2017 IL App (2d) 141207
Nos. 2-14-1207 & 2-14-1267, cons.
Order filed March 16, 2017

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

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CF-2439
	)	
DONALD TROTTER,	)	Honorable
	)	Joseph G. McGraw,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) In appeal no. 2-14-1207, the trial court improperly dismissed the defendant's petition for postconviction relief; (2) in appeal no. 2-14-1267, the trial court complied with this court's mandate and the sentence it imposed does not reflect an abuse of discretion.

¶ 2 Following a jury trial, the defendant, Donald R. Trotter, was convicted of three counts of criminal sexual assault (720 ILCS 5/12-13(a)(4) (West 2008)), one count of child abduction (720 ILCS 5/10-5(b)(10) (West 2008)), and one count of unlawfully sending a travel ticket to a minor (720 ILCS 5/10-8.1(b)(1) (West 2008)). The trial court imposed consecutive 15-year terms of imprisonment on each of the criminal sexual assault offenses, a concurrent 3-year term of

imprisonment on the child abduction offense, and a concurrent 1-year term of imprisonment on the offense of unlawfully transferring a travel ticket to the a minor. On direct appeal, this court affirmed the defendant's convictions but vacated the sentences and remanded the cause for the trial court to determine the appropriate sentences to be served consecutively and to impose an indeterminate MSR term of three years to natural life on each of the criminal sexual assault convictions. *People v. Trotter* (*Trotter I*), 2013 Ill App (2d) 120363, ¶ 2.

¶ 3 On October 16, 2014, the defendant filed a postconviction petition, asserting that he was deprived of the effective assistance of counsel. The trial court dismissed his petition as frivolous and patently without merit. On November 3, 2014, the trial court ordered that the defendant's sentence for child abduction be served consecutively to the sentences he had received for criminal sexual assault. The trial court's order had the effect of increasing the defendant's cumulative sentence from 45 years' imprisonment to 48 years' imprisonment. On appeal, the defendant argues that the trial court did not comply with this court's mandate in *Trotter I* and that his sentence is excessive. The defendant further contends that the trial court erred in dismissing his post-conviction petition. We affirm the defendant's sentence but remand for additional post-conviction proceedings.

¶ 4 BACKGROUND

¶ 5 Between June 1 and August 1, 2009, the defendant (born May 24, 1955) sexually assaulted the victim (born August 31, 1995). The defendant and the victim had struck up a friendship when they both worked on a community youth theater production of *Beauty and the Beast* between November 2008 and February 2009. The defendant exchanged many text messages with the victim and also gave her gifts, including an i-Pod and two smart phones. The defendant would pick the victim up from school as well as at her house when her parents were

away. In June and July 2009, the defendant sexually assaulted the victim on five occasions at various locations in Winnebago County. He also sexually assaulted the victim once in Chicago when they took a trip there.

¶ 6 After the victim decided that she wanted to run away from home and be with the defendant, the defendant helped her develop a plan where she would fly to California and he would visit her occasionally. The defendant rented an apartment in Long Beach, California. The defendant purchased her an airline ticket, which bore the name of the defendant's daughter. The victim flew to California on August 1, 2009. The defendant met her at the Long Beach apartment on August 3, 2009. On August 5, 2009, the defendant was arrested at the Long Beach apartment.

¶ 7 In September 2010, the victim received a letter from the defendant while he was incarcerated awaiting trial. The letter consisted mostly of numbers, with only a few words. The victim's mother gave the letter to the Rockford police, who were able to decode it. The letter included the phrases, "You must not be a witness," and "Please say you lied."

¶ 8 Following a jury trial, the defendant was convicted of all the charges against him. On October 21, 2011, the trial court conducted a sentencing hearing. The defendant made a statement in allocution and accepted "full responsibility" for his conduct. The trial court considered the mitigating factors that the defendant's conduct did not cause or threaten serious physical harm, that the defendant was unlikely to commit another crime, and that he had no history of criminality. The trial court also found that a significant sentence was needed for deterrence, and while the defendant's motives might have been benevolent in the beginning, they turned "sinister."

