2017 IL App (4th) 140895-U

NO. 4-14-0895

FILED
February 28, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DEVIN D. McCLENDON,	)	No. 13CF1072
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in denying defendant postconviction relief following an evidentiary hearing.

¶ 2 In August 2013, defendant, Devin D. McClendon, pleaded guilty to one count of armed robbery, and the trial court sentenced him to 22 years in prison. In July 2014, appointed counsel filed an amended postconviction petition. After an evidentiary hearing in October 2014, the court denied defendant postconviction relief.

¶ 3 On appeal, defendant argues the trial court erred in denying his amended postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In July 2013, the State charged defendant by information with one count of armed robbery (count I) (720 ILCS 5/18-2(a)(2) (West 2012)), alleging he took money from the

presence of Brian Barto and Robert Davis by threatening the imminent use of force while armed with a handgun. The State also charged him with one count of aggravated unlawful possession of a firearm by a felon (count II) (720 ILCS 5/24-1.1(a) (West 2012)), alleging he had been convicted of aggravated battery, a forcible felony, and knowingly possessed a handgun. At the arraignment hearing, the trial court informed defendant that the armed robbery with a firearm charge was a Class X offense with a sentencing range of 21 to 45 years in prison.

¶ 6 In August 2013, the trial court conducted a plea hearing. The court noted the sentencing range for count I, a Class X offense, was 6 to 30 years in prison, but with the additional firearm element, the range was 21 to 45 years in prison. Defendant indicated he understood the range of penalties and wanted to plead guilty. In exchange for defendant's guilty plea on count I, the State agreed to recommend a 22-year sentence and the dismissal of count II. As a factual basis, the State indicated defendant entered a Sonic restaurant, displayed a handgun, demanded cash from employees Barto and Davis, and left with $1,400. Thereafter, defendant pleaded guilty, and the court sentenced him to 22 years in prison.

¶ 7 Defendant did not file a motion to withdraw his guilty plea. Instead, he sent several letters to the trial court asking for a sentence reduction. In March 2014, the court entered an order, finding defendant's requests were "not timely and inappropriate given the fact that this sentence resulted from a negotiated plea." The court forwarded the letters to defense counsel.

¶ 8 In May 2014, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)), alleging his constitutional rights had been violated. Defendant attached a letter dated April 24, 2014, that he received from his plea counsel, Bruce Ratcliffe. Therein, counsel stated, in part, as follows:

"You were charged with, plead guilty to, and were convicted of

> armed robbery. You went into a store, the Sonic, and pointed a gun at a worker. It didn't matter if it was a BB gun or a real gun, the person thought [it] was a real gun, and that is enough. You took some money from the store. You admitted to the police you did it."

Counsel noted defendant could possibly file a postconviction petition to address his concerns. Moreover, counsel stated "I am sorry that you have gotten into the situation you are now in. I got you the minimum sentence because after the armed robbery charge, the law must add on time for using the gun. Sadly, the minimum plus the added time is a long time." Upon the filing of the petition, the trial court appointed counsel.

¶ 9 In July 2014, defendant's appointed counsel filed an amended postconviction petition, alleging, in part, that Ratcliffe was ineffective for inaccurately advising defendant that the minimum sentence on the offense of armed robbery was 22 years when the actual minimum sentence was 21 years. Defendant alleged he would not have accepted the plea of 22 years had he been advised correctly. The amended petition also alleged there was no factual basis for the guilty plea, as defendant possessed a BB gun, not a firearm, during the robbery, and counsel was ineffective for failing to assert the weapon was not a firearm.

¶ 10 In August 2014, the State filed a motion to dismiss the amended petition, arguing defendant failed to meet his burden of making a substantial showing of a constitutional violation. In October 2014, the trial court conducted an evidentiary hearing on the amended petition.

¶ 11 Defendant testified he was 20 years old and had been diagnosed with attention deficit hyperactivity disorder. He stated his attorney visited him in jail two times prior to the plea hearing. Defendant stated counsel told him the minimum sentence was 22 years in prison.

Counsel also told him he should accept the State's offer. Although defendant remembered hearing the judge mentioning the minimum sentencing term being 21 years, he stated counsel told him to "just say yeah." Defendant stated he would not have pleaded guilty had he known the minimum sentence was less than 22 years.

