2017 IL App (3d) 140906-U

Order filed February 6, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0906 Circuit No. 07-CF-2377
MARIO RUBIO,	)	Honorable Carla Alessio-Policandriotes,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Wright dissented.

ORDER

¶ 1 *Held*: The defendant's second-stage postconviction petition made a substantial showing of a constitutional violation.

¶ 2 The defendant, Mario Rubio, appeals from the second-stage dismissal of his postconviction petition. He argues that his petition made a substantial showing of a constitutional claim, and that he is therefore entitled to a third-stage evidentiary hearing.

¶ 3 FACTS

¶ 4 The State charged the defendant by indictment with two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)). The defendant was charged in November of 2007, and attorney Keith Jones entered his appearance on behalf of the defendant soon thereafter. Jones moved to withdraw approximately eight months later, in July of 2008. After a brief period in which the defendant was represented by the public defender's office, attorney Bamidele Adelayo filed an appearance on the defendant's behalf. While under the representation of Adelayo, the defendant agreed to plead guilty to one count in exchange for an agreed sentence of 15 years' imprisonment. The State agreed to enter a *nolle prosequi* on the remaining count.

¶ 5 At the plea hearing held on October 2, 2008, the State presented the factual basis for the conviction. According to the State, the defendant asked the eight-year-old victim if she needed to use the bathroom. The victim indicated that she did. The defendant took the victim to the bathroom, pulled down her underwear, and placed his finger in the victim's vagina. The victim's 10-year-old cousin indicated that she saw the victim enter the bathroom with the defendant. The State continued: "I believe the defendant did give a statement, and in the statement, there was incriminating statements given by him with regards to Count 1 definitely, and Count 2, circumstantially."

¶ 6 The trial court accepted the factual basis and proceeded to admonish the defendant pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997). After ensuring that the defendant was not under the influence of any drugs or alcohol, and explaining the rights the defendant was waiving, the trial court addressed the voluntariness of his plea:

> "THE COURT: Have you had a full opportunity to speak with your attorney?

[THE DEFENDANT]: Yes, your Honor.

THE COURT: Has he explained to you what your rights are, as well as the effects, the consequences of pleading guilty?

[THE DEFENDANT]: Yes, your Honor.

THE COURT: Are you doing this, sir, of your own free will?

[THE DEFENDANT]: Yes, your Honor.

THE COURT: Anyone promise you anything to induce you to plead guilty.

[THE DEFENDANT]: No, your Honor.

THE COURT: Has anyone forced you to plead guilty?

[THE DEFENDANT]: No, your Honor.

THE COURT: Anyone threaten you to make you plead guilty?

[THE DEFENDANT]: No, your Honor.

* * *

THE COURT: And you're doing this of your own free will?

[THE DEFENDANT]: Yes, your Honor.

THE COURT: And you're satisfied with the services of your attorney?

[THE DEFENDANT]: Yes, your Honor.

THE COURT: Is there any reason at all that you can think of *** why I should not accept you pleading guilty to this offense?

[THE DEFENDANT]: No, your Honor, no."

The trial court found that the defendant's plea had been "made knowingly and voluntarily" and accepted the plea. On December 17, 2008, the court sentenced the defendant to a term of 15 years' imprisonment.

¶ 7 The defendant filed a *pro se* petition for postconviction relief on April 8, 2010. In the petition, the defendant argued that he had not received effective assistance of counsel. Specifically, the defendant argued that Adelayo's performance was ineffective for

> "dismissing the fact that it was wrong for the prosecutor to threaten me with an arrest of my mother, Sally Valenzuela, on unrelated charges. Since my lawyer, Mr. Adelayo, led me to believe that if I did not accept the plea agreement my mother would be arrested, he was in clear violation of his duties as a lawyer."

The defendant also asserted that he "was under further stress due to the treatment [he] was receiving in the Will County Jail," pointing out that he had come to the plea hearing with a black eye. The defendant also argued in his petition that his 15-year sentence was excessive.