¶ 9 At the close of the sentencing hearing, the trial court sentenced the defendant to serve three consecutive prison terms of 15 years on each of the sexual assault charges, plus concurrent prison terms of 3 years on the child abduction charge and 1 year based on the unlawful purchase of a travel ticket. Following the denial of his motion to reconsider the sentence, the defendant filed a timely notice of appeal.

¶ 10 On December 13, 2013, this court determined that the sentencing order was void because the sentence on the child abduction conviction was required to run consecutive to the sexual assault convictions. We therefore vacated the defendant's sentences and remanded for resentencing under the proper statutory scheme. *Trotter*, 2013 IL App (2d) 120363, ¶ 59.

¶ 11 On October 16, 2014, the defendant filed a postconviction petition asserting that he had received the ineffective assistance of counsel. The defendant alleged that the State had offered to recommend that he receive a 20-year sentence in exchange for pleading guilty. He claimed that his counsel did not inform him of the maximum sentence that he could receive. As he believed that the maximum sentence that he could receive was 15 years' imprisonment, he turned down the State's offer. On November 3, 2014, the trial court dismissed the defendant's petition as frivolous and patently without merit. The defendant filed a timely notice of appeal from that order. That appeal was docketed in this court as appeal no. 2-14-1207.

¶ 12 Also on November 3, 2014, the trial court conducted a new sentencing hearing. The trial court indicated that it was aware of this court's mandate and stated that it was to reconsider all sentences previously imposed to determine "if the total should remain the same and adjust down the previously entered sentences so that [it was] the same total or not." The parties then stipulated to the information contained in the transcript from the original sentencing hearing. The State argued the trial court's previous sentence was proper and that a maximum, consecutive

three-year term of imprisonment should be imposed for the child abduction counts based on the facts of the case, the impact on the victim, and the defendant's deceit and manipulation of her. Defense counsel argued that the defendant should receive the minimum term on each count based on his lack of criminal history, his expressed remorse, and his great potential for rehabilitation.

¶ 13 Following arguments, the trial court indicated that it had considered all of the relevant factors in mitigation and aggravation, the defendant's prior statement in allocution, and the facts of the case. The trial found that the defendant was "extremely evil," manipulative, and extremely cunning and deceitful. The trial court determined that the defendant's actions warranted the "full sanction the court can impose under these circumstances." The trial court therefore imposed the maximum sentence possible on each of the criminal sexual assault offenses—consecutive 15-year terms of imprisonment—explaining that there was "no reason to deviate from the sentence originally imposed" because it had "not been presented with anything that would cause the court to change its mind." The trial court further sentenced the defendant to three years' imprisonment for child abduction and ordered that the sentence be consecutive to the sexual assault convictions. Thus, the trial court sentenced the defendant to a total of 48 years' imprisonment.

¶ 14 Following the denial of his motion to reconsider sentence, the defendant filed a timely notice of appeal. That appeal was docketed in this court as appeal no. 2-14-1267.

¶ 15 On August 22, 2016, this court consolidated appeal nos. 2-14-1207 and 2-14-1267 for purposes of review.

¶ 16 ANALYSIS

¶ 17 Appeal No. 2-14-1207

¶ 18 On appeal, the defendant argues that the trial court erred in summarily dismissing his petition. Specifically, the defendant contends that his petition set forth the potentially meritorious claim of ineffective assistance of counsel due to trial counsel's failure to inform him of the maximum sentencing range, causing him to turn down the State's plea offer of a 20-year prison term.

¶ 19 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 (West 2014)) provides a remedy to criminal defendants who have had substantial violations of their constitutional rights during their criminal trial. See *People v. Vernon*, 276 Ill. App. 3d 386, 391 (1995). A postconviction proceeding is not an appeal *per se*, but a collateral attack upon a final judgment. See *People v. Lester*, 261 Ill. App. 3d 1075, 1077 (1994). A *pro se* petitioner is entitled to an evidentiary hearing for his postconviction petition only when he presents the "gist" of a meritorious constitutional claim (*People v. Porter*, 122 Ill. 2d 64, 74 (1988)), and the record or accompanying affidavits support the allegations in the petition. (*Vernon*, 276 Ill. App. 3d at 391). The "gist" standard represents a "low threshold," and during the summary dismissal stage the allegations in the petition must be taken as true and liberally construed. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). The question whether the allegations in postconviction pleadings are sufficient to avert summary dismissal without an evidentiary hearing is a legal inquiry, subject to *de novo* review. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