¶ 12 Bruce Ratcliffe testified he discussed the plea offer with defendant and erroneously told him 22 years was the minimum sentence instead of 21 years. Ratcliffe did not make a counteroffer because he "was laboring under the misconception it was twenty-two so I couldn't get less than that." When asked about his letter to defendant, wherein he stated it did not matter if a BB gun or an actual firearm was used, Ratcliffe stated, in part, as follows:

> "Well, what I meant by it is that we had discussed that it was a BB gun or a real gun, and that we couldn't prove that it was a BB gun and the State had enough proof that it was a real gun, and the person believed it was a real gun. That means that unless he has proof that it was a BB gun, that that's going to be enough regardless—well, that's what I meant by that. It was inartfully stated and I had told him all along during the course of the trial or during the course of the work I was doing on it, when we discussed the BB gun or real gun that I would have to have the BB gun or I would have to have someone testify to it or it's going to be presumed to be a real gun, and it really wouldn't matter what he said unless the jury would believe him as I previously testified, so yeah, I wrote that but it is just inartful. I don't know how else to say it."

¶ 13 The trial court denied defendant's amended postconviction petition. The court noted Ratcliffe "misspoke as to the minimum" of 21 years, but the sentence was "awfully close to twenty-two and substantially less than [defendant] would have gotten had he gone to trial." The court also stated that, with the exception of Ratcliffe's erroneous advice, there was "nothing in this record that would indicate that for that one extra year, this defendant would have taken this case to trial." On the issue of a possible BB gun defense, the court noted evidence from a codefendant's case where the jury found him guilty of armed robbery with a firearm. The court stated defendant would have taken a "big chance" in going to trial but instead took the "incredibly reasonable offer from the State." This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 Defendant argues the trial court erred in denying his postconviction claim, arguing counsel was ineffective in advising him as to the minimum sentence and a possible defense and, but for that erroneous advice, he would have rejected the State's plea offer and gone to trial. We disagree.

¶ 16 The Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 17 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. At the first stage, the trial court must

review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2014).

¶ 18 At the second stage, the trial court may appoint counsel, who may amend the petition to ensure defendant's contentions are adequately presented. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). Also at the second stage, the State may file an answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2014). A petition may be dismissed at the second stage "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, 841 N.E.2d 913, 920 (2005).

¶ 19 If "a substantial showing of a constitutional violation is established, the petition proceeds to the third stage for an evidentiary hearing." *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In this case, the trial court denied postconviction relief following an evidentiary hearing. "Following an evidentiary hearing where fact-finding and credibility determinations are involved, the trial court's decision will not be reversed unless it is manifestly erroneous." *People v. Beaman*, 229 Ill. 2d 56, 72, 890 N.E.2d 500, 509 (2008).

¶ 20 A defendant's challenge to his guilty plea alleging ineffective assistance of counsel is subject to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Rissley*, 206 Ill. 2d 403, 457, 795 N.E.2d 174, 204 (2003) (citing *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)). "Under *Strickland*, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and the defendant was prejudiced by counsel's substandard performance." *Hall*, 217 Ill. 2d at 335, 841 N.E.2d at 920.

¶ 21 "Counsel's conduct is deficient under *Strickland* if the attorney failed to ensure

that the defendant entered the plea voluntarily and intelligently." *Rissley*, 206 Ill. 2d at 457, 795 N.E.2d at 204.

> "To establish the prejudice prong of an ineffective assistance of counsel claim in these circumstances, the defendant must show there is a reasonable probability that, absent counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial. [Citations.] 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. [Citation.] Rather, the defendant's claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial. [Citations.] Under *Hill*, the 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. [Citations.]" *Hall*, 217 Ill. 2d at 335-36, 841 N.E.2d at 920-21.

¶ 22 A. Minimum Sentence

¶ 23 In the case *sub judice*, it is clear defense counsel erroneously advised defendant regarding the minimum sentence on the offense of armed robbery. The State charged defendant with one count of armed robbery, a Class X offense. 720 ILCS 5/18-2(a)(2), (b) (West 2012). While normally a Class X offense carries a minimum 6-year sentence (730 ILCS 5/5-4.5-25(a) (West 2012)), a violation of the armed robbery statute as charged here requires an additional 15-year sentence. Thus, the minimum sentence in this case was 21 years in prison, and counsel's

advice to defendant that the minimum sentence was 22 years was in error.

¶ 24 Even though counsel's performance was deficient given the incorrect legal advice, defendant must still show he was prejudiced by the error. We note the trial court did admonish defendant at the guilty plea hearing that the minimum sentence was 21 years, and the State's offer of 22 years was near the minimum sentence. After considering the State's evidence during the evidentiary hearing on the postconviction petition, the court noted defense counsel "[m]anaged to get an incredibly reasonable offer from the State." The court also noted it "takes a dim view of people committing crimes with firearms, and with a prior record for aggravated battery great bodily harm as this defendant has, his sentence would have been in the middle thirties had this gone to trial." In denying postconviction relief, the court found "nothing in this record that would indicate that for that one extra year, this defendant would have taken this case to trial."

