2019 IL App (4th) 170392-U

NO. 4-17-0392

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 1, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBERT C. DEAR, Defendant-Appellant.	))))))))	Appeal from the Circuit Court of Woodford County No. 15CF71 Honorable Charles M. Feeney III, Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, granting the Office of the State Appellate Defender's motion to withdraw as postconviction counsel.

¶ 2 In May 2015, the State charged defendant, Robert C. Dear, by information with single counts of aggravated domestic battery and domestic battery based on having prior convictions for domestic battery. In July 2015, defendant pleaded guilty to aggravated domestic battery. The trial court sentenced him to 42 months' imprisonment. The court also appointed the Office of the State Appellate Defender (OSAD) to represent defendant on appeal.

¶ 3 On appeal, OSAD moves to withdraw its representation of defendant, citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987), contending any appeal in this cause would be frivolous. We grant OSAD's motion and affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In May 2015, defendant was charged by information with one count of aggravated domestic battery (count I) (720 ILCS 5/12-3.3(a-5) (West 2014)), alleging defendant knowingly strangled a family or household member, and one count of domestic battery, subject to an enhancement due to defendant's prior conviction for domestic battery (count II) (720 ILCS 5/12-3.2(a)(2), (c) (West 2014)), alleging defendant knowingly made physical contact of an insulting or provoking nature with a family or household member by grabbing her around the neck, and he had been previously convicted of domestic battery in May 2005, June 2007, and March 2014. In exchange for defendant's plea of guilty to aggravated domestic battery, the State dropped the domestic battery charge and agreed to a requested sentence of 42 months, served at 50%.

¶ 6 At the plea hearing, the State recognized the mistake regarding defendant's eligibility for good-time credit and informed the trial court that defendant's counsel needed to "advise his client of truth-in-sentencing." See 730 ILCS 5/3-6-3(a)(2)(vii) (West 2014) ("[A] prisoner serving a sentence for aggravated domestic battery shall receive no more than 4.5 days of sentence credit for each month of his or her sentence ***."). The court granted a brief recess for defendant and his attorney to confer. When the parties went back on the record, the State said the parties had reached an agreement of 42 months, served at 85%. Defendant's counsel stated the recess was needed due to some confusion over "the day-for-day versus the 85 percent, and that's what we clarified." The court asked defendant, "[I]s that your understanding of the agreement?" Defendant said, "Yes, sir." The court asked, "Is the making of this plea agreement what you want to do?" Defendant said, "It is other than the 85 percent. I was told 50 percent." When the judge sought to clarify, defendant cut him off, saying, "Right. I do," apparently in response to the court's inquiry about whether he wanted to persist in his plea. The court went on to say, "Nobody here can affect what the law is. The law is what it is, right?" Defendant agreed.

The court sentenced defendant to 42 months' imprisonment in the Illinois Department of Corrections, served at 85%, followed by 4 years of mandatory supervised release.

¶ 7 Defendant filed a postconviction petition, alleging he did not seek a new trial, but his counsel was ineffective for not telling him he was to serve his sentence at 85% and his mittimus should be corrected to serve at 50%. The trial court dismissed the petition as frivolous and patently without merit as defendant could not possibly prove the prejudice prong of an ineffective assistance of counsel claim.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 OSAD has filed a motion to withdraw its representation of defendant and a supporting memorandum of law. The record shows proof of service on defendant. This court granted defendant leave to file a response by January 10, 2019. He has not done so. Based on our examination of the record, we conclude, as has OSAD, an appeal in this cause would be without arguable merit.

¶ 11 We note initially the relief sought by defendant is not possible, as he is statutorily mandated to serve no less than 85% of his sentence. See 730 ILCS 5/3-6-3(a)(2)(vii) (West 2014). Moreover, a defendant may not enter into a negotiated plea agreement and then seek to keep part of the bargain by only challenging his sentence. *People v. Evans*, 174 Ill. 2d 320, 327-28, 673 N.E.2d 244, 247-48 (1996). Here, defendant did not seek to withdraw his plea and explicitly stated in his letter and petition he was not asking for a new trial. Regardless of whether he was willing to ask for a new trial, defendant would still not be entitled to one.

