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2019 IL App (3d) 160082-U

Order filed April 18, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-16-0082 Circuit No. 06-CF-925
BREON A. DAVIS,)	Honorable Albert L. Purham Jr., Judge, Presiding.
Defendant-Appellant.)	

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's second-stage postconviction petition made a substantial showing of ineffective assistance of trial counsel.

¶ 2 Defendant, Breon A. Davis, appeals from the second-stage dismissal of his postconviction petition. Defendant argues the court erred because his petition made a substantial showing of ineffective assistance of counsel. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant, and codefendants John Bell, and Deandrew Jackson, with two counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2006)). The charges alleged that defendants had shot Taurus Baugh with a handgun, and Baugh had died as a result of the gunshot wound. Before jury selection, the circuit court admonished defendant that the first degree murder charges carried a potential sentence of 20 to 60 years' imprisonment plus an additional 20 years if the jury finds that defendant discharged a firearm during the commission of the murder.

¶ 5 A jury found defendant guilty of first degree murder and acquitted Bell and Jackson. The jury also found that defendant had personally discharged a firearm in committing the murder. The court sentenced defendant to 30 years' imprisonment plus a consecutive 20-year term due to defendant's use of a firearm for a total sentence of 50 years' imprisonment.

¶ 6 On direct appeal, we found the court did not err when it instructed the jury on the principles of accountability, and the court did not abuse its discretion when it granted the State's motion to bar a witness' testimony. *People v. Davis*, No. 3-07-0093 (2009) (unpublished order under Illinois Supreme Court Rule 23).

¶ 7 Following the resolution of defendant's direct appeal, defendant filed a *pro se* postconviction petition. The petition alleged, in relevant part, that defendant had received ineffective assistance of counsel. The court advanced the petition to the second stage and appointed counsel to represent defendant. Appointed counsel filed a motion to dismiss defendant's petition and withdraw as counsel. The court granted counsel's motion.

¶ 8 On appeal, we found that postconviction counsel had acted unreasonably when he moved to dismiss the petition and withdraw as counsel. *People v. Davis*, No. 3-12-0858 (2014)

(unpublished minute order). We reversed the court's dismissal of the petition and remanded the cause for further postconviction proceedings. *Id.*

¶ 9 On remand, the public defender's office assigned a new attorney to defendant's case. This attorney filed an amended postconviction petition. The amended petition alleged that,

“78. The Defendant contends that he received ineffective assistance of defense trial counsel in relation to the conveyance of the plea offer from defense trial counsel to the Defendant and in conversations between said counsel and Defendant relative to the plea offer and the potential sentence upon trial.

79. As to this basis for relief, the Defendant contends per his attached affidavit that he received ineffective assistance of trial counsel at the time of plea discussions, in the following respects, either individually and/or jointly combined:

- a. Defendant's trial Counsel did not advise the Defendant about the sentencing enhancement for the fire arm [*sic*] add on;
- b. Defendant's trial Counsel did not advise the Defendant about the principles of accountability; and
- c. Defendant would have taken the plea, if he had been fully informed as to the sentencing enhancement for the fire arm [*sic*] and the principles of accountability.

80. The factual basis for these assertions do not appear in the record. However, attached to this present pleading is the affidavit of the Defendant for which paragraphs 3 through 10 specifically address the issue of plea negotiations and/or defense trial counsel's erroneous advice regarding the same.”

Defendant provided the following statements in his supporting affidavit.

“4. I was never given any written notice by the State before trial that the State would seek an increased sentence based on the sentencing enhancement provisions relating to firearms set forth in 730 ILCS 5/5-8-1(a)(1)(d)(i), (ii) and/or (iii). I also never received any such written notification from the Clerk, my trial attorney nor the Court.

5. My attorney did not explain the enhancement of the sentence for using a gun. I did not know that there would be a sentencing enhancement if it was found that a firearm was used.

6. My attorney did not explain the theory of accountability to me. I did not know that I could be responsible for the conduct of others. If I did, I would have severed my trial from my co-Defendants because I was not with my co-Defendants.

7. Prior to trial, I was presented with a plea offer of a blind plea to Aggravated Discharge of a Firearm, a class X offense, facing a sentence of 6 to 30 years in the Illinois Department of Corrections. There would have been no enhancement. I rejected the plea offer because my attorney *** told me that if the State could not prove that I (myself directly) was the one that shot Mr. Baugh then I could not be found guilty of anything. I rejected this plea offer because I did not know about accountability and [counsel] did not explain accountability to me. [Counsel] also did not explain the firearm enhancement to me.