¶ 8 In an affidavit attached to the defendant's petition, the defendant's sister, Amber Rubio, explained the nature and effect of the State's purported threat: "Our mother, Sally Valenzuela, was threatened with charges and jail time due to a letter that she sent to the [victim's] family. Because of the above threats, [the defendant] *** was forced to take a plea bargain by his attorney, Bamidele Adelayo." Amber also averred that the defendant had been under the influence of drugs and alcohol when he was questioned by the police, that he did not understand what was happening at that time, and that he was not provided with a lawyer during questioning.

¶ 9 Valenzuela also provided an affidavit that was attached to the defendant's petition. In her affidavit, Valenzuela explained that because she feared for her son, she "took it upon [herself] to write a letter pleading with the victim's family to have mercy on [her] son." According to

Valenzuela: "[T]he State's Attorney said they could and would throw me in jail for tampering with a case and that it would be in the best interest of my son to just take the plea deal." Valenzuela also averred that the defendant "was under the influence and in no condition to be questioned by law enforcement without legal representation, which could not be found due to the Thanksgiving Holiday."

¶ 10 The trial court found the defendant's petition patently without merit, dismissing the petition without further comment. The defendant appealed that dismissal to this court.

¶ 11 On appeal, this court summarized the arguments before it as follows:

> "As framed on appeal, defendant's petition claimed that his guilty plea was involuntary, in violation of his constitutional right to due process, because he entered his guilty plea: (1) under duress because of violence he suffered while in pretrial detention; and (2) in response to the State's threat to prosecute his mother for witness tampering if he refused to plead guilty." *People v. Rubio*, 2013 IL App (3d) 110538-UB, ¶ 13.

Thus, the defendant's arguments on appeal were not perfectly congruent with those put forth in his *pro se* petition, as he no longer made a claim of ineffective assistance of counsel.

¶ 12 A divided panel of this court reversed the ruling of the trial court and remanded the defendant's petition, in its entirety, for second-stage proceedings. *Id.* ¶ 29. The majority found that the defendant had pled facts, that when taken as true, were

> "sufficient to establish the gist of a claim that the threat to charge his mother caused defendant to plead guilty involuntarily. Valenzuela's actions, as described in the affidavits attached to defendant's petition, do not appear to satisfy the elements of witness harassment (720 ILCS 5/32-4a (West 2006)) or

communicating with a witness (720 ILCS 5/32-4(b) (West 2006)). Therefore, defendant has alleged facts that could show that the threat was made without probable cause to charge Valenzuela with the threatened crime. Such a 'bad faith' threat could create a risk of inducing a false guilty plea. Defendant has therefore presented the facts necessary to establish the gist of a constitutional claim." *Id.* ¶ 27.

¶ 13 The dissenting justice would have found the defendant's claims of coercion and undue influence rebutted by the record of the plea colloquy. *Id.* ¶ 36 (Wright, J., dissenting). The dissent explained:

> "For example, the judge asked defendant if he [was] 'hurt' and defendant responded 'no.' The judge also asked defendant if he had been threatened or forced into pleading guilty, and defendant clearly indicated, to the court, that he had not.
>
> Focusing on whether the record rebuts defendant's postconviction claim that he was feeling undue influence, coercion, or pain at the time he entered his guilty plea, I respectfully submit the record clearly rebuts defendant's contention that he did not voluntarily enter his guilty plea in this case." *Id.* ¶¶ 36-37 (Wright, J., dissenting).

¶ 14 Upon remand, newly appointed counsel filed an amended postconviction petition on the defendant's behalf. The amended petition put forth two claims of constitutional deprivation: ineffective assistance of counsel and prosecutorial misconduct. Each claim related to the State's purported threat to prosecute the defendant's mother based upon her letter to the victim's family.

¶ 15 The State filed a motion to dismiss the amended petition. The State pointed out that the letter written by Valenzuela to the victim's family had not been attached to the amended petition, and argued that without the letter "there can be no assessment of whether the defendant's mother's actions rose to the level of witness harassment or communicating with a witness." In response, postconviction counsel obtained the letter in question and was granted leave to file a second amended petition. The defendant's second amended postconviction petition is the subject of this appeal.

