2017 IL App (2d) 150319-U
No. 2-15-0319
Order filed October 19, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BOB A. BRINSON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 07-CF-1005 Honorable Daniel B. Shanes, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's postconviction claim that his rejection of a plea offer was induced by ineffective assistance of counsel, specifically counsel's failure to advise him that he could be adjudicated a habitual criminal and sentenced to life imprisonment: defendant failed to show prejudice, as an effective life sentence was possible anyway, he professed his innocence and mounted a vigorous defense, and the court indicated that it would not have accepted the plea agreement.

¶ 2 Defendant, Bob A. Brinson, appeals from the denial, following an evidentiary hearing, of his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) for relief from his conviction of possession of a controlled substance with intent to deliver (720

ILCS 570/401(a)(2)(A) (West 2006)). As a result of that conviction and his prior criminal history, defendant was adjudicated to be a habitual criminal (720 ILCS 5/33B-1 (West 2006)) and was sentenced to life imprisonment. In his postconviction petition, defendant claimed that he was deprived of the effective assistance of counsel in connection with plea negotiations. We affirm.

¶ 3 The record on appeal establishes the following relevant facts. On April 4, 2007, defendant was charged by indictment with a single count of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(A) (West 2006)). According to the indictment, defendant possessed 15 grams or more but less than 100 grams of a substance containing cocaine, making the offense a Class X felony. *Id.* Defendant was released on bond. The record reflects that defendant was charged with, *inter alia*, attempted first-degree murder and aggravated discharge of a firearm based on an incident that occurred while he was free on bond.

¶ 4 The possession charge was tried before a jury. Evidence at trial showed that police conducted a search of defendant's apartment and recovered various evidence, including numerous plastic baggies containing cocaine that were found in the pocket of a red leather jacket in defendant's bedroom closet. A police officer testified that defendant made an incriminating oral statement but refused to put the statement into writing. Defendant called several witnesses in an effort to prove that the jacket belonged to a woman who had been residing without permission in an apartment in another building. Defendant alleged that the owner of that building asked him to get the woman out of the apartment, so defendant and two other individuals cleaned out the apartment and moved some articles of clothing to defendant's apartment.

¶ 5 The jury found defendant guilty and the State moved to adjudicate defendant a habitual criminal pursuant to section 33B-1(a) of the Criminal Code of 1961 (720 ILCS 5/33B-1(a) (West 2006)), which provided, in pertinent part, and subject to certain conditions (see 720 ILCS 5/33B-1(d) (West 2006)), that "[e]very person who has been twice convicted *** of an offense that contains the same elements as an offense now classified in Illinois as a Class X felony *** and is thereafter convicted of a Class X felony *** committed after the 2 prior convictions, shall be adjudged an habitual criminal." Section 33B-1(e) (720 ILCS 5/33-B-1(e) (West 2006)) provided, "Except when the death penalty is imposed, anyone adjudged an habitual criminal shall be sentenced to life imprisonment." In seeking that defendant be adjudged a habitual criminal, the State alleged that defendant had been convicted of two armed robberies that occurred in 1978 and 1986. At the sentencing hearing, the prosecutor indicated that he became aware of the 1986 armed robbery only after trial. As noted, the trial court adjudged defendant a habitual criminal and sentenced him to life in prison. Defendant appealed, and we affirmed. *People v. Brinson*, No. 2-09-0707 (2011) (unpublished order under Supreme Court Rule 23).

¶ 6 Defendant filed a *pro se* petition under the Act. The trial court appointed counsel to represent defendant, and counsel amended the petition. The State moved to dismiss the petition, and the trial court granted the motion with respect to all but one of the petition's claims. The trial court refused to dismiss defendant's claim of ineffective assistance of counsel in connection with plea negotiations. Defendant claimed that the attorney who represented him during plea negotiations failed to inform him that he faced a life sentence as a habitual criminal. Defendant alleged that, had he known of that possibility, he might have accepted a plea offer from the State that would have spared him a life sentence.

¶ 7 The claim of ineffective assistance of counsel in connection with plea negotiations proceeded to an evidentiary hearing. At the hearing, defendant testified that he was initially represented by Herbert Abrams. The State offered defendant a sentence of seven years' imprisonment if he pleaded guilty to the charge of possession with intent to deliver. After the additional charges were filed, the State offered a 6-year prison sentence for the possession charge, to be served consecutively to a 20-year prison sentence for attempted first-degree murder and aggravated discharge of a firearm. Defendant testified that Abrams told him that he thought he could negotiate the sentence down to a total of 22 years. Abrams did not mention that defendant could receive a life sentence as a habitual criminal. Defendant was generally aware that of the potential for a life sentence for a third Class X conviction, but his first armed-robbery conviction was not a Class X felony. Defendant was unaware that, because armed robbery had subsequently been classified as a Class X felony, the first armed-robbery conviction counted toward the three convictions for habitual-criminal status. After the unsuccessful plea negotiations, Abrams withdrew as defendant's attorney. Defendant was later represented by Scott Spaulding, who represented him at trial. Defendant and Spaulding never discussed the possibility of defendant entering a negotiated plea. Defendant testified that he would have accepted the State's offer of a combined 26-year sentence had he known that he could receive a life sentence as a habitual criminal. Defendant explained that he would have accepted the offer because "at least I would have had a chance to be free once again." The trial court denied the petition, and this appeal followed.