8. If I had known the State could rely on principles of accountability I would have accepted the plea offer.

9. If I had known about the sentencing enhancement for the use of a firearm, I would have accepted the plea offer.”

¶ 10 The court granted the State’s motion to dismiss the amended postconviction petition. Defendant appeals.

¶ 11 II. ANALYSIS

¶ 12 Defendant argues the court erred in granting the State’s motion to dismiss because his petition made a substantial showing of ineffective assistance of counsel. Specifically, at the time of the State’s plea offer, (1) counsel failed to advise defendant that he would be subject to a 20-year firearm enhancement if he were convicted of first degree murder, (2) counsel unreasonably misrepresented that the State would be unable to obtain a murder conviction based on accountability, and (3) defendant made a substantial showing that he was prejudiced by counsel’s deficient performance. We find defendant’s amended petition made a substantial showing of ineffective assistance based on counsel’s alleged failure to advise defendant of the potential sentence enhancement and the accountability principles at the time that the State made its plea offer.

¶ 13 “The second stage of postconviction review tests the legal sufficiency of the petition.” *People v. Domagala*, 2013 IL 113688, ¶ 35. At the second stage, all well-pled allegations of a constitutional violation that are not positively rebutted by the record are taken as true. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). The second stage involves no fact-finding or credibility determinations. *Id.* Any claims that could have been raised in defendant’s direct appeal are procedurally defaulted. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). To advance to the third stage of postconviction review, the petition must make a substantial showing of a constitutional

violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). We review *de novo* the second-stage dismissal of a postconviction petition. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 14 In the context of an ineffective assistance of counsel claim, a postconviction petition must make a substantial showing that (1) counsel’s performance was so deficient that it fell below an objective standard of reasonableness, and (2) there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Domagala*, 2013 IL 113688, ¶ 36; *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 15 A. Forfeiture

¶ 16 We first address the State’s argument that defendant has forfeited review of his claims of ineffective assistance of counsel because defendant could have raised these issues in his direct appeal. Defendant’s ineffective assistance claims are reliant on matters outside of the record. Defendant’s claims, therefore, are not subject to procedural default because they are better resolved on collateral review where both sides have an opportunity to present evidence and develop the record. See *Ligon*, 239 Ill. 2d at 105.

¶ 17 B. Deficient Performance

¶ 18 Defendant argues his amended postconviction petition substantially showed that counsel provided deficient performance where counsel failed to advise defendant, at the time of the plea offer, of (1) the firearm sentence enhancement applicable to the first degree murder charge, and (2) accountability principles.

¶ 19 “A criminal defendant has the constitutional right to be *reasonably* informed with respect to the direct consequences of accepting or rejecting a plea offer.” (Emphasis in original.) *People v. Curry*, 178 Ill. 2d 509, 528 (1997), abrogated on other grounds by *People v. Hale*, 2013 IL 113140. Counsel has an obligation to inform his client about the minimum and maximum

sentences that can be imposed for the charged offenses. *Id.* This information is necessary for defendant to make an informed decision of whether to accept or reject a plea offer. See *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992) (“Knowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty.”); see also *People v. Correa*, 108 Ill. 2d 541, 549 (1985) (voluntariness of guilty plea depends upon whether defendant had effective assistance of counsel).

¶ 20 According to the petition and defendant’s affidavit, the State offered to dismiss defendant’s pending first degree murder charge in exchange for defendant’s agreement to plead guilty to an unenhanced charge of aggravated discharge of a firearm. If defendant accepted the State’s offer, he would have been sentenced to a term of 6 to 30 years’ imprisonment. 730 ILCS 5/5-8-1(a)(3) (West 2006). In comparison, defendant’s murder charge carried a potential sentence of 20 to 60 years’ imprisonment (*id.* § 5-8-1(a)(1)(a)) plus a 20-year firearm enhancement (*id.* § 5-8-1(a)(1)(d)(ii)). Without counsel’s discussion of the firearm enhancement, defendant was unaware of the maximum aggregate sentence of 80 years’ imprisonment for a first degree murder conviction, and the 50-year difference between the maximum murder sentence and maximum aggravated discharge of a firearm sentence. Without this information of a direct consequence of proceeding to trial on the first degree murder charge, defendant could not make an informed decision on whether to accept or reject the State’s plea offer. Therefore, taking these allegations as true, the amended postconviction petition made a substantial showing that counsel provided deficient performance for failing to advise defendant of the firearm sentence enhancement.