¶ 20 As the defendant's claim alleges the ineffective assistance of counsel, the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), apply. *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). To succeed on such a claim, a defendant must show both that his counsel's performance "fell below an objective standard of reasonableness" (*Strickland*, 466 U.S. at 688) and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different" (*id.* at 694). To satisfy the first portion of the *Strickland* test, a defendant must show that his attorney's performance fell below an objective standard as measured by prevailing professional norms. *People v. Spann*, 332 Ill. App. 3d 425, 430 (2002). There is a strong presumption, which a defendant must overcome, that counsel's performance "falls within the wide range of reasonable professional assistance." *People v. Miller*, 346 Ill. App. 3d 972, 982 (2004). Decisions involving judgment, strategy, or trial tactics will not support a claim of ineffective assistance. *People v. Lindsey*, 324 Ill. App. 3d 193, 197 (2001).

¶ 21 Prior to addressing the merits of the defendant's contention, we first address the State's argument that the defendant has waived this issue by failing to raise it on direct appeal. The State insists that a review of the record reveals that the defendant's claim could have been raised on direct appeal because it is based entirely on facts known to the defendant prior to direct appeal that are reflected in the record. The State therefore contends that the defendant's failure to raise this issue in a timely fashion bars us from considering it now.

¶ 22 Although the State's argument might be correct as to most constitutional matters (*People v. Harris*, 224 Ill. 2d 115, 124 (2007)), it is not true as to claims of ineffective assistance of trial counsel. Rather, such claims are preferably brought on collateral review rather than direct appeal. *People v. Bew*, 228 Ill. 2d 122, 134–35 (2008) (finding that, although the record on direct appeal was insufficient to establish ineffective assistance, the defendant could raise the issue under the Act). Generally, a defendant is not required to bring a claim of ineffective assistance on direct review or else forfeit that claim. *People v. Clark*, 406 Ill. App. 3d 622, 640–41 (2010). This is because, when an ineffective-assistance claim is brought on direct appeal, " 'appellate counsel and the court must proceed on a trial record not developed precisely for the

object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose.' " *Bew*, 228 Ill. 2d at 134, quoting *Massaro v. United States*, 538 U.S. 500, 504–05 (2003). The benefit of raising an ineffective assistance claim in a collateral proceeding is that the defendant has a full opportunity to present evidence establishing ineffective assistance, the State has a full opportunity to present evidence to the contrary, the trial court has an opportunity to make credibility determinations, and the appellate court, if need be, has the benefit of a factual record bearing precisely on the issue. *Bew*, 228 Ill. 2d at 134. Accordingly, we do not believe that the defendant has waived this issue for our review.

¶ 23 Turning to the merits of his contention, we find that the instant case is analogous to *People v. Barghouti*, 2013 IL App (1st) 112373. There, the defendant alleged that his attorney did not correctly advise him of the applicable range of sentences, leading him to reject a plea offer of 12 years, and incur a sentence of 35 years in prison. *Id.* at ¶ 6–8. The affidavits of the defendant and the defendant's father accompanying the post-conviction petition in *Barghouti* attested that defense counsel told them of a possible sentencing range of 8 to 10 years in prison as opposed to the actual range of 6 to 60 years. *Id.* at ¶ 7–9. The reviewing court held that the defendant had established prejudice from defense counsel's incorrect advice because the actual sentence greatly exceeded the State's plea offer, and the defendant arguably suffered prejudice because he would have accepted the 12-year offer had he known the correct range of sentences to which he was subject. *Id.* at ¶ 18.