¶ 8 The Act was designed to permit inquiry into constitutional issues that were not, and could not have been, adjudicated previously on direct appeal. *People v. English*, 2013 IL 112890, ¶ 22. Thus, issues that were raised and decided on direct appeal are barred by *res judicata*, and issues

that could have been raised on direct appeal, but were not, are forfeited. *Id.* The general principles governing proceedings under the Act, as described by our supreme court, are as follows:

> "The Act provides a three-stage process for adjudicating postconviction petitions. At the first stage, the circuit court determines whether the petition is 'frivolous or is patently without merit.' [Citation.] The court makes an independent assessment as to whether the allegations in the petition, liberally construed and taken as true, set forth a constitutional claim for relief. [Citation.] The court considers the petition's 'substantive virtue' rather than its procedural compliance. [Citation.] If the court determines the petition is frivolous or patently without merit, the court dismisses the petition. [Citation.] If the petition is not dismissed, it will proceed to the second stage.
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> At the second stage, the court may appoint counsel to represent an indigent defendant, and counsel may amend the petition if necessary. [Citation.] The State may then file a motion to dismiss the petition. [Citation.] If the State does not file a motion to dismiss or if the court denies the State's motion, the petition will proceed to the third stage and the court will conduct an evidentiary hearing on the merits of the petition. [Citation.]" *People v. Hommerson*, 2014 IL 115638, ¶¶ 7-8.

¶ 9 This appeal arises from the third-stage denial of a postconviction petition, following an evidentiary hearing. "To be successful at the third stage and ultimately have his petition granted, a defendant has to make a substantial showing of a constitutional violation." *People v. Carballido*, 2015 IL App (2d) 140760, ¶ 65. We may reverse only if the trial court committed manifest error. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 10 A criminal defendant's constitutional right to the effective assistance of counsel applies in connection with plea negotiations. *People v. Hale*, 2013 IL 113140, ¶ 15 (citing *Lafler v. Cooper*, 566 U.S. 156 (2012)). Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984), which requires a showing that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance was prejudicial in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In order to assist a criminal defendant in determining whether to accept a plea offer, counsel "must fully inform himself of the facts and the law relevant to the State's offer and candidly advise his client as to the direct consequences of accepting or rejecting the offer." *People v. Brown*, 309 Ill. App. 3d 599, 605 (1999). This entails supplying accurate information about the maximum and minimum sentences the defendant faces if convicted. *Id.* To show prejudice under *Strickland* where a defendant has rejected a plea offer, it is not enough simply to show that the defendant did not receive proper advice. Rather, "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler*, 566 U.S. at 164.

¶ 11 Before considering the reasons that the trial court gave for denying defendant's petition, we note that the State argues that defendant forfeited his claim of ineffective assistance of counsel by failing to raise it on direct appeal. It is well established that "[a] postconviction claim

that depends on matters outside the record *** is not ordinarily forfeited because such matters may not be raised on direct appeal." *People v. Brown*, 2014 IL App (1st) 122549, ¶ 41. Thus, to show forfeiture, the State must establish that defendant's claim depends entirely on matters that were included in the record before this court on direct appeal. The State has failed to do so. Notably, the State has provided no citation to the record on direct appeal showing the terms of the plea offer that defendant rejected. We fail to see how, without that information, defendant could make a showing of prejudice as described in *Lafler*. Accordingly, the State has not shown that defendant forfeited his ineffective-assistance-of-counsel claim.

¶ 12 The trial court reached the merits of defendant's claim, but also observed that defendant did not have "clean hands." The record reveals that, just prior to trial, the trial court ruled on a motion *in limine* concerning the admissibility, for impeachment purposes, of defendant's prior convictions. During the proceedings on the motion, the prosecutor and Spaulding made remarks indicating that defendant had a single armed-robbery conviction. In denying defendant's postconviction petition, the trial court reasoned that defendant "contributed to the situation by not informing his attorney of the second armed robbery and, more importantly, not correcting the record when he heard a factual misrepresentation in this regard." We note that our supreme court has rejected the application of the clean-hands doctrine to bar postconviction relief for the deprivation of a fundamental constitutional right. In *People v. Hawkins*, 181 Ill. 2d 41 (1998), the trial judge accepted a bribe from the defendant, but nonetheless found him guilty. A different judge awarded postconviction relief to the defendant on the basis that he did not receive a fair trial before an impartial trier of fact. In affirming the award of postconviction relief, our supreme court rejected the State's argument that the clean-hands doctrine should apply, reasoning that the defendant's contribution "to the corruption of an impartial fact finder is

immaterial to our immediate inquiry of whether [he was] denied a fair trial." *Id.* at 57. Even if we were to hold that defendant had some obligation to correct the misstatement by Spaulding and the prosecutor in connection with the motion *in limine*, defendant's failure to do so has no bearing on whether he had received the effective assistance of counsel in connection with prior plea negotiations that occurred before Spaulding even represented defendant.

