2018 IL App (4th) 160026-U

NO. 4-16-0026

FILED
March 20, 2018
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
KENNETH DALTON,	)	No. 10CF2153
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err by dismissing defendant's amended postconviction petition at the second stage of the postconviction proceedings.

¶ 2 In December 2010, the State charged defendant, Kenneth Dalton, with aggravated driving under the influence (DUI) and driving while license revoked (DWLR). In April 2011, defendant pleaded guilty to the DWLR charge, and, following a trial, a jury convicted defendant of DUI. In May 2011, the Champaign County circuit court entered judgment on the aggravated DUI charge, a Class 2 felony, and thereafter sentenced defendant as a Class X offender to a 25-year prison term based on defendant's prior Class 2 felony convictions. The court also sentenced defendant to a concurrent six-year prison term on the DWLR charge, which was reduced to three years on direct appeal.

¶ 3 In July 2013, defendant filed a *pro se* postconviction petition, contending he was

denied effective assistance of appellate counsel because counsel failed to raise an issue that his 25-year sentence was excessive. In October 2013, the circuit court summarily dismissed defendant's petition as frivolous and patently without merit. Defendant appealed, and this court reversed the summary dismissal and remanded the case for further proceedings. *People v. Dalton*, 2015 IL App (4th) 130932-U. On remand, appointed counsel filed an amended postconviction petition, and the State filed a motion to dismiss the amended petition. In December 2015, the circuit court granted the State's motion and dismissed defendant's amended postconviction petition. Defendant appeals, arguing his claim of ineffective assistance of appellate counsel made a substantial showing of a constitutional claim. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In December 2010, the State charged defendant with (1) aggravated DUI, a Class 2 felony (625 ILCS 5/11-501(a)(2), (d)(2)(B) (West 2010)) (count I), based on defendant committing DUI with two prior DUI convictions; (2) aggravated driving with a drug, substance, or compound in his body, a Class 2 felony (625 ILCS 5/11-501(a)(6), (d)(2)(B) (West 2010)) (count II); and (3) DWLR, a Class 4 felony (625 ILCS 5/6-303(a-5) (West 2010) (text of section effective until July 1, 2011)) (count III). In April 2011, defendant pleaded guilty to count III, and the State dismissed count II. Thereafter, the circuit court commenced a jury trial on count I. At the conclusion of the trial, the jury found defendant guilty of aggravated DUI. The evidence relevant to the issue on appeal follows.

¶ 6 Champaign County sheriff's deputy Jonathon Reifsteck testified on December 24, 2010, at about 12:30 a.m., he stopped defendant in Champaign County, Illinois, for traveling 61 miles per hour in a 45-mile-per-hour zone. When Reifsteck made contact with defendant, he noticed defendant's eyes were bloodshot and glassy, and Reifsteck could detect a "strong odor of

an alcoholic beverage" on defendant's breath. Upon questioning defendant, Reifsteck noticed defendant's speech "was somewhat slurred." Reifsteck asked defendant to perform field sobriety tests, and defendant agreed. While he was performing the tests, defendant indicated to Reifsteck he needed to use the restroom. Reifsteck refused to allow defendant to do so until defendant completed the tests. During the tests, defendant urinated on himself. The circuit court admitted into evidence a video recording of the traffic stop and allowed the State to play the recording for the jury. The State also showed the jury a photograph taken of defendant at the time of his arrest.

¶ 7 Following the field sobriety tests, Reifsteck concluded defendant was under the influence of alcohol. Reifsteck arrested defendant and transported him to jail, where defendant refused to submit to chemical testing. Reifsteck later inventoried defendant's pickup truck and found one 24-ounce Ice House beer can under the driver's seat and three 24-ounce cans in the bed. The cans were open and contained "the minimal amount of a liquid substance that smelled of beer."

