough, where there was evidence in the record corroborating those allegations, defendant sufficiently established prejudice resulting from counsel's performance).

¶ 34 In so holding, we are also informed by the supreme court's decision in *People v. Davis*, 145 Ill. 2d 240, 251 (1991). In that case, the trial court advised defendant during his guilty plea proceedings that his sentence could range from Treatment Alternatives to Street Crimes (TASC) or probation, to an extended-term sentence. Defendant, however, was ineligible for TASC or probation. Although defendant failed to raise this issue in his motion to withdraw his guilty plea, the supreme court determined that "defendant's claimed misapprehension as to his eligibility for TASC *** coupled with the fact that the trial court gave incorrect admonishments" was so prejudicial that it amounted to plain error. The court concluded that "[d]ue to the gravity of the error, and in the interests of justice, we believe defendant's failure to raise the issue in his motion does not waive it on appeal." *Davis*, 145 Ill. 2d at 251.

¶ 35 The State, however, contends that defendant cannot establish prejudice because he has not claimed actual innocence or a plausible defense, and has not shown that a decision to reject the plea offer would have been "rational under the circumstances" (*People v. Hughes*, 2012 IL 112817, ¶ 65). We disagree. Aguilar testified that he and defendant had discussed potential defenses to the charged offenses, including that defendant was unaware that there was a child in the van and that he did not use force in its taking. He also stated that he believed that the plea offer was high, given that there were "bonafide issue[s] of knowledge and force" that could have been raised at trial, but that defendant chose to plea because he was concerned about the risk of

receiving a much longer sentence. Aguilar's testimony established that, throughout the plea process, defendant was considering going to trial, but was weighing the potential sentence that he may have received after a trial against the plea offers. The record thus indicates that defendant had potential defenses to the charged offenses, and that he chose to plead guilty in exchange for a 29-year sentence based on the misinformation that he was subject to a maximum sentence of 60 years' imprisonment. Had defendant chosen to go to trial and was found guilty, the maximum sentence defendant could have actually received was 30 years, only one year more than the 29 years he was offered for his plea. Under these facts, we find that a decision to reject the plea offer would have been "rational under the circumstances." *Hughes*, 2012 IL 112817, ¶ 65

¶ 36 For the foregoing reasons, we conclude that defendant sufficiently established cause and prejudice to bring a successive post-conviction petition. We therefore reverse the denial of defendant's motion for leave to file a successive post-conviction petition by the circuit court of Cook County and remand for further proceedings.

¶ 37 Reversed and remanded.