¶ 16 In his second amended postconviction petition, the defendant alleged that he was informed by Jones—his first attorney at the trial level—of the following: (1) the State had threatened to prosecute Valenzuela for witness harassment; (2) the State had indicated to Valenzuela that it would not prosecute her if the defendant accepted its plea offer; and (3) one of the assistant State's Attorneys on the case had told Valenzuela that the State "could and would 'throw [her] in jail' for tampering with a case and that it would be in the best interest of Defendant to just take the plea deal."

¶ 17 The second amended petition further clarified that Adelayo, the defendant's attorney, also received the above information, directly from Valenzuela herself. The defendant contended that Adelayo should have known that the State had no probable cause to make any such threats to Valenzuela, as he had seen the letter written by Valenzuela—the ostensible basis for the State's purported threat. On the contrary, Adelayo, having been informed of the perceived threat, advised the defendant to plead guilty.

¶ 18 In an affidavit provided by Valenzuela, she explained that the assistant State's Attorney trying the case approached her and asked: "What good are you going to do your son if you are in jail?" Valenzuela perceived this as a threat, and communicated to Jones and Adelayo that the

State had threatened to "throw [her] in jail." In his petition, the defendant conceded that "the information provided to Defendant's counsel by Defendant's mother was not accurate." In other words, the defendant acknowledged that the State's *actual* comments to his mother did not rise to the level of a threat; accordingly, the defendant no longer argued that the State had committed prosecutorial misconduct, or that his plea had been the product of coercive conduct by the State.

¶ 19 The petition asserted that the defendant pled guilty based on Adelayo's advice, "specifically and solely to avoid what he was told was the threatened prosecution of his mother." The defendant contended that but for Adelayo's advice, he would not have pled guilty. Finally, the amended petition described the defense that the defendant would have put forth, had he not pled guilty and instead proceeded to trial:

> "[H]ad he gone to trial, Defendant likely would have prevailed and would have been found not guilty on all counts, as there was no physical evidence corroborating the victim's allegations, and the Defendant's inculpatory statements likely would have been suppressed had a motion to suppress statements been filed and heard (based on the fact that any inculpatory statements made by Defendant were made while he was under the influence of marijuana and alcohol to the extent that he lacked the capacity to waive his *Miranda* rights, and he was in custody during the interrogation which led to the inculpatory statements)."

¶ 20 Attached to the second amended petition was the letter written by Valenzuela to the victim's family. In the letter, Valenzuela offered to pay for therapy for the victim until she reached the age of 18 "to ensure she is emotionally well from this experience." Valenzuela begged the family for mercy "and [to] drop the counts to a lesser charge."

¶ 21 In his own affidavit attached to the second amended petition, the defendant averred that "Adelayo, knowing of the aforementioned threat, told me to plead guilty simply to threat of prosecution of my mother." The defendant also explained in his affidavit that he did not mention the threat to the trial court because he thought that doing so would have increased the likelihood that the State would follow through on its threat.

¶ 22 The State filed a motion to dismiss the second amended petition. In its motion, the State emphasized that the present claim was "now different from the claim the appellate court believed should survive first stage dismissal." In other words, while the appellate court's ruling dealt with coercion flowing from actual, bad-faith threats made by the State, the defendant's argument at the second stage concerned only counsel's duty to debunk *perceived* threats. The State argued that "taking everything together shows that the plea was voluntary."

¶ 23 In his response to the State's motion to dismiss, the defendant expressly conceded that there had been no prosecutorial misconduct in the case, and that the State had not actually threatened to prosecute his mother. The defendant nevertheless maintained that his "plea in this case is still involuntary insofar as it resulted solely from his attorney's faulty advice and the inaccurate information provided by his attorney."

¶ 24 A second-stage hearing was held on October 23, 2014. During arguments, the trial court addressed the letter written by Valenzuela, and the possibility that it could serve as the basis for prosecution. The court stated: "[J]ust taking even a cursory look at this letter by anybody, particularly a lawyer that does criminal defense work, would suggest there is nothing in here to be prosecuted for." Further, the court stated: "Why would a lawyer qualified as both of these two gentlemen [(Jones and Adelayo)] are give him that advise [*sic*]?" In response, postconviction

counsel explained: "[T]he fact that there would have been no viable prosecution based on this letter is exactly at the heart of our claim of ineffective assistance of counsel."

