2019 IL App (1st) 161985-U

No. 1-16-1985

March 29, 2019

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 04 CR 29436
	)	
PIERRE WHITE,	)	Honorable
	)	Erica L. Reddick,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WALKER delivered the judgment of the court.
Justices Pierce and Griffin concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred in summarily dismissing defendant's postconviction petition where defendant's claim of ineffective assistance of trial counsel does not lack an arguable basis in law and fact.

¶ 2 Defendant Pierre White appeals from the order of the circuit court summarily dismissing his petition filed pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)). On appeal, defendant contends the circuit court erred because his petition adequately

alleged arguable claims of ineffective assistance of trial and appellate counsel. We reverse and remand.

¶ 3 Defendant was charged by indictment with, *inter alia*, first degree murder and armed robbery following the November 2004 fatal shooting of Karim Ally. Defendant initially entered a negotiated plea of guilty to first degree murder and was sentenced to 28 years in prison. The trial court denied defendant's subsequent motion to withdraw his plea. Finding defendant had been improperly admonished and sentenced to a term of imprisonment below the statutory minimum, we reversed and remanded so that defendant could withdraw his guilty plea and proceed to trial. *People v. White*¸ No. 1-07-2102 (2009) (unpublished order under Illinois Supreme Court Rule 23), aff'd, *People v. White*, 2011 IL 109616.

¶ 4 By leave of court on remand, defendant withdrew his plea and the State reinstated all charges. Following a jury trial, defendant was found guilty of first degree murder for personally discharging a firearm that caused death, and attempted armed robbery. The evidence at trial was that cabdriver Ally drove defendant and Hyzell "Hooper" Williamson to a housing complex, where Ally was subsequently found shot to death in the cab.[1] Shortly after hearing a gunshot that night, a witness saw defendant holding a gun. A security officer guarding the scene of the shooting subsequently detained defendant and recovered a handgun from him that was still warm. Forensic testing found gunshot residue on the right sleeve of defendant's jacket. Consistent with a statement he made while in custody, defendant testified he and Hooper took the cab to the housing complex and Hooper shot Ally.

[1] Williamson is referred to as Hooper throughout the record and in our prior order. We adhere to that use for consistency.

¶ 5 The court sentenced defendant to consecutive prison terms of 60 years for first degree murder and 15 years for attempted armed robbery, and imposed an additional 25-year enhancement because he personally discharged the firearm that proximately caused Ally's death. We affirmed on direct appeal. *People v. White*, 2015 IL App (1st) 123487-U.

¶ 6 On April 21, 2016, defendant filed the postconviction petition at issue here. The petition alleged, *inter alia*, that defendant was denied the effective assistance of trial counsel when counsel failed to have an expert test Hooper's clothes for GSR and failed to relay a plea offer from the court. Defendant alleged he "would have taken" the offer. The petition further alleged that the prosecution made improper comments and misstatements of evidence during closing arguments, and that appellate counsel was ineffective for failing to argue all these issues. On May 27, 2016, the circuit court dismissed defendant's petition, finding that it was frivolous and patently without merit. Defendant timely appealed.

¶ 7 Defendant contends that: (1) trial counsel was ineffective for failing to have Hooper's clothes tested for GSR; (2) trial counsel was ineffective for failing to relay a 35-year plea offer to defendant; and (3) appellate counsel was ineffective for failing to argue that the State committed misconduct during closing argument. We begin, and end, our analysis with defendant's second issue as we find it dispositive.

¶ 8 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) "provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); see also *People v. Begay*, 2018 IL App (1st) 150446, ¶ 27. Relevant here, at the initial stage of a

postconviction proceeding, the circuit court may, within 90 days, dismiss a petition as frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2016); see also *People v. Boykins*, 2017 IL 121365, ¶ 9. A petition is frivolous and patently without merit if the petition has no arguable basis in law or fact. *Hodges*, 234 Ill. 2d at 16. Such a petition is one that is based on an indisputably meritless legal theory or fanciful factual allegation. *Id.* The allegations in the petition must be taken as true and construed liberally. *People v. Allen*, 2015 IL 113135, ¶ 25. At the first stage of postconviction proceedings, a defendant need only present a limited amount of detail in the petition, setting forth the gist of a constitutional claim. *Hodges*, 234 Ill. 2d at 9. Where a petition states even one arguably meritorious claim, the entire petition is advanced to second stage review for further proceedings. See *People v. Romero*, 2015 IL App (1st) 140205, ¶ 27 (citing *People v. Rivera*, 198 Ill. 2d 364, 371 (2001)).

¶ 9 Claims of ineffective assistance of counsel are judged against the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Peterson*, 2017 IL 120331, ¶ 79. In order to meet the *Strickland* standard, a defendant must show that (1) counsel's performance fell below an objectively reasonable level of assistance and (2) defendant was prejudiced as a result, *i.e.*, that there is a reasonable probability that the outcome of the proceeding would have been different. *Peterson*, 2017 IL 120331, ¶ 79. However, at the first stage of postconviction proceedings, a petition 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." *Hodges*, 234 Ill. 2d at 17.

