2019 IL App (4th) 180094-U

NO. 4-18-0094

FILED
December 10, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRIAN K. RAMSEY, Defendant-Appellant.	)	Appeal from the Circuit Court of Macon County No. 15CF571 Honorable Jeffrey S. Geisler, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Turner and Cavanagh 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, Brian K. Ramsey, with three counts of burglary (720 ILCS 5/19-1(a) (West 2014)), one count of theft by deception with a prior theft conviction (720 ILCS 5/16-1(a)(2), (b)(2) (West 2014)), and one count of theft of services (720 ILCS 5/16-3(a) (West 2014)).

¶ 3 Defendant pled guilty to one count of burglary, and the remaining charges were dismissed pursuant to a plea agreement. The charge he pled guilty to was a Class 2 felony that was eligible for Class X sentencing. The trial court sentenced defendant to 20 years in prison.

¶ 4 In September 2017, defendant filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). Defendant

claimed (1) trial counsel was ineffective for not recommending defendant for a drug treatment program, (2) trial counsel was ineffective because he failed to inform the court that the State had previously offered a 15-year sentence in exchange for a plea of guilty, (3) trial counsel was ineffective because he told defendant he could receive a sentence greater than 20 years, (4) defendant did not knowingly or voluntarily plead guilty, and (5) defendant's sentence is excessive and serves no rehabilitative purpose.

¶ 5 Later in September 2017, the trial court entered an order dismissing defendant's postconviction petition as patently frivolous and without merit. The court found that (1) defendant was not eligible for drug treatment for his sentence, (2) defendant's plea was knowing and voluntary, (3) nothing in the record indicated ineffective assistance of counsel, and (4) defendant's sentence was proper.

¶ 6 Defendant appealed and the Office of the State Appellate Defender (OSAD) was appointed to represent him on appeal. OSAD moves to withdraw its representation of defendant, contending that any appeal in this cause would be frivolous.

¶ 7 We grant counsel's motion and affirm the trial court's judgment.

¶ 8 I. BACKGROUND

¶ 9 In May 2015, the State charged defendant, Brian Ramsey, with three counts of burglary (720 ILCS 5/19-1(a) (West 2014)), one count of theft by deception with a prior theft conviction (720 ILCS 5/16-1(a)(1)(A) (West 2014)), and one count of theft of services. (720 ILCS 5/16-3(a) (West 2014)).

¶ 10 In August 2015, defendant pled guilty to one count of burglary and the remaining charges were dismissed pursuant to a plea agreement. The factual basis for the charge was that in April 2015, defendant was dropped off at a Walmart where he selected a box grill and took it out

of the store without paying. He was approached at high speed by the vehicle that dropped him off, and they immediately left. Two similar incidents later occurred on separate occasions.

¶ 11 Defendant pled guilty to burglary, a Class 2 felony that was eligible for Class X sentencing. At the plea hearing, the trial court informed defendant that this meant the charge carried a range of 6 to 30 years in prison and was not probationable. Defendant said he understood the sentencing range. The court confirmed with defendant that this would be a fully negotiated plea resulting in a sentence of 20 years in the Illinois Department of Corrections, and defendant agreed.

¶ 12 Defendant said he understood all of the rights that he would be giving up by pleading guilty. Defendant signed a jury waiver. The trial court asked defendant if he was pleading guilty voluntarily, and defendant said yes. The court asked defendant if any force or threats had been used against him to get him to plead guilty, and defendant said no. The court asked defendant if any promises were made to him other than the plea terms that were discussed with the court, and defendant said no. The court asked defendant if he would agree that the court did not initiate the plea negotiations, and defendant said yes. The judge asked defendant if his attorney had answered all of his questions to his satisfaction, and defendant said yes.

¶ 13 Following the parties' agreement, the trial court sentenced defendant to 20 years in prison. The court informed defendant of his appellate rights, and defendant said he understood them. The only question that defendant raised throughout the entire hearing was whether his bond money would be returned to the person who posted the bond. Defendant never filed a motion to withdraw his guilty plea and did not appeal his conviction.

¶ 14 In September 2017, defendant filed a postconviction petition. Defendant claimed that (1) trial counsel was ineffective for not recommending defendant for a drug treatment

program, (2) trial counsel was ineffective because he failed to inform the court that the State had previously offered a 15-year sentence in exchange for a plea of guilty, (3) trial counsel was ineffective because he told defendant he could receive a sentence greater than 20 years, (4) defendant did not knowingly or voluntarily plead guilty, and (5) defendant's sentence is excessive and serves no rehabilitative purpose.