¶ 25 Despite finding that Valenzuela's letter could obviously not have supported prosecution, the trial court ultimately granted the State's motion to dismiss the defendant's second amended petition. In so ruling, the court emphasized the questions asked during the plea colloquy, finding that the defendant "was in a position at the time of the plea to tell me what was going on if, in fact, something was going on that was inappropriate."

¶ 26 ANALYSIS

¶ 27 On appeal, the defendant argues that his second amended postconviction petition made a substantial showing of a constitutional violation and thus should be advanced to the third stage of postconviction proceedings. Specifically, the defendant maintains that the second amended petition pled facts that, when taken as true, substantially show that he was deprived of the effective assistance of counsel. The State counters that defendant's claims are rebutted by the record, and, alternatively, still fail to make the requisite substantial showing of a constitutional violation.

¶ 28 A postconviction petition will be dismissed at the second stage of proceedings "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334 (2005). At this stage, a petitioner's factual allegations are taken as true unless they are affirmatively rebutted by the record. *People v. Domagala*, 2013 IL 113688, ¶ 35. Thus, the "substantial showing" standard is a measure of the legal sufficiency of the allegations; inquiring whether the allegations in the petition, if proven true at an evidentiary hearing, would entitle the petitioner to

relief. *Id*. We review the second-stage dismissal of a postconviction petition *de novo*. *Hall*, 217 Ill. 2d at 334.

¶ 29 At the outset of our analysis, it would be helpful to clarify the defendant's precise argument, given its evolution over time and the apparent confusion at the trial level. The defendant's lone argument on this appeal is the same as the only argument made in his second amended petition: He contends that Adelayo provided ineffective assistance of counsel in urging him to plead guilty based upon a perceived threat from the State, when Adelayo should reasonably have known that the State could not have actually followed through on that threat.

¶ 30 The conceded fact that the State's comments to Valenzuela did not rise to the level of an actual threat has no bearing on the defendant's ineffective assistance of counsel argument.[1] As alleged by the defendant, at the time of his plea, both he and Adelayo were proceeding under the belief that the State had threatened to prosecute the defendant's mother if the defendant did not plead guilty. Moreover, Adelayo urged the defendant to plead guilty specifically because of the erroneous belief that the State had threatened Valenzuela. The defendant contends that Adelayo should have known that it would be impossible for the State to follow through on any such threat, due to a lack of probable cause, and should not have advised the defendant to plead guilty. Accordingly, the defendant claims that his plea was involuntary, insofar as it was the product of ineffective assistance of counsel. *E.g.*, *People v. Correa*, 108 Ill. 2d 541, 549 (1985) (Whether a

[1] Of course, the concession would undoubtedly defeat claims of coercion or prosecutorial misconduct, and the defendant has thus abandoned those arguments. The merit of such claims would turn on the conduct of the State, whereas the defendant's ineffective assistance of counsel argument turns on the knowledge and conduct of his attorney.

plea "voluntary and intelligently and knowingly made depends on whether the defendant had effective assistance of counsel.").

¶ 31 I. Whether the Defendant's Claims are Rebutted by the Record

¶ 32 Before proceeding to a substantive analysis of the defendant's claim of ineffectiveness, we must first address the factual allegations contained in the second amended petition. The State on appeal argues that the record of the plea hearing "positively rebut[s] the allegations the defendant suggests make a showing of a constitutional violation." Quoting the transcript of the plea colloquy between the court and the defendant (see *supra* ¶ 6), the State insists that "[r]egardless of how the claim is structured, under the umbrella of ineffective assistance or not, the record completely contradicts the claim."

¶ 33 The State specifically notes that the defendant never informed the trial court that he was "displeased with counsel's handling of the perceived threat concerning his mother's actions, despite having the perfect opportunity to do so." The State also emphasizes that the defendant provided no reason why the trial court should not accept his plea, and that the defendant's responses to the trial court's questions "established that he was not threatened or forced to plead guilty."