¶ 10 Defendant contends that his petition stated an arguable claim that trial counsel was ineffective for failing to relay a 35-year plea offer to defendant and defendant was prejudiced

thereby as he would have accepted the offer. The State responds that the record rebuts defendant's claim that he would have accepted a plea offer had it been communicated to him.

¶ 11 A defendant has the right to decide whether to plead guilty. *People v. Trujillo*, 2012 IL App (1st) 103212, ¶ 9 (citing *People v. Whitfield*, 40 Ill. 2d 308, 311 (1968)). Accordingly, an attorney's failure to relay a plea offer to a defendant may give rise to a constitutional claim regardless of whether the defendant subsequently received a fair trial. *Trujillo*, 2012 IL App (1st) 103212, ¶ 9 (citing *People v. Curry*, 178 Ill. 3d 509, 517 (1997)); see also *Lafler v. Cooper*, 566 U.S. 156, 166 (2012) ("Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.")

¶ 12 Under *Strickland*, however, a defendant must demonstrate both deficient performance and prejudice. *Peterson*, 2017 IL 120331, ¶ 79; see also *Hodges*, 234 Ill. 2d at 17 (in the context of first stage postconviction proceedings, the petition must demonstrate both arguable deficient performance and arguable prejudice). In the context of a failure to communicate a plea offer, the Supreme Court has held that:

> "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *Missouri v. Frye*, 566 U.S. 134, 147 (2012).

We find defendant's petition sufficiently alleged both arguable deficient performance and arguable prejudice therefrom.

¶ 13 Defendant alleged in his postconviction petition that trial counsel was deficient when she "failed to relay a plea offer from the judge." Defendant alleged that "[t]he judge in petitioner's trial made comments during sentencing that leads in the direction that she'd spoken to petitioner's trial lawyer to see if petitioner would just be re-admonished correct [*sic*] according to the supreme court ruling and take a plea of the minimum 35 years."

¶ 14 In support of his claim that a plea offer was made, defendant points to the following colloquy, which occurred during argument on defendant's posttrial motion:

> "THE COURT: Okay. I also want to spread of record that I had discussions with the Defense several times over the course of this case regarding the fact that the Defendant would be withdrawing the plea he was seeking just to plead guilty again and receive a proper admonishment. And in chambers I brought up the fact did he understand what he was doing when he was going forward with this trial and that he would be at risk of receiving a much greater sentence. The Defendant's statement to this Court was that he was innocent and he wanted to go forward with this trial.
>
> He had the opportunity to receive a re-admonishment before jury began regarding this case and receive the sentence that he had been given beforehand.
>
> MS. PIEMONTE [Defense Counsel]: I don't think he was ever offered the 28.
>
> THE COURT: Not by the State, no. But there was [*sic*] discussions by the Court at the bench that I had with the attorneys regarding the fact that was this going to be a situation where he was going [to] plead guilty again with proper admonishments because the

> Appellate Court determination was that improper admonishments were given with regard to the enhancement of the sentence, the firearm enhancement of 15 [*sic*] years, because the failure of the court to admonish him even though the Defendant wasn't given that enhanced sentence.
>
> MS. PIEMONTE: Right, and that would be a 35-year sentence.
>
> THE COURT: And that would be a 35-year sentence."

¶ 15 It is unclear from the judge's comments whether the judge spoke to defense counsel, defendant, or both regarding a possible plea offer, or even whether there was, in fact, a plea offer to defendant. Although the court's comments are subject to varying interpretations, at the first stage of a postconviction proceeding we must accept the allegations of the petition as true and liberally construe them in favor of defendant. See *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). Construing defendant's allegations liberally, as we must, we conclude the court's comments can be interpreted as defendant suggests: that the trial court had discussion with defense counsel regarding allowing defendant to plead guilty and to be sentenced to the minimum 35-year sentence.

¶ 16 Further, we find the petition sufficiently alleged that counsel failed to relay the alleged plea offer. Defendant's petition clearly alleged "petitioner's attorney never informed him of such an offer." Although defendant did not include this allegation in his affidavit, the affidavit did allege that "the facts stated in this petition are true." At the first stage of postconviction proceedings, we will not hold any potential evidentiary affidavit problems with the petition against defendant; instead such considerations are better considered during the second stage of proceedings after counsel has been appointed and has an opportunity to amend the petition. See

Allen, 2015 IL 113135, ¶ 35. In this case, where the record itself neither supports nor rebuts defendant's allegation that he was never informed of the plea offer, it is appropriate to remand the petition for further proceedings where credibility determinations can be made. See *Trujillo*, 2012 IL App (1st) 103212, ¶ 14 ("Whether or not counsel informed the defendant of the State's plea offer cannot be resolved at the first stage of these postconviction proceedings because it would require a credibility determination.") Accordingly, defendant adequately alleged that trial counsel failed to relay a plea offer, in derogation of his right to make decisions regarding whether to accept an offer and how to plead. See *Id.* ¶ 9. Defendant's petition therefore states an arguable claim of deficient performance.