¶ 12 To survive dismissal at the first stage, a postconviction petition "must only present 'the gist of a constitutional claim.' " *People v. Boclair*, 202 Ill. 2d 89, 99, 789 N.E.2d

734, 741 (2002) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996)). If the petition is "frivolous" or "patently without merit," the trial court "shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision." 725 ILCS 5/122-2.1(a)(2) (West 2016). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16, 912 N.E.2d 1204, 1212 (2009).

¶ 13 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Henderson*, 2013 IL 114040, ¶ 11, 989 N.E.2d 192. To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 687). " 'Effective assistance of counsel refers to competent, not perfect representation.' " *Evans*, 209 Ill. 2d at 220 (quoting *People v. Stewart*, 104 Ill. 2d 463, 491-92, 473 N.E.2d 1227, 1240 (1984)). "Mistakes in trial strategy or tactics do not necessarily render counsel's representation defective." *People v. Thomas*, 2017 IL App (4th) 150815, ¶ 10, 93 N.E.3d 664.

¶ 14 "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Lee v. United States*, 582 U.S.__, 137 S. Ct. 1958, 1967 (2017). "Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

¶ 15 The allegation he was unaware of being sentenced to serve the 42 months at 85% because his lawyer did not so apprise him is a "fanciful factual allegation." See *Hodges*, 234 Ill. 2d at 16. At the outset of the plea hearing, the State informed the trial court the parties needed a recess so defense counsel could confer with his client. After the recess, defense counsel returned to the record, stating the recess was taken specifically to allow him to clear up confusion over defendant serving "the day-for-day versus the 85 percent." The court then asked if defendant understood that any sentence he would serve would have to be at 85%, and he said, "Yes, sir." While defendant clearly was not thrilled about serving his sentence at 85% versus day-for-day and his attorney could have informed him earlier, defendant can hardly allege he was unaware he was going to serve 85% of his sentence because of his attorney.

¶ 16 Assuming *arguendo* he could make a claim of ineffective assistance of counsel, it still lacks merit. To establish the second prong of *Strickland*, "[a] defendant establishes prejudice by showing that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different." *People v. Houston*, 229 Ill. 2d 1, 4, 890 N.E.2d 424, 426 (2008). A "reasonable probability" has been defined as a probability that would be sufficient to undermine confidence in the outcome of the trial. *Houston*, 229 Ill. 2d at 4. "A defendant must satisfy both prongs of the *Strickland* test and a failure to satisfy any one of the prongs precludes a finding of ineffectiveness." *People v. Simpson*, 2015 IL 116512, ¶ 35, 25 N.E.3d 601.

¶ 17 In *People v. Valdez*, 2016 IL 119860, ¶ 31, 67 N.E.3d 233, our supreme court noted a "circuit court can cure prejudice to a defendant resulting from [trial] counsel's incorrect advice." Where the record reflected the trial court properly admonished the defendant regarding

the immigration consequences of his plea at the plea hearing, the defendant could not complain once he had proceeded to plead guilty after being so advised. *Valdez,* 2016 IL 119860, ¶ 32.

¶ 18 Here, the trial court informed defendant he would serve 42 months' imprisonment at 85%, so despite any alleged error by trial counsel, of which we find none, he was still apprised of the sentence. Actual time to be served is, in reality, a collateral consequence for purposes of any claim of ineffective assistance of counsel. In *Thomas*, 2017 IL App (4th) 150815, ¶ 16, this court stated "counsel's failure to inform the defendant of a collateral consequence of his guilty plea, *i.e.*, actual time served, will not normally provide a basis for relief." " '[A] trial court's obligation to ensure that a defendant understands the direct consequences of his or her plea encompasses only those consequences of the sentence that the trial judge can impose.' " (Emphasis omitted.) *People v. Manning*, 227 Ill. 2d 403, 415, 883 N.E.2d 492, 500-01 (2008) (quoting *People v. Williams*, 188 Ill. 2d 365, 372, 721 N.E.2d 539, 544 (1999)). As the trial court noted when discussing good-time credit, "Nobody here can affect what the law is. The law is what it is, right?" So even if defendant would have made an argument that he was not adequately informed by the trial court, the argument would still fail. Therefore, defendant has suffered no prejudice, and his claim lacks legal merit. Thus, the court was justified in dismissing the petition at the first stage.

¶ 19 Accordingly, we find an appeal in this cause would be without arguable merit.

¶ 20 III. CONCLUSION

¶ 21 We grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 22 Affirmed.