¶ 34 We are compelled to point out that the State, in its brief, fails to identify with any precision the specific factual allegations made by the defendant that it claims are rebutted by the record. To be sure, the State claims that the defendant's statements that he was "satisfied with the services of [his] attorney" and was pleading guilty of his own free will rebut the *legal* conclusions that the defendant's plea was the product of ineffective assistance of counsel or otherwise involuntary. In our reading of its argument, the only *factual* allegation the State takes

issue with is the allegation that the defendant believed he was threatened by the State, arguing that defendant's response to the trial court that he was not threatened rebuts this claim.[2]

¶ 35 The law of the case doctrine precludes the State from prevailing on such an argument. The law of the case doctrine bars the relitigation of any issues already decided in the same case, preventing a party from " 'taking two bites out of the same appellate apple.' " *People v. Tenner*, 206 Ill. 2d 381, 395 (2002) (quoting *People v. Partee*, 125 Ill. 2d 24, 37 (1988)). In the defendant's appeal from the *first*-stage dismissal of his postconviction petition, this court addressed the question of whether the defendant's allegation that the State threatened to prosecute his mother was rebutted by the record. A majority of the court held that the defendant's allegation regarding the threat to his mother should be presumed true, despite his failure to bring it up during the plea colloquy, because "[t]he nature of the alleged threat against defendant—assuming its truth—would have required that he not disclose the threat at the plea colloquy." *Rubio*, 2013 IL App (3d) 110538-UB, ¶ 28. Thus, having already determined on the merits that the defendant's allegation regarding the threat to his mother should be taken as true, we need not address it again. See *People v. McNair*, 138 Ill. App. 3d 920, 922 (1985) ("Under the long-established 'law of the case' doctrine, a determination of an issue on its merits by an appellate court is final and conclusive upon the parties in a second appeal in the same case, and the issues considered and decided cannot be reconsidered by the same court except on a petition for rehearing.").

[2] Any distinction to be drawn between the State threatening the defendant and the State threatening the defendant's mother is semantic in nature. In any event, neither of the parties on appeal attempt to draw such a distinction.

¶ 36 The State's legal argument—that the record refutes the defendant's claim of ineffective assistance of counsel—also fails for numerous reasons. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that he was prejudiced by that performance.[3] *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to satisfy the deficient performance prong, "the defendant must show that counsel's representation fell below an *objective standard* of reasonableness." (Emphasis added.) *Id.* at 688; see also, *e.g.*, *People v. Perry*, 224 Ill. 2d 312, 345 (2007) (referring to *Strickland*'s deficient performance inquiry as an "objective test"). At the plea colloquy in the present case, the defendant was asked his subjective opinion; that is, the court asked if he was satisfied with counsel's performance. A defendant's opinion, however, simply has no bearing on an *objective* determination as to whether counsel's performance was unreasonable. In other words, the sixth amendment entitles a criminal defendant to objectively reasonable assistance of counsel, not assistance of counsel that the defendant himself finds subjectively satisfactory. Accordingly, the defendant's subjective satisfaction with counsel cannot serve to rebut a claim of ineffective assistance of counsel.

¶ 37 The State's argument also depends on the flawed premise that the defendant should have known he was receiving ineffective assistance of counsel at the time of his guilty plea. By arguing that a defendant may not claim ineffective assistance of counsel unless he raises it at the plea hearing, the State does not allow for the probability that a defendant may only become aware of counsel's deficient performance after the fact. Indeed, it is entirely likely that a defendant will only become aware of counsel's deficient performance if and when he is represented by a new attorney, such as at the second stage of postconviction proceedings.

[3] A more thorough discussion of ineffective assistance of counsel follows (*infra* ¶¶ 40-57).

Holding a common criminal defendant responsible for personally seeking out counsel's legal errors in real time would run counter to the very purposes of the sixth amendment right to counsel.

¶ 38 Neither the defendant's factual allegations nor his legal conclusions are rebutted by the record. Accordingly, we will take those factual allegations as true, and proceed to determine whether they make a substantial showing of ineffective assistance of counsel.