¶ 17 Next, we consider whether defendant made an arguable claim of prejudice. Defendant's petition alleged that he would have taken a 35-year offer if it had been relayed to him by his attorney. At the first stage of postconviction proceedings, failure to relay an offer is a sufficient allegation of prejudice. See *People v. Barghouti*, 2013 IL App (1st) 112373, ¶ 18. Supreme court precedent suggests that "[t]his showing of prejudice must encompass more than a defendant's own subjective, self-serving testimony." (Internal quotation marks omitted.) *People v. Hale*, 2013 IL 113140, ¶ 18 (quoting *People v. Curry*, 178 Ill. 2d 509, 531 (1997)).

¶ 18 Nevertheless, the disparity between the sentence a defendant faced and a significantly shorter plea offer can be considered in support of a defendant's claim that he would have accepted a plea offer. *Hale*, 2013 IL 113140, ¶ 18. Here, defendant was ultimately sentenced to 100 years and was potentially subject to a term of life imprisonment. In contrast, the alleged plea offer was 35 years, the minimum possible sentence. Therefore, we conclude that defendant

adequately alleged arguable prejudice from his counsel's alleged failure to convey a plea offer sufficient to advance his petition to the second stage of postconviction proceedings.

¶ 19 The State argues that defendant's claim is rebutted by the record. It argues that the trial court's statements regarding possibly off-the-record discussions with the defense show that defendant rejected the 35-year offer. We disagree. As noted above, the court's recitation of these off-the-record discussions does not clearly show whether the 35-year offer was made directly to defendant or only to defense counsel. More importantly, to the extent these comments are at odds with defendant's version of events, this is a credibility determination that is inappropriate at this stage of proceedings. See *Trujillo*, 2012 IL App (1st) 103212, ¶ 14. Again, the actual record is silent on whether the plea offer was relayed to defendant. Accordingly, we reject the State's argument that the record rebuts defendant's claim that he would have accepted a plea offer had he been aware of it.

¶ 20 The State also argues that defendant's claim that he would have accepted the plea offer fails because he repeatedly expressed his opposition to defense counsel's agreement to continue the matter and demanded a speedy trial. The State concludes defendant's "belated, self-serving, and subjective post-conviction assertion that he would have accepted a plea offer does not prove that he would have accepted a plea offer in light of the record before this Court."

¶ 21 As the State points out, when the case was continued several times "by agreement," defendant repeatedly objected to his attorney's agreeing to continue the case. In 2011, he told the court, "I don't agree with this by agreement. I've been doing this too long, your honor, and it's about time for this to go and let's do it" and "I've been gone a total of almost eight years *** I'm ready for trial *** I don't agree with the by-agreement." In 2012, he objected during multiple

hearings, telling the court he did not agree "with by agreement" and, on one occasion, requesting leave to file a *pro se* motion to dismiss based on violation of his right to a speedy trial. When the trial court denied him leave to file a *pro se* motion while represented by counsel, defendant interjected "this is some bulls***."

¶ 22 However, defendant is not required to prove that he would have accepted a plea offer. See *People v. Tate*, 2012 IL 112214, ¶ 19. Rather, he need only allege it is "arguable" that he was prejudiced, *i.e.*, it is arguable that he would have accepted the offer. *Hodges*, 234 Ill. 2d at 17. Further, unlike in *People v. Hale*, 2013 IL 113140, relied on by the State, there has been no evidentiary hearing or finding that defendant's allegation that he would have accepted a plea deal was incredible. Credibility determinations are inappropriate until the third stage of a postconviction proceeding, which, unlike the first-stage proceeding at issue here, does involve an evidentiary hearing. See *People v. Domagala*, 2013 IL 113688, ¶ 35 (citing *People v. Coleman*, 183 Ill. 2d 366, 385 (1998)). Therefore, at this stage of the proceedings, we must accept as true defendant's allegation that he would have taken a plea deal had it been communicated to him (see *Barghouti*, 2013 IL App (1st) 112373, ¶ 16), and we need not consider what effect his prior actions in pushing for a speedy trial may have on the credibility of his claim. Accordingly, we reject the State's argument that the record rebuts defendant's claim of prejudice.

¶ 23 Therefore, defendant's postconviction petition alleged an arguable claim of ineffective assistance of counsel. Accordingly, we reverse the judgment of the circuit court and remand for further proceedings consistent with this order. We need not address defendant's other claims of error because, at the first stage of postconviction proceedings, summary partial dismissals are not permitted under the Post-Conviction Hearing Act. See *Rivera*, 198 Ill. 2d at 374.

¶ 24 Reversed and remanded.