¶ 8 Defendant testified he worked as a cook at Montana Mike's restaurant. On December 23, 2012, he worked until 4 p.m. and then helped a friend move furniture. When he returned home later that evening, he watched television with his fiancée. According to defendant, he consumed a lot of water because he felt dehydrated from working in the hot kitchen earlier that day. He denied drinking any alcohol. Around 11:20 p.m., defendant decided to drive to a convenience store to buy a can of beer.

¶ 9 After buying one can of Ice House beer, defendant "took like a little cruise." During the ride, he drank part of the can of beer and realized he had to urinate so he "tried to hurry up and get to where [he] could get a place to use the restroom." Defendant saw the

flashing lights of a police car in his rearview mirror, so he pulled into a Schnuck's parking lot. When defendant got out of his car, he felt he "had to urinate really bad" and asked Reifsteck if he could use the restroom. Reifsteck did not allow him to do so. Defendant testified he had difficulty completing the field sobriety tests because he "had to urinate." He explained he has "weak kidneys." The urge to urinate intensified during the field tests, and defendant was forced to urinate on himself.

¶ 10 In May 2011, defendant filed a motion for a judgment of acquittal and a new trial, which the circuit court denied. At defendant's sentencing hearing, defendant presented the testimony of his friends, David and Taryn Mabon; his brother, Terry Dalton, and defendant's fiancée, Angela Robinson. David testified defendant had turned his life around since getting out of prison. Before the latest DUI, defendant had been working two jobs and was a family man. Taryn testified she often sought spiritual advice from defendant. Terry testified defendant was no longer using illegal substances. Defendant had taken cooking classes and worked regularly. Terry also noted defendant was very involved with his family. Robinson testified defendant had been working regularly and behaving himself when it came to drugs and alcohol. Defendant himself apologized for his poor decision making and expressed remorse. He stated he desired to continue to become a more productive member of society. Defendant also presented a letter from his sister, a certificate from a drug treatment program, and a certificate showing his work in restaurant education and food services.

¶ 11 Defendant's presentence report indicated defendant had previously been convicted of DUI twice in the 1990s. Moreover, defendant had convictions for (1) possession of cannabis; (2) manufacturing or delivering cannabis; (3) manufacturing or distributing a lookalike substance; (4) domestic battery; and (5) burglary, a Class 2 felony (in total, defendant had five

burglary convictions). Defendant had numerous traffic violations, including the suspension or revocation of his driver's license. Defendant's prior longest prison term was 12 years, and he last left prison in December 2009. Defendant was due to be discharged from mandatory supervised release on December 29, 2011. The circuit court sentenced defendant as a Class X felon to a 25-year prison term for aggravated DUI and a concurrent 6-year prison term for DWLR. In June 2011, defendant filed a motion to reconsider sentence, which the circuit court denied following a July 2011 hearing.

¶ 12 Defendant appealed, arguing (1) his conviction for aggravated DUI should be reduced to a misdemeanor because the State did not present his prior convictions to the jury, and the jury found him guilty only of an unenhanced DUI; (2) the trial judge lacked authority to impose a Class X sentence because defendant was only "convicted" of a misdemeanor that was enhanced to a felony for sentencing purposes; and (3) the extended-term sentence imposed on the Class 4 DWLR was improper. *People v. Dalton*, 2012 IL App (4th) 110482-U, ¶¶ 1-3. This court rejected the first and second arguments but ordered the DWLR sentence be reduced to three years. *Dalton*, 2012 IL App (4th) 110482-U, ¶ 39.

¶ 13 On July 26, 2013, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2012)). Therein, defendant claimed (1) appellate counsel was ineffective for failing to raise the meritorious issues identified in the petition; (2) appellate counsel was ineffective for failing to challenge the 25-year aggravated DUI sentence as excessive; (3) appellate counsel was ineffective for failing to properly challenge the sentencing issues included in the motion to reconsider sentence; (4) appellate counsel was ineffective for failing to challenge the DUI statute as vague and ambiguous; (5) appellate counsel was ineffective for failing to challenge the

admission of tainted video and audio evidence; and (6) trial counsel was ineffective for failing to challenge the improper sentence issues in the motion to reconsider sentence. Defendant attached his own affidavit to the petition, stating appellate counsel refused to raise his excessive sentence issues. Defendant also attached a letter from appellate counsel explaining why he did not raise the issue regarding an excessive sentence on appeal. Defendant included a letter he wrote to appellate counsel "formally" requesting counsel raise several issues on appeal.

