2018 IL App (3d) 160511-U

Order filed November 5, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-16-0511
v.	)	Circuit No. 07-CF-2030
	)	
COY RUSSELL JR.,	)	Honorable
	)	Carla Alessio-Policandriotes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in summarily dismissing defendant's *pro se* postconviction petition.

¶ 2 Defendant, Coy Russell Jr., appeals from the circuit court's dismissal of his first-stage postconviction petition. Defendant argues the court erred in summarily dismissing his *pro se* petition. We affirm.

¶ 3 FACTS

¶ 4 In October 2007, the State charged defendant with three Class X felony charges of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)). The charges respectively alleged that defendant had (1) placed his penis in the minor victim's vagina, (2) placed his penis in the minor victim's rectum, and (3) placed his penis in the minor victim's mouth. The court issued a warrant for defendant's arrest and set defendant's bond at $5 million. The police arrested defendant on October 3, 2007. Before the arraignment, defendant hired private attorneys Cosmo Tedone and Chuck Bretz to represent him. Tedone and Bretz filed a motion to reduce defendant's bond to $100,000.

¶ 5 On October 30, 2007, defendant appeared with Tedone for a hearing on defendant's motion for a bond reduction. The State opposed a bond reduction and argued:

> "Under the statute these offenses are mandatory consecutive and they are mandatory 85 percent. We're dealing with a possibility of if my math is correct 90 years at 85 percent possible sentence on these offenses."

Later in the hearing, the court referenced the State's argument saying "the nature of the offenses are predatory criminal sexual assault of a child, three counts, Class X. As indicated by [the State], mandatory Department of Corrections and mandatory consecutive sentencing." The court reduced defendant's bond to $750,000.

¶ 6 At the August 17, 2009, pretrial hearing, the parties noted that plea discussions were then ongoing. Defense counsel sought a continuance to discuss a plea offer made by the State. Neither of the parties mentioned the terms of the State's offer on the record. The State agreed to defense counsel's request for a continuance, and the court entered an agreed order to continue the case. On August 24, 2009, defense counsel rejected the State's plea offer.

¶ 7 In December 2009, the case proceeded to a jury trial. At the conclusion of the trial, the jury found defendant guilty on each of the charged offenses. The court sentenced defendant to mandatorily consecutive terms of 22, 26, and 28 years' imprisonment. On direct appeal, we affirmed defendant's convictions and sentences. *People v. Russell*, 2011 IL App (3d) 100661-U.

¶ 8 On July 18, 2016, defendant filed a *pro se* postconviction petition. The petition alleged that defendant's trial attorneys had provided ineffective assistance. Defendant alleged that he had asked his attorneys before an August 17, 2009, pretrial hearing if the State had made any plea offers. Bretz responded " 'No, but he would ask if the State had any offers to make.' " In response, the State initially offered "one-count 12-years," then, five minutes later, the State amended the offer to "two-counts 18-years" of imprisonment. The parties moved to continue the case to allow defendant to discuss the State's plea offer with his attorneys. The court granted the parties agreed motion. During defendant's plea discussion with his attorneys, Bretz said " 'I'm not going to accept 18-years for two-counts because we can win this case!' " Defendant "accepted" Bretz's statement and agreed to take the case to trial. However, defendant contended that he did not make a fully informed and voluntary decision where Bretz had not explained the applicable sentence ranges, the mandatory consecutive sentence requirement, and that defendant had the right to decide whether to accept or reject the plea offer. Defendant specifically contended that Bretz had not explained that there was "more than a 300% difference between the State's offer and the potential [maximum] sentence." Defendant argued that if Bretz had fully informed him of this information, defendant would have taken the State's plea offer and the court would have accepted it. Defendant also alleged that appellate counsel provided ineffective assistance for not raising defendant's ineffective assistance of trial counsel claim on direct appeal.

¶ 9 The court summarily dismissed defendant's *pro se* petition. Defendant appeals.

¶ 10 ANALYSIS

¶ 11 Defendant argues the court erred in summarily dismissing his *pro se* postconviction petition where his petition presented the gist of a claim that trial counsel provided ineffective assistance. Defendant contends that he presented an arguable claim that counsels' performance was deficient for failing to advise him of the direct consequences of accepting or rejecting the State's plea offer, including the minimum and maximum sentences which could be imposed. Additionally, defendant alleges he suffered prejudice because "had he been aware of the fact that 'there was more than a 300% difference between the State's offer and the potential [maximum] sentence' if found guilty, he would have accepted the State's offer." We find that defendant's petition did not establish the gist of a claim of ineffective assistance of counsel as defendant cannot make an arguable assertion of prejudice.

¶ 12 The Post-Conviction Hearing Act (Act) provides a three-stage proceeding through which an imprisoned defendant may raise a claim of a substantial denial of his constitutional rights. See 725 ILCS 5/122-1 *et seq*. (West 2016); *People v. Tate*, 2012 IL 112214, ¶ 10. "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). The threshold for survival at the first stage is low, and a *pro se* defendant need only allege the "gist" of a constitutional claim to avoid dismissal. *Id.* at 9. A petition that is frivolous or patently without merit is subject to dismissal. *Id.* at 10.

¶ 13 In this case, we need not address the sufficiency of trial counsels' performance as defendant failed to make an arguable assertion of prejudice. See *People v. Coleman*, 183 Ill. 2d

366, 397-98 (1998) (where defendant's claim can be disposed of for lack of sufficient prejudice, a reviewing court need not consider the reasonableness of counsel's performance). Establishing prejudice in the guilty plea context requires that defendant make an arguable assertion that if he had been properly advised, there is a reasonable probability that the result of the proceeding would have been different. *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). Where defendant rejects a plea offer based on counsel's allegedly erroneous advice,

> "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." *Id.* at 164.

¶ 14 Defendant cannot show that he suffered prejudice as a result of trial counsels' alleged failure to discuss with defendant the sentence ranges and the mandatory consecutive sentence requirement. The record establishes that defendant had prior notice of the maximum sentence and consecutive sentence requirement. At the October 30, 2007, hearing, the State argued against a bond reduction because the charges carried a maximum cumulative sentence of 90 years' imprisonment. Thereafter, the court noted that it was required to order any potential sentences to run consecutively. While this notice occurred on October 30, 2007, its half-life was certainly more than two years and provided defendant with notice that he faced 90 years in prison in light of the very serious underlying charges. Simply stated, the "300% difference" between the 90-

year maximum sentence and the 18-year plea offer framed any plea discussion, whether or not it was explicitly stated. In this case, defendant apparently placed less value on the prison time savings afforded by the plea and instead accepted counsels' suggestion that the State would not prevail at trial. This was a calculated risk, but one defendant assumed by permitting his attorneys to reject the plea offer.[1] Given these circumstances, defendant cannot show that the outcome of the proceedings would have changed—he would have accepted the plea offer—if his attorneys had discussed the sentence outcomes at the time of the plea offer. He had already been advised of the potential sentencing ranges. While a person standing in a courtroom might well forget certain details, no one would forget the fact that he was looking at 90 years if convicted. Accordingly, the court did not err when it summarily dismissed defendant's postconviction petition.

¶ 15 CONCLUSION

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 17 Affirmed.

[1]Defendant argued in his postconviction petition that his attorneys were ineffective for failing to advise him that the decision to accept or reject the plea belonged to him. Defendant did not raise this argument on appeal.