¶ 39 II. Ineffective Assistance of Counsel

¶ 40 The sixth amendment of the United States Constitution and article I of the Illinois Constitution provide that every criminal defendant has the right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. 1, § 8; see also *Domagala*, 2013 IL 113688, ¶ 36. The right to counsel extends to pleas and the plea bargaining process. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). A defendant's claim that he was deprived of the effective assistance of counsel is thus a constitutional claim cognizable under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2010)). *E.g.*, *People v. Jones*, 191 Ill. 2d 354, 359 (2000).

¶ 41 Claims of ineffective assistance of counsel are analyzed under the standard set forth in *Strickland*, 466 U.S. 668. In order to ultimately prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that such deficiency was prejudicial to the defense. *Id*. at 687. To prevail at the second stage of postconviction proceedings, then, a defendant must make a substantial showing with respect to each of those prongs. *People v. Evans*, 186 Ill. 2d 83, 93 (1999).

¶ 42 A. Deficient Performance

¶ 43 Counsel's performance will be deemed constitutionally deficient where it falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. This standard has been

characterized as requiring counsel to provide assistance within the range of competence demanded of attorneys in criminal cases, under prevailing professional norms. *People v. Wilson*, 191 Ill. 2d 363, 372 (2000). In the context of plea negotiation, the United States Supreme Court has determined that "it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement." *Libretti v. United States*, 516 U.S. 29, 50 (1995).

¶ 44 1. Direct versus Collateral Consequences of Plea

¶ 45 At the outset, we recognize the present issue requires a brief discussion concerning the differences between the direct and collateral consequences of a plea. "[A] direct consequence of a guilty plea is one which has a definite, immediate and largely automatic effect on the range of a defendant's sentence." *People v. Hughes*, 2012 IL 112817, ¶ 35. A collateral consequence, on the other hand, "is one which the circuit court has no authority to impose, and 'results from an action that may or may not be taken by an agency that the trial court does not control.' " *Id.* ¶ 36 (quoting *People v. Delvillar*, 235 Ill. 2d 507, 520 (2009)). Counsel's failure to advise a client regarding collateral consequences has traditionally not fallen under the ambit of the sixth amendment. *Id.* ¶ 45. An attorney's *affirmative misadvice* regarding a collateral consequence, however, does amount to constitutionally deficient performance. See *Correa*, 108 Ill. 2d at 550-53.

¶ 46 To be sure, the potential prosecution of the defendant's mother is a collateral consequence of the defendant's plea. The decision whether to prosecute Valenzuela would have no bearing on the defendant's sentence, and, in fact, would be a decision made by the State's Attorney, rather than the court. See *Hughes*, 2012 IL 112817, ¶ 36. However, the defendant alleged in his second amended petition that counsel provided affirmative misadvice. That is, the

defendant alleged that counsel affirmatively provided him with objectively erroneous information regarding the State's ability to prosecute his mother. Thus, a claim of ineffective assistance of counsel may still lie. See *Correa*, 108 Ill. 2d at 553.

¶ 47 2. Allegation of Affirmative Misadvice

¶ 48 The defendant alleged in his second amended petition that counsel advised him to accept the State's plea offer so that the State would not follow through on its threat to prosecute his mother based upon the letter she wrote to the victim's family. The defendant further alleged that counsel, having read that letter, should have known that it could not possibly have served as the basis of any prosecution. Thus, the defendant concludes, counsel provided affirmative misadvice in suggesting that the State could file a meritorious charge against Valenzuela.

¶ 49 The defendant pointed out in his second amended petition that any charge against Valenzuela flowing from her letter would have to be characterized as either witness harassment (720 ILCS 5/32-4a (West 2008)) or communicating with a witness (720 ILCS 5/32-4(b) (West 2008)). The State did not raise any other possibilities at the trial level, nor does it do so here.

¶ 50 To commit the offense of witness harassment, a person must contact a potential witness "with intent to harass or annoy" that witness, "in such manner as to produce mental anguish or emotional distress or [convey] a threat of injury or damage to *** property." 720 ILCS 5/32-4a(b) (West 2008). Valenzuela's letter, in which she offers to pay for the victim's therapy and pleads for mercy for her son, does not begin to approach the elements of witness harassment.