¶ 14 On October 1, 2013, the circuit court dismissed defendant's petition, finding it frivolous and patently without merit. Defendant appealed the summary dismissal, only asserting he was denied effective assistance of appellate counsel because counsel failed to challenge his near-maximum 25-year sentence as excessive on direct appeal. This court found defendant's postconviction petition did meet the low threshold of stating a gist of a constitutional claim of ineffective assistance of appellate counsel for failure to raise an excessive sentence claim. *Dalton*, 2015 IL App (4th) 130932-U, ¶ 28. Thus, we reversed the circuit court's summary dismissal and remanded the case for further proceedings. *Dalton*, 2015 IL App (4th) 130932-U, ¶ 30.

¶ 15 On remand, appointed counsel filed an amended postconviction petition, asserting, *inter alia*, defendant's sentence was disproportionate and excessive to the crime committed and the circuit court abused its discretion by giving too much weight to the aggravating factors, too little weight to the mitigating factors, not giving defendant an individualized sentence, and using defendant's prior sentences both to enhance the charge and aggravate the sentence. Counsel also filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). In November 2015, the State filed a motion to dismiss defendant's amended postconviction petition, asserting defendant failed to allege any prejudice in his

amended postconviction petition.

¶ 16 On December 10, 2015, the circuit court entered a written order granting the State's motion and dismissing defendant's amended postconviction petition. On January 6, 2016, defendant filed a timely notice of appeal from the dismissal of his amended postconviction petition in compliance with Illinois Supreme Court Rule 606 (eff. Dec. 11, 2014). Accordingly, this court has jurisdiction of defendant's appeal under Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013).

¶ 17 II. ANALYSIS

¶ 18 Defendant argues the circuit court erred by dismissing his amended postconviction petition at the second stage of the postconviction proceedings. He claims his appellate counsel provided constitutionally ineffective assistance when he failed to challenge his near-maximum 25-year sentence as excessive. Further, defendant contends we should follow *People v. Jimerson*, 166 Ill. 2d 211, 231, 652 N.E.2d 278, 288 (1995), find an evidentiary hearing is unnecessary, and remand for a new sentencing hearing. The State contends defendant failed to make a substantial showing of ineffective assistance of counsel.

¶ 19 The Postconviction Act provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). In cases not involving the death penalty, the Postconviction Act sets forth three stages of proceedings. *Pendleton*, 223 Ill. 2d at 471-72, 861 N.E.2d at 1007.

¶ 20 At the first stage, the circuit court independently reviews the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2012). If the

court does not dismiss the petition, it proceeds to the second stage, where, if necessary, the court appoints the defendant counsel. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Defense counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Also, at the second stage, the State may file a motion to dismiss the defendant's petition or an answer to it. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1008. If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the defendant may present evidence in support of his or her petition. *Pendleton*, 223 Ill. 2d at 472-73, 861 N.E.2d at 1008. In this case, the State did file a motion to dismiss, and the court granted that motion.

¶ 21 With the second stage of the postconviction proceedings, the circuit court is concerned only with determining whether the petition's allegations sufficiently show a constitutional infirmity that would necessitate relief under the Postconviction Act. *People v. Coleman*, 183 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071 (1998). At this stage, "the defendant bears the burden of making a substantial showing of a constitutional violation" and "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. "[T]he 'substantial showing' of a constitutional violation that must be made at the second stage [citation] is a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle petitioner to relief." (Emphasis in original.) *People v. Domagala*, 2013 IL 113688, ¶ 35, 987 N.E.2d 767. The court reviews the petition's factual sufficiency as well as its legal sufficiency in light of the trial court record and applicable law. *People v. Alberts*, 383 Ill. App. 3d 374, 377, 890 N.E.2d 1208, 1212 (2008). However, at a