¶ 25 We agree with this conclusion. On the issue of counsel's erroneous advice on the minimum sentence, defendant has failed to show the one-year error would have led him to reject the State's offer and insist on going to trial. Thus, we find defendant failed to satisfy the second prong of the *Strickland* standard.

¶ 26 B. BB Gun Defense

¶ 27 Defendant also argues counsel's representation was objectively unreasonable for failing to inform him about the BB gun defense. Defendant testified at the evidentiary hearing that he turned himself in to the police and told investigators he carried a BB gun when he robbed the Sonic restaurant. He then told his attorney, who, according to defendant, did not tell him a BB gun was not a "firearm" under the statute. See 720 ILCS 5/18-2(a)(2), (b) (West 2012) (requiring a 15-year enhancement to the Class X offense of armed robbery with a firearm); 720

ILCS 5/2-7.5 (West 2012) (stating the term "firearm" has the meaning ascribed under the Firearm Owners Identification Card Act); 430 ILCS 65/1.1 (West 2012) (excluding BB guns from the definition of "firearm").

¶ 28 Defendant pleaded guilty in August 2013. In April 2014, after the trial court forwarded his letters to counsel, Ratcliffe wrote to him stating, "You went into a store, the Sonic, and pointed a gun at a worker. It didn't matter if it was a BB gun or a real gun, the person thought it was a real gun, and that is enough." At the evidentiary hearing, counsel stated he and defendant discussed whether the weapon used was a BB gun or a real gun. In their discussions, counsel stated he would need to have the BB gun or have someone testify that it was a BB gun, otherwise "it's going to be presumed to be a real gun, and it really wouldn't matter what [defendant] said unless the jury would believe him."

¶ 29 Given defendant's testimony and the letter, which counsel admitted was "inartfully" worded, we will assume counsel's advice on a possible BB gun defense was deficient. The question then centers on whether defendant was prejudiced by the "inartful" advice. To that end, defendant must establish the existence of "a plausible defense that could have been raised at trial." *Hall*, 217 Ill. 2d at 335-36, 841 N.E.2d at 920. We find defendant clearly had a plausible defense, as evidenced by his statement to the police that he used a BB gun. However, as stated, "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." *Hall*, 217 Ill. 2d at 336, 841 N.E.2d at 921. We find defendant's likelihood of success at trial to be minimal. The only evidence the weapon used was a BB gun came from defendant's self-serving statement. Ratcliffe also stated, in part, as follows:

> "The problem with [defendant] getting up on the witness stand at

trial and saying it was a BB gun would be an admission that he was involved in the armed robbery. That would leave him exposed to the potential *** armed robbery, and if the jury didn't believe his mere self-serving statement, they could very well have convicted him for the armed robbery with a weapon that would qualify under the enhancement statute.

Another factor was another member of the—another co-defendant had expressed—I believe it was Natasha Duvall—had expressed concern about people getting hurt and whether or not there were bullets, and with that I thought that it would be very difficult to put forth the proposition that it was a BB gun with virtually no proof."

¶ 30 At the conclusion of the evidentiary hearing, the trial court noted another codefendant had gone to trial and the jury found him guilty of armed robbery with a firearm. The court stated a surveillance video showed defendant with what "certainly looked like a firearm." Further, the court stated as follows:

"Miss Duvall had made some comments in her text messages about bullets. The defendant in that case, Mr. Bragg, in the statement that was played for the jury, when asked why didn't you just get out of the car, his comment was well, man, he had a gun. The jury made the determination that there was ample evidence that the State had proven beyond a reasonable doubt that the armed robbery was committed with a firearm. The defendant's statement to the

> police would have been icing on the cake I suppose, and all it would have done was muddy the State's case when he says it was a BB gun."

The court also noted Bragg testified about "trying to get a gun earlier in the day, a firearm. He's not asking his friend for a BB gun; he is asking for a gun. All of the evidence presented in the Bragg trial would have been presented in this defendant's trial ***."

¶ 31 Other than his statement, defendant has not produced any evidence to support his contention that the weapon used in the armed robbery was a BB gun and not a firearm. His codefendant was found guilty of armed robbery with a firearm on the same evidence. Given the evidence in this case, the likelihood was miniscule that defendant would have succeeded at trial in convincing the jury he used a BB gun and not a firearm. As defendant cannot show counsel's representation caused him to plead guilty, his claim of ineffectiveness fails. Thus, we find the trial court did not err in denying defendant postconviction relief.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 34 Affirmed.