¶ 21 We next review defendant’s allegation that counsel provided ineffective assistance for failing to advise defendant of the principles of accountability at the time of the State’s plea offer.

According to defendant's affidavit, counsel only told defendant that the State could not prove that defendant had personally shot the victim and did not discuss the potential for a conviction based on accountability. Again, taking defendant's allegation as true, counsel's failure to discuss the application of accountability principles renders defendant's consideration of the State's plea offer incomplete. Without this information, defendant could not fully assess the strength of his case and compare his case to the consequences of accepting the State's plea offer and admitting guilt of a lesser offense. Therefore, the petition has made a substantial showing of deficient performance due to trial counsel's failure to discuss the principles of accountability at the time of the State's plea offer.

¶ 22 C. Prejudice

¶ 23 Defendant argues his petition made a substantial showing that he was prejudiced by trial counsel's deficient performance because defendant would have accepted the State's plea offer if trial counsel had informed him of the firearm sentence enhancement and principles of accountability.

¶ 24 To show prejudice in the context of a rejected plea offer, defendant must demonstrate a reasonable probability that he would have accepted the plea offer if he had been afforded the effective assistance of counsel, and there was a reasonable probability that the court would have accepted the plea agreement. *Hale*, 2013 IL 113140, ¶ 21. The difference between the sentence a defendant faced and a shorter plea offer can provide support for a defendant's claim of prejudice. *Id.* ¶ 18.

¶ 25 The amended postconviction petition and defendant's affidavit alleged that defendant would have accepted the State's open plea offer if counsel had fully informed defendant as to the firearm sentence enhancement and principles of accountability. The plea offer would have

subjected defendant to a maximum sentence of 30 years' imprisonment instead of a maximum sentence of 80 years' imprisonment following a conviction for first degree murder and application of the firearm enhancement. *Supra* ¶ 20. The 50-year difference between these maximum sentences supports defendant's claim that he would have accepted the plea agreement, and therefore, made a substantial showing of prejudice. See *Hale*, 2013 IL 113140, ¶ 18. Additionally, advice on the potential for a conviction based on accountability would have caused defendant to question his potential for success at trial and enhance the perceived benefit of accepting the plea offer. Finally, nothing in the record indicates that the court would have rejected an open plea to one count of aggravated discharge of a firearm and dismissal of the first degree murder charge. Therefore, we find that defendant's petition made a substantial showing of prejudice.

¶ 26 The State argues that the record rebuts defendant's allegations of ineffective assistance of counsel, and therefore, the petition did not make a substantial showing of prejudice, because: (1) the indictment notified defendant of the firearm enhancement, (2) the indictment notified defendant of a potential conviction based on accountability, and (3) the court admonished defendant of the applicable sentence range before trial. The State's arguments tend to conflate positive record rebuttals that require dismissal with lack of express record support. The collateral nature of postconviction proceedings is designed to resolve unsupported constitutional issues through additional record development. See *Ligon*, 239 Ill. 2d at 105. For example, the State correctly points out that the indictment notified defendant that the charge included the use of a firearm. However, the indictment does not, by itself, establish that defendant knew the length of the firearm enhancement when he considered the State's plea offer. Similarly, the inclusion of multiple codefendants in the indictment does not inform defendant of the legal

principal of accountability such that he could fully understand the possible ways the State could prove his guilt. Finally, the court's pretrial sentence admonishment, at best, shows that defendant had notice of the sentence range immediately before trial. It fails to indicate whether defendant could then avail himself of the State's plea offer, and it cannot retroactively inform defendant's decision to accept or reject an earlier plea offer. While each of the State's arguments cites to a lack of record support for defendant's claims, they fail to positively rebut defendant's claims.

¶ 27 Overall, defendant's ineffective assistance claims are dependent on defendant's knowledge of the sentence consequences and theories of the case at the time of the State's plea offer. This information is not part of the present record, and because the amended petition made a substantial showing of ineffective assistance of counsel, the claims are ripe for a third-stage evidentiary hearing.

¶ 28 III. CONCLUSION

¶ 29 The judgment of the circuit court of Peoria County is reversed and remanded.

¶ 30 Reversed and remanded.