¶ 13 On the merits of defendant's claim, the trial court concluded, *inter alia*, that defendant had failed to establish prejudice. The trial court discredited defendant's testimony that he would have accepted the State's offer had he known of the risk that he would receive a life sentence. The court noted that, during pretrial proceedings and while speaking in allocution, defendant had insisted that he was innocent. The court indicated that defendant had substantial experience with the criminal justice system and that, although defendant was found guilty, the State's case against defendant "was not that strong." The court concluded that defendant "wanted to roll the dice and go to trial because he might have thought he could win." Furthermore, based on defendant's extensive criminal history, the court found that, if the plea agreement for a combined sentence of 26 years had been presented, the court "most likely would not have accepted [it]."

¶ 14 The trial court did not commit manifest error when it found that defendant had failed to establish prejudice. As noted, to establish prejudice a defendant must show, *inter alia*, that, but for counsel's deficient advice, he or she would have accepted a plea offer. This showing must encompass more than just the defendant's subjective self-serving testimony. *Hale*, 2013 IL 113140, ¶ 18. "Rather, there must be 'independent, objective confirmation that defendant's rejection of the proffered plea was based upon counsel's erroneous advice,' and not on other considerations." *Id.* (quoting *People v. Curry*, 178 Ill. 2d 509, 532 (1997)). Defendant's testimony about what he would have done if he had been properly advised is not controlling.

¶ 15 It has been recognized that "[t]he disparity between the sentence a defendant faced and a significantly shorter plea offer can be considered supportive of a defendant's claim of prejudice." *Id.* Defendant argues that it was reasonable to reject the offer of a 26-year sentence because he erroneously believed that he faced a sentence of 6 to 30 years. In fact, although defendant faced that sentence for the possession with intent to deliver charge, he faced serving that sentence consecutively to the sentences for offenses allegedly committed while he was released on bond. See 730 ILCS 5/5-8-4(h) (West 2006). One of the alleged offenses, attempted first-degree murder, carried a sentence of 6 to 30 years *or longer* depending on the circumstances of the offense. See 720 ILCS 5/8-4(c) (West 2006). Thus defendant—who was born in 1957—should have known that, by rejecting the plea offer, he was exposing himself to at least the possibility of being convicted of both offenses and receiving consecutive sentences that could confine him to prison for the rest of his life. These circumstances undermine defendant's self-serving testimony that he rejected a combined 26-year sentence because he was unaware that he faced a life sentence if adjudged a habitual criminal.

¶ 16 As seen, the trial court also considered it significant that defendant had insisted that he was innocent. In *Hale* the defendant claimed that the reason he rejected a plea offer was that he was not advised that he faced consecutive sentencing. In rejecting the claim, our supreme court noted that the defendant "clearly and expressly, on many occasions, professed his innocence and indicated a *desire* for trial." (Emphasis in original.) *Hale*, 2013 IL 113140, ¶ 26. The *Hale* court noted that "a claim of innocence by a defendant and the presentation of a defense to the charges 'does little, by itself, to answer the question of why he refused the plea offer in the first place.' " *Id.* ¶ 27 (quoting *Curry*, 178 Ill. 2d at 532). However, upon consideration of the defendant's profession of innocence in conjunction with the vigorous defense he mounted, the

Hale court concluded that the threat of consecutive sentencing would not have led the defendant to accept a plea offer. Likewise, in this case, defendant mounted a vigorous defense in a prosecution in which, by the trial court's estimation, "the State's case was not that strong." Defendant's insistence on his innocence, combined with his defense tactics, undermines his claim that Abrams's allegedly deficient advice was prejudicial, and instead suggests that defendant would have opted for a trial even if he were aware that he faced a possible life sentence.

¶ 17 Finally, the trial court was in the best position to assess whether it would have accepted a plea agreement for a combined 26-year sentence had such agreement been presented to the court. Given defendant's criminal history, the trial court found that it most likely would *not* have accepted the agreement. Defendant challenges this finding, noting that the trial court "never objected on the record to the occurrence of the plea negotiations, which suggests [the court] would have at least considered whatever agreement the parties reached." The relevant question, however, is not whether the trial court would have *considered* the agreement, but whether the court would have *accepted* the agreement. We see no reason to disregard the trial court's finding that it probably would not have. Defendant further argues that "[i]f the judge *had* rejected [the] plea agreement, nothing suggests that the parties would not have continued to negotiate until they reached a sentence that the judge approved—a sentence that would have involved a sentence less than natural life." (Emphasis in original.) Whether the parties would have reached an agreement acceptable to the trial court is a matter of pure speculation.

¶ 18 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for

this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 19 Affirmed.