¶ 51 To commit the offense of communicating with a witness, a person must convey to a potential witness "any knowingly false information or a threat of injury or damage to the property or person" with the intent to deter that witness "from testifying freely, fully and

truthfully to any matter pending in any court." 720 ILCS 5/32-4(b) (West 2008). Once again, Valenzuela's letter does not come close to satisfying these elements.

¶ 52 Even in ultimately ruling in favor of the State, the trial court agreed that Valenzuela's letter could not possibly have given rise to charges against her, stating: "[J]ust even taking a cursory look at this letter by anybody, particularly a lawyer that does criminal defense work, would suggest there is nothing in here to be prosecuted for." Indeed, even the State on appeal does not contend that Valenzuela could have been prosecuted. Thus, what is apparent to this court, apparent to the trial court, and apparent to the State, should have been apparent to the defendant's attorney: The State could not have followed through on any claim to prosecute Valenzuela. Accordingly, the defendant's allegation that counsel advised him to accept the plea offer in order to avoid prosecution of his mother, taken as true, makes a substantial showing that counsel provided affirmative misadvice and rendered constitutionally deficient performance.

¶ 53 B. Prejudice

¶ 54 In order to satisfy the prejudice prong of the *Strickland* test at this stage of proceedings, a defendant must make a substantial showing that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). In the guilty plea context, a defendant must demonstrate a reasonable probability that, but for the deficient performance of counsel, he would have insisted on proceeding to trial rather than accepting the plea. *Hughes*, 2012 IL 112817, ¶ 63.

¶ 55 The defendant here has alleged that the only reason he pled guilty was counsel's erroneous advice that the State could prosecute his mother if he did not accept the State's plea offer. If not for that advice, the defendant alleges, he would have proceeded to trial. However, our supreme court in *Hall* has stated that "[a] bare allegation that the defendant would have

pleaded not guilty and insisted on a trial if counsel had not been deficient is not enough to establish prejudice." *Hall*, 217 Ill. 2d at 335. Instead, the *Hall* court concluded, a defendant's claim of prejudice

> "must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial. [Citations.] *** [T]he question of whether counsel's deficient representation caused the defendant to plead guilty depends in large part on predicting whether the defendant likely would have been successful at trial." *Id*. at 335-36.

Speaking in broader terms, the United States Supreme Court has held that the prejudice inquiry is satisfied where a defendant shows that the decision to forego a plea and proceed to trial "would have been rational under the circumstances." *Padilla*, 559 U.S. at 372.

¶ 56 The defendant has satisfied the *Hall* standard in the present case.[4] In his second amended petition, defendant alleged that he was under the influence of marijuana and alcohol when he was questioned by the police. Accordingly, the defendant alleged that he could not have knowingly waived his *Miranda* rights, and a motion to suppress his statements would have been meritorious. Moreover, the defendant alleged that the State had no physical evidence implicating him in the charged offenses, a fact apparently confirmed by the State's failure to mention any such evidence in its factual basis.

[4] In his brief, the defendant initially argued that the *Hall* standard should not apply in this case. He argued, in the alternative, that he nevertheless satisfied that standard. In response, the State argued that *Hall* does apply. However, the State has provided no actual argument contesting the defendant's assertion that he nevertheless satisfied the standard.

¶ 57 Importantly, our end in this analysis is not to predetermine whether the defendant would have prevailed on his motion to suppress, or whether he ultimately would have prevailed at trial. We need only determine if he has made allegations, which, if taken as true, would support a plausible defense. *Hall*, 217 Ill. 2d at 336. If the defendant was, indeed, under the influence of marijuana, that would either render his statements completely inadmissible, or at least undermine the probative weight that could be given to the statements. *People v. Johnson*, 285 Ill. App. 3d 802, 811-12 (1996). The State, lacking any physical evidence, would be left with the testimony of the minor victim, as well as the circumstantial testimony from the victim's 10-year-old cousin. It would be at least plausible for the defendant to raise the defense that this evidence does not overcome the presumption of innocence. See *Hall*, 217 Ill. 2d at 335. Or, in other words, the defendant's decision to proceed to trial would not have been wholly irrational. *Padilla*, 559 U.S. at 372. Thus, the defendant has demonstrated prejudice under *Strickland* and *Hall*.