¶ 24 Here, as in *Barghouti*, the defendant alleged that he would have accepted the State's plea offer had his counsel accurately informed him of the maximum sentence that he could receive. The defendant's allegations were supported by his affidavit. The fact that the defendant received a significantly longer sentence (48 years) than the State offered him via the plea agreement (20

years) supports a claim that he was prejudiced by his counsel's representation. See *People v. Hale*, 2013 IL 113140, ¶ 18. Accordingly, without addressing the merits of the defendant's petition, we reverse the trial court's judgment and remand for the appointment of counsel to assist the defendant with the second stage of postconviction proceedings. See *Barghouti*, 2013 IL App (1st) 112373, ¶ 18.

¶ 25 In so ruling, we reject the State's attempt to distinguish *Barghouti* on the basis that the defendant supported his petition with two affidavits, unlike the defendant in this case who only supported his petition with one. The second affidavit in *Barghouti* was that of the defendant's father, which thus did not substantially enhance the value of the defendant's affidavit. See *United States v. Canales*, 744 F.2d 413, 425 (5th Cir. 1984) (a close family relationship to the defendant makes a witness's testimony inherently suspect). The significance of the affidavits in *Barghouti* was their content, not their quantity.

¶ 26 We also reject the State's argument that the trial court's summary dismissal of the petition was correct because its allegations were contradicted by the record. There is nothing in the record that indicates that defense counsel informed the defendant regarding the maximum sentence he could receive prior to the defendant rejecting the State's plea offer. The State points to the indictment that listed the charges and penalties against the defendant as well as the transcript of the defendant's arraignment where a public defender (not the same one who represented the defendant nine months later when he rejected a plea agreement) indicated that he had reviewed the penalties with the defendant, as evidence that the defendant was aware of the maximum sentence he could receive. However, as our courts have found that a trial court's admonishments to the defendant regarding a maximum penalty may be insufficient if the defendant is not properly informed by his trial counsel (*People v. Correa*, 108 Ill. 2d 541, 552

(1985); *Clark*, 406 Ill. App. 3d at 642, n.2.), we do not believe the fact that the defendant could have read the possible penalties in the indictment is sufficient to cure the lack of information he received from his defense counsel. There is also nothing in the record that indicates that the information that the defendant received at his arraignment from the public defender was correct.

¶ 27 We also find unpersuasive the State's argument that the defendant failed to present consistent evidence that could be corroborated because in his October 16, 2014, affidavit he asserted that he learned of the maximum sentence from attorney Debra Schafer while in a letter he wrote on March 3, 2014, he stated that he learned of the maximum sentence from attorney Randy Wilt. Both Schafer and Wilt worked for the law firm of Sreenan and Cain, the firm the defendant hired to represent him after he was previously represented by the public defender's office. We believe that this inconsistency is insignificant as it does not undermine the defendant's allegation that his counsel had not informed him of the maximum possible sentence when he rejected the plea agreement.

¶ 28 Appeal No. 2-14-1267

¶ 29 In this appeal, the defendant first argues that the trial court failed to fully comply with this court's mandate in *Trotter I*. The defendant contends that although this court vacated the defendant's sentences for criminal sexual assault and child abduction and remanded for resentencing, the trial court simply reimposed the original sentences, making the child abduction sentence consecutive (instead of concurrent) without exercising any discretion.

¶ 30 Section 5-5-3(d) of the Unified Code of Corrections (Code) requires a new sentencing hearing on remand when a defendant's sentence is vacated. 730 ILCS 5/5-5-3(d) (West 2014). Section 5-5-3(d) provides that the trial court may impose any sentence that could have been imposed at the original trial. *Id.* On remand for a new sentence, the trial court must obey the

clear and unambiguous directions in a mandate issued by a reviewing court. *People v. Stephens*, 2012 IL App (1st) 110296, ¶ 123. Nonetheless, the trial court should not construe the order vacating its original sentence as a mandate from the appellate court instructing that on resentencing a lesser sentence should be imposed. *People v. Giller*, 191 Ill. App. 3d 710, 712 (1989).

¶ 31 Based on our review of the record, it is apparent that the trial court did comply with our mandate and conduct a new sentencing hearing. The trial court considered all of the relevant evidence as well as the arguments from the parties before making its decision. Although the trial court imposed the same sentence on the sexual assault charges that it had at the original hearing, that is not a basis to find that its ruling was improper. See *Giller*, 191 Ill. App. 3d at 712.