dismissal hearing, the court is prohibited from engaging in any fact-finding. *Coleman*, 183 Ill. 2d at 380-81, 701 N.E.2d at 1071. Thus, the dismissal of a postconviction petition at the second stage is warranted 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. *Coleman*, 183 Ill. 2d at 382, 701 N.E.2d at 1072. We review *de novo* the circuit court's dismissal of a postconviction petition at the second stage. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 22 Claims of ineffective assistance of appellate counsel are evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Enis*, 194 Ill. 2d 361, 377, 743 N.E.2d 1, 11 (2000). For a successful ineffective assistance of counsel claim, a defendant must demonstrate (1) defense counsel's performance fell below an objective standard of reasonableness *and* (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). Further, the defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64. Additionally, the *Strickland* Court noted that, when a case is more easily decided on the ground of lack of sufficient prejudice rather than that counsel's representation was constitutionally deficient, the court should do so. *Strickland*, 466 U.S. at 697.

¶ 23 Defendant asserted he suffered prejudice because, if appellate counsel would have

raised the excessive-sentence claim, this court would have reduced his sentence or remanded for a new sentencing hearing. While a jury found defendant guilty of aggravated DUI, a Class 2 felony (625 ILCS 5/11-501(a)(2), (d)(2)(B) (West 2010)), he was subject to Class X sentencing under section 5-4.5-95(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-95(b) (West 2010)) based on his criminal record. A Class X felony has a sentencing range of 6 to 30 years in prison. 730 ILCS 5/5-4.5-25(a) (West 2010). Thus, defendant's 25-year prison sentence was within the relevant sentencing range. Citing *People v. Boyd*, 347 Ill. App. 3d 321, 331, 807 N.E.2d 639, 648 (2004), the State asserts defendant cannot raise an excessive-sentence argument in a postconviction petition where the defendant's sentence was in the statutory range. However, defendant is arguing ineffective assistance of appellate counsel based on counsel's failure to raise an excessive-sentence argument on direct appeal and not a stand-alone argument his sentence was excessive. Thus, we disagree with the State defendant's argument was inappropriate for postconviction relief.

¶ 24 In addressing the prejudice prong of the *Strickland* test, we address whether defendant made a substantial showing a reasonable probability exists defendant's excessive-sentence claim would have been successful if raised on direct appeal. This court has explained appellate review of a defendant's excessive-sentence claim as follows:

> "A trial court's sentencing determination must be based on the particular circumstances of each case, including factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Generally, the trial court is in a better position than a court of review to determine an appropriate sentence based upon the

> particular facts and circumstances of each individual case. [Citation.] Thus, the trial court is the proper forum for the determination of a defendant's sentence, and the trial court's decisions in regard to sentencing are entitled to great deference and weight. [Citation.] Absent an abuse of discretion by the trial court, a sentence may not be altered upon review. [Citation.] If the sentence imposed is within the statutory range, it will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." (Internal quotation marks omitted.) *People v. Price*, 2011 IL App (4th) 100311, ¶ 36, 958 N.E.2d 341 (quoting *People v. Hensley*, 354 Ill. App. 3d 224, 234-35, 819 N.E.2d 1274, 1284 (2004)).

¶ 25 In this case, defendant was 43 years old and had an extensive criminal history and numerous prison sentences. Specifically, defendant had 5 burglary convictions for which he had served a 6-year prison term, a 3-year prison term, a 12-year prison term and concurrent 10 year-prison terms. Defendant had also served prison time for drug-related crimes. Moreover, he had two prior DUI convictions and three convictions for driving on a suspended or revoked license. In addition, defendant had a misdemeanor domestic battery conviction and several traffic offenses. His presentence report noted several instances in which he was unsuccessfully discharged from probation. Defendant was on mandatory supervised release when he committed the aggravated DUI. The offense was discovered when the police stopped defendant for driving 61 miles per hour in a 45 miles-per-hour zone. No car accident was involved, and no person or

property was damaged.