¶ 58 Two final points bear mentioning. First, we note that the standards for demonstrating prejudice under *Hall* and *Padilla* are not necessarily equivalent. In *Padilla*, the defendant argued that his attorney provided ineffective assistance by failing to warn him that his guilty plea could result in mandatory deportation. To demonstrate prejudice in this context, a defendant need only show that his decision to reject a plea offer and go to trial would have been "rational under the circumstances." *Padilla*, 559 U.S. at 372. The defendant can make this showing without establishing that he would likely have succeeded at trial (as *Hall* requires). See, *e.g.*, *United States v. Orocio*, 645 F.3d 630, 643 (3rd Cir.2011) (ruling that, under *Padilla*, a "rational" decision not to plead guilty "does not focus solely on whether a defendant would have been found guilty at trial"). As the *Padilla* Court recognized, preserving a noncitizen defendant's right to stay in the United States may be more important to the defendant than a potential sentence of

imprisonment. *Padilla*, 559 U.S. at 368; see also *Orocio*, 645 F.3d at 645. A defendant who fears deportation more than he does imprisonment might "rationally" choose to risk a lengthier prison sentence in exchange for even a slight chance of prevailing at trial and thereby avoiding deportation.

¶ 59 Second, in our view, prejudice should be presumed in all cases wherein the defendant shows that his counsel rendered deficient performance by failing to advise him of the consequences of pleading guilty. In such cases, the defendant is deprived of the opportunity to decide whether to plead guilty with full knowledge of the consequences based on his own particular risk tolerance. That results in a real and substantial prejudice to the defendant, regardless of the strength of his defense or the perceived wisdom of pleading guilty. The right to enter a plea of one's choice based on accurate information and one's own assessment of the risks and benefits is a liberty interest that is deserving of legal protection, even when rejecting a plea offer and proceeding to trial might appear to be unreasonable based on the strength of the evidence against the defendant.[5] We recognize that our supreme court reached a different conclusion in *Hall*. That does not affect our analysis in this case, however, because, as noted above, the defendant in this case satisfied the *Hall* standard.

¶ 60 In summary, neither the defendant's factual allegations nor his legal conclusions are rebutted by the record. Taking those factual allegations as true, the defendant has made a substantial showing both that he received deficient performance from counsel and that such

[5] The law protects a criminal defendant's right to make unwise decisions in other situations. For example, a defendant has a Sixth Amendment right to reject court-appointed counsel and represent himself in a criminal trial, despite the serious risks that such a decision poses for the defendant. *Faretta v. California*, 422 U.S. 806 (1975).

performance was prejudicial. Accordingly, the defendant has satisfied the requirements of a second-stage postconviction petition, and the matter is remanded for third-stage proceedings.

¶ 61 CONCLUSION

¶ 62 The judgment of the circuit court of Will County is reversed, and the matter is remanded for third-stage proceedings.

¶ 63 Reversed and remanded with directions.

¶ 64 JUSTICE WRIGHT, dissenting.

¶ 65 Defendant claims his amended petition states the gist of a constitutional claim based on ineffective assistance of counsel. First, I presume it is true that the prosecutor communicated the threatening inference to defendant's mother. Next, I assume defendant's counsel had knowledge of this exchange between the prosecutor and defendant's mother. Finally, I will presume it is true that defendant's attorney told defendant to consider the indirect threat to the well-being of defendant's mother as a reason to enter a guilty plea. The record clearly shows defendant did not rely on the poor advice of defense counsel and entered his guilty plea without any concerns for his mother's well being.

¶ 66 Specifically, the trial court directly asked defendant if there was "any reason" the court should not view defendant's guilty plea as the product of his own free will. In response, defendant did not disclose that his attorney advised him to do so because of implicit prosecutorial threats to incarcerate defendant's mother. Defendant's negative response to this question tells me that his mother's conversation with the prosecutor did not enter his mind when defendant elected to sign the guilty plea. The record negates defendant's new claim asserting this conversation influenced his decision.

¶ 67 For this reason, I respectfully dissent and would affirm the trial court's decision.