¶ 32 As an alternative argument, the defendant contends that the 48-year sentence was excessive. The defendant asserts that, based on his age at the time of sentencing, the trial court's sentence essentially constitutes a life sentence. The defendant argues that the abundant mitigating factors in this case supported a sentence well under the maximum sentence that he received. The defendant therefore urges this court to exercise its power under Illinois Supreme Court 615(b)(4) (eff. Jan. 1, 1967) and reduce the aggregate consecutive sentences to a shorter period of time, or remand the case for resentencing to a shorter period of years.

¶ 33 Imposition of a sentence is normally within a trial court's discretion (*People v. Jones*, 168 Ill. 2d 367, 373 (1995)), and there is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, such that a trial court's sentencing decision is reviewed with great deference. *People v. Dowding*, 388 Ill. App. 3d 936, 942-43 (2009). The presumption is only overcome by an affirmative showing that the sentence imposed varies greatly from the

purpose and spirit of the law or manifestly violates constitutional guidelines. *People v. Escobar*, 168 Ill. App. 3d 30, 46 (1988).

¶ 34 We cannot say that the trial court abused its discretion in sentencing the defendant. The record indicates that the trial court considered all of the relevant circumstances of the case as well as all of the statutory aggravating and mitigating factors. The trial court's imposition of the maximum sentence on the defendant is consistent with its finding that the defendant was an "extremely evil" person whose actions warranted the "full sanction" that the trial court could impose. As the defendant sexually assaulted multiple times a 13-year-old who was 40 years younger than himself and encouraged and facilitated her abandoning her family, the trial court's finding is certainly supported by the record. Although the defendant insists that the trial court should have placed more weight on the evidence in mitigation and given him a lesser sentence, it is not this court's role to reweigh the relevant evidence and statutory factors. See *Coleman*, 166 Ill. 2d at 262.

¶ 35 The defendant further contends that "as not all sexual assault offenses are equally reprehensible, *** it is logical to conclude that the maximum sentence should be reserved for only the most reprehensible sexual assault offenders." The defendant then accentuates that prior to his arrest, he was a law-abiding, hard working individual who was active in his community, particularly though his involvement in a youth theater group. The defendant asserts that if a different defendant, who had a criminal record, no work history, and no history of volunteer work, had committed the same offenses with the same set of facts, he and the defendant would be facing the same *de facto* sentence. The defendant suggests that such a scenario would be patently unfair.

¶ 36 The defendant's argument essentially asks us to compare his sentence to that of a hypothetical defendant. However, our supreme court has explicitly stated that such comparisons are improper. See *People v. Fern*, 189 Ill. 2d 48, 56 (1999) (explaining that the propriety of the sentence imposed in a particular case cannot properly be judged by the sentence imposed in another, unrelated case). Accordingly, we decline the defendant's invitation to engage in such a comparison here.

¶ 37 The defendant further contends that his sentence is excessive because it is financially burdensome to the taxpayers, a factor which courts must consider when imposing a prison term. See 730 ILCS 5/5-4-1(a)(3) (West 2008). The defendant asserts that the average annual cost per inmate at the Menard Correctional Center, where the he is currently held, is over $20,000 a year.

¶ 38 Here, the trial court did consider the financial impact that the defendant's sentence would cause society. The trial court found, however, that this factor did not outweigh the need to impose a significant sentence for deterrence. We decline to disturb the trial court's decision on this basis. See *People v. Means*, 2017 IL App (1st) 142613, ¶¶ 15-16 (where trial court considered all mitigating evidence, including the financial impact of incarceration, reviewing court declined to impose lesser sentence because to do so would improperly substitute reviewing court's judgment for that of trial court).

¶ 39 CONCLUSION

¶ 40 For the foregoing reasons, in appeal no. 2-14-1207, we reverse the judgment of the circuit court of Winnebago County and remand for additional proceedings pursuant to the Act. In appeal no. 2-14-1267, we affirm the circuit court's judgment.

¶ 41 Appeal no. 2-14-1207; reversed and remanded with directions.

¶ 42 Appeal no. 2-14-1267; affirmed.