¶ 26 Defendant contends his 25-year sentence is excessive given the mitigating evidence showing his rehabilitative potential and the minimal harm caused by the circumstances of the offense. As to the mitigation evidence, defendant contends he presented significant mitigation evidence showing his rehabilitative potential and ongoing rehabilitation. He notes he had earned certificates for food service and restaurant education courses. Defendant had also completed drug treatment and had a job. Several people had testified to his rehabilitation. While the circuit court had to consider all of the testimony defendant offered in mitigation, it was not obligated to believe such testimony if other evidence undercuts its veracity. *People v. Bradney*, 170 Ill. App. 3d 839, 868, 525 N.E.2d 112, 131 (1988). Given defendant's extensive criminal history, unsuccessful probation terms, and the fact he committed this crime while on mandatory supervised release, the circuit court did not have to believe defendant's evidence he had changed his life around. In fact, the record indicates the court did not find defendant had rehabilitative potential. Additionally, we note "the existence of mitigating factors does not obligate the trial court to reduce a sentence from the maximum allowable." *People v. Williams*, 317 Ill. App. 3d 945, 955-56, 742 N.E.2d 774, 783 (2000).

¶ 27 Regarding the seriousness of the offense, defendant asserts the seriousness of the offense is the most important sentencing factor. See *People v. Weiser*, 2013 IL App (5th) 120055, ¶ 32, 993 N.E.2d 614. However, other cases have held " 'a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment, must be equally weighed.' " *People v. Hestand*, 362 Ill. App. 3d 272, 281, 838 N.E.2d 318, 326 (2005) (quoting *People v. Hernandez*, 319 Ill. App. 3d 520, 529, 745 N.E.2d 673, 681 (2001)); see also *People v. Hale*,

2012 IL App (4th) 100949, ¶ 34, 967 N.E.2d 476. The supreme court has yet to address the issue. Even considering the seriousness of the offense as the most important factor, the circuit court could have concluded the other factors, *i.e.*, defendant's criminal history, his lack of rehabilitative potential, the need to deter others, and the need to protect society, carried much greater weight than the seriousness of the offense. The record shows the circuit court noted the factors of defendant's criminal history, his lack of rehabilitative potential, the need to deter others, and the need to protect society in imposing its sentence. Additionally, defendant minimizes his crime by asserting he was only mildly speeding when the police stopped him. However, as the circuit court noted, defendant's actions exposed the general public to a risk of harm.

¶ 28 Additionally, defendant cites two cases where the defendants received lesser sentences than he did for aggravated DUI and the other defendants' actions resulted in the death of at least one person. See *Weiser*, 2013 IL App (5th) 120055; *People v. Winningham*, 391 Ill. App. 3d 476, 909 N.E.2d 363 (2009). However, "a defendant who has stood trial cannot properly compare his sentence with those imposed on persons who have pleaded guilty." *People v. Reckers*, 251 Ill. App. 3d 790, 796, 623 N.E.2d 811, 816 (1993). In both *Weiser*, 2013 IL App (5th) 120055, ¶ 4, and *Winningham*, 391 Ill. App. 3d at 477, 909 N.E.2d at 365, the defendants pleaded guilty to the aggravated DUI charge. Thus, defendant's comparison is improper.

¶ 29 Given the defendant's extensive criminal history, his lack of rehabilitative potential, the need to deter others from the same actions, and the need to protect the general public, it is not reasonably probable this court would have found on direct appeal the circuit court abused its discretion in sentencing defendant to 25 years in prison. Accordingly, defendant has failed to make a substantial showing of the prejudice prong of the *Strickland* test, and the

circuit court's dismissal of defendant's amended postconviction petition was proper.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the Champaign County circuit court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 32 Affirmed.