2017 IL App (2d) 150514-U
No. 2-15-0514
Order filed September 26, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JEAN M. FAISON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 10-CF-2870 Honorable Leonard J. Wojtecki, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition, which alleged that his guilty plea was induced by ineffective assistance of counsel: defendant did not allege that he probably would have accepted the State's plea offer but for counsel's alleged deficiency, instead lamenting only that, given that he ultimately received a higher sentence, he "would have been better off" had he done so.

¶ 2 Defendant, Jean M. Faison, appeals the first-stage dismissal of his postconviction petition. He contends that it stated the gist of a meritorious claim that his counsel was ineffective for incorrectly advising him that he faced a possible sentence of 6 to 30 years in prison when, due to a mandatory enhancement, he faced 21 to 45 years in prison (see 720 ILCS 5/8-4(c)(1)(B)

(West 2010)). He argues that, had he known this, he likely would have accepted the State's offer to plead guilty in exchange for a 12-year sentence. We affirm.

¶ 3 The underlying facts are set out in our disposition of defendant's direct appeal and need not be repeated in detail here. See *People v. Faison*, 2013 IL App (2d) 120448-U. Defendant was charged with numerous offenses, including attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)), following an attack on his neighbor, C.B. At his arraignment, the trial court informed him that he was subject to 21 to 45 years' imprisonment if convicted of attempted murder. The sentencing range included a mandatory 15-year add-on because defendant allegedly possessed a firearm during the offense.

¶ 4 Following a jury trial, defendant was found guilty of attempted first-degree murder, two counts of armed violence (720 ILCS 5/33A-2(a) (West 2010)), aggravated kidnaping (720 ILCS 5/10-2(a)(3) (West 2010)), unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)), and unlawful possession of a weapon without a firearm owner's identification (FOID) card (430 ILCS 65/2(a)(1) (West 2010)). The court sentenced him to 40 years' imprisonment for attempted murder. The court also sentenced him to concurrent terms of 40 years for aggravated kidnaping, 20 and 15 years for the two armed-violence counts, 12 years for unlawful possession of a weapon by a felon, and 8 years for possession of a weapon without a FOID card. The remaining convictions were merged.

¶ 5 On direct appeal, we vacated the armed-violence and FOID convictions and amended the written sentencing order to reflect only one attempted-murder conviction. *Faison*, 2013 Il App (2d) 120448-U, ¶¶ 19-20.

¶ 6 Defendant filed a *pro se* petition pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). Defendant alleged, *inter alia*, that trial counsel was

ineffective for failing to advise him that he faced 21 to 45 years in prison due to the 15-year add-on, instead erroneously advising him that he faced only 6 to 30 years in prison. Defendant alleged that the State offered him a deal in which he would receive a 12-year sentence in exchange for pleading guilty to armed violence. His attorney, however, "couldn't see the judge giving me more than 15 years." Counsel "never once made known" to him that he actually faced 21 to 45 years in prison if convicted after trial. Defendant would have been "better off" accepting the plea offer.

¶ 7 Defendant alleged that counsel met with defendant's family prior to sentencing. At the meeting, after defendant's family members asked him in several questions to explain "about the 15 year add-ons," counsel said that "he 'was looking for a loophole.' " In his affidavit, defendant stated as follows:

> "it was my understanding that it meant, (based on the 6-30 yrs [counsel] told me that I was facing), the judge could sentence me to 6-45 years instead of 6-30; and since my trial attorney told me I couldn't receive more than 15 years if found guilty, I never gathered any other understanding. *** I maintain my innocence and know today more than ever that I would have been a good witness in my on [*sic*] defense had I exercised my right over my trial attorney's ineffectiveness, and considering how he failed to effectively represent me I would have been better off accepting the State's plea offer of 12 yrs."

¶ 8 The trial court summarily dismissed the petition, finding that it was frivolous and patently without merit. Defendant timely appeals.

¶ 9 Defendant contends that the court erred by summarily dismissing his petition where it stated the gist of a meritorious claim that his counsel was ineffective. He argues that counsel failed to advise him about the mandatory 15-year add-on in addition to the basic 6-to-30-year

sentencing range and that, had he done so, it is reasonably probable that defendant would have opted to accept the State's 12-year offer.

¶ 10 The Act provides a method by which defendants can assert that their convictions resulted from a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A *pro se* defendant need only make out the "gist" of a constitutional claim at this stage. *Id.* If, within 90 days, the court decides that a petition is either frivolous or patently without merit, the court must dismiss it in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2014). Our review is *de novo*. *People v. Burns*, 209 Ill. 2d 551, 560 (2004).

¶ 11 The sixth-amendment right to the effective assistance of counsel applies to the plea-bargaining process. *People v. Hale*, 2013 IL 113140, ¶ 15. Claims of ineffective assistance of counsel in the plea-bargain context are governed by the two-part test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Thus, a defendant must first show that counsel's performance was deficient. The defendant must also show that the deficient performance prejudiced him. *Id.* at 687. However, we may dispose of an ineffective-assistance claim by proceeding directly to the prejudice prong without addressing counsel's performance. *Id.* at 697.

¶ 12 A defendant has the constitutional right to be reasonably informed of the direct consequences of accepting or rejecting a plea offer. *Hale*, 2013 IL 113140, ¶ 16. This right extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial. *Id.* To establish the requisite prejudice in this context, the defendant must establish that there is a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer. *Id.* ¶ 18.

¶ 13 Here, defendant does not dispute that the trial court informed him at his arraignment of the 15-year add-on. The petition's allegations demonstrate that defendant and his family remained aware of the extended sentencing range throughout the proceeding. Moreover, to the extent he could logically do so, defendant did not allege that he would probably have accepted the State's 12-year offer had defense counsel personally informed him of the 15-year add-on. Instead, he alleged that he would have been "better off" accepting the State's offer. Clearly, defendant's observation that, in hindsight, he would have been "better off" accepting the 12-year offer instead of the 40-year sentence he actually received is insufficient to state even the gist of an ineffective-assistance claim.

¶ 14 This is not merely, as defendant asserts, a failure to use "magic legalese." There is a fundamental difference between alleging that he probably would have accepted the plea offer when it was made and saying that, in hindsight, he would have been better off doing so. As the State points out, the overall tenor of defendant's petition shows that he continued to protest his innocence and that he wanted to vigorously defend the charges against him. Thus, it appears unlikely that he would have seriously considered a plea offer in any event. In this context, his reference to having been better off taking the plea offer appears more a lament about what he considers to have been counsel's overall failure to mount a more aggressive defense and the fact that he received a much longer sentence than the State originally offered. (Defendant, among other things, wanted counsel to call the victim's sister and a medical expert at trial. However, the petition did not include affidavits from any prospective witnesses. Thus, defendant does not pursue these claims on appeal.)

¶ 15 The judgment of the circuit court of Kane County if 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).

¶ 16 Affirmed.