¶ 15 Later in September 2017, the trial court entered an order dismissing defendant's postconviction petition. The court found that (1) defendant was not eligible for drug treatment for his sentence, (2) defendant's plea was knowing and voluntary, (3) nothing in the record indicated ineffective assistance of counsel, and (4) defendant's sentence was proper.

¶ 16 Defendant appealed and OSAD was appointed to represent him on appeal. OSAD moves to withdraw its representation of defendant, contending that any appeal in this cause would be frivolous. OSAD states in its motion that it considered the following issues:

> "(A) Whether it is arguable that any procedural error warrants reversal.
>
> (B) Whether it is arguable that the postconviction petition states the gist of a claim of ineffective assistance of counsel.
>
> (C) Whether it is arguable that the postconviction claim of excessive sentence *** states the gist of a constitutional claim.
>
> (D) Whether it is arguable that the trial court's refusal to grant defendant a drug evaluation was a violation of his right to due process."

¶ 17 OSAD contends that any appeal would be frivolous, and therefore moves to withdraw. Defendant *pro se* filed two responses in which he indicates the reasons he believes his appeal is not frivolous.

¶ 18 II. ANALYSIS

¶ 19 Defendant appeals, claiming his postconviction petition was erroneously dismissed because (1) trial counsel was ineffective for not recommending defendant for a drug treatment program, (2) trial counsel was ineffective because he failed to inform the court that the State had previously offered a 15-year sentence in exchange for a plea of guilty, (3) trial counsel was ineffective because he told defendant he could receive a sentence greater than 20 years, (4) defendant did not knowingly or voluntarily plead guilty, and (5) defendant's sentence is excessive and serves no rehabilitative purpose.

¶ 20 We disagree. We grant counsel's motion to withdraw and affirm the judgment of the trial court.

¶ 21 A. The Standard of Review and *Anders*

¶ 22 The United States Supreme Court has set forth the procedures to be followed for an appellate attorney to withdraw as counsel. *Anders v. California*, 386 U.S. 738 (1967); *People v. Mares*, 2018 IL App (2d) 150565, ¶ 6, 98 N.E.3d 554. Counsel's request to withdraw must be accompanied by a brief referring to anything in the record that could support an appeal. *People v. Meeks*, 2016 IL App (2d) 140509, ¶ 10, 51 N.E.3d 1109. After identifying issues that counsel could conceivably raise, counsel must then explain why these potential arguments are without merit. *Id.* A copy of this motion must be provided to the client, who will then be given an opportunity to respond to the motion to withdraw. *Id.* The appellate court will then review the record to determine whether the available arguments are wholly without merit. *Id.*

¶ 23 The Act provides a criminal defendant the means to redress substantial violations of his constitutional rights that occurred in his original trial or sentencing. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 23, 38 N.E.3d 1256; 725 ILCS 5/122-1 (West 2016). The Act con-

tains a three-stage procedure for relief. *People v. Allen*, 2015 IL 113135, ¶ 21, 32 N.E.3d 615; 725 ILCS 5/122-2.1 (West 2016). At the first stage, the trial court shall, within the first 90 days after the petition is filed and docketed, dismiss a petition summarily if the court determines it is "frivolous or is patently without merit ***." 725 ILCS 5/122-2.1(a)(2) (West 2016).

¶ 24 A petition may be dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. *Allen*, 2015 IL 113135, ¶ 25. Stated another way, "[a] post-conviction petition is considered frivolous or patently without merit only if the allegations in the petition, taken as true and liberally construed, fail to present the 'gist of a constitutional claim.' " *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996)). An appellate court reviews the first-stage dismissal of a postconviction petition *de novo*. *People v. Couch*, 2012 IL App (4th) 100234, ¶ 13, 970 N.E.2d 1270.

¶ 25 B. Ineffective Assistance of Counsel Claims

¶ 26 Defendant makes three claims related to ineffective assistance of counsel in his *pro se* petition. He claims that trial counsel was ineffective for (1) not arguing that defendant should receive drug treatment as a condition of probation, (2) not informing the court of a prior favorable plea offer from the State, and (3) telling defendant that he could have received a sentence greater than 20 years.

¶ 27 In its motion, OSAD contends that defendant's claims are meritless because (1) defendant was not eligible for drug treatment as a condition of probation, (2) there was no reason to inform the court of a previous offer, and (3) it was proper to tell defendant the possible sentencing range in its entirety. We agree and address each argument in turn.

¶ 28 1. *The Ineffective Assistance of Counsel Standard*

¶ 29 All defendants enjoy the constitutional right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Domagala*, 2013 IL 113688, ¶ 36, 987 N.E.2d 767.

¶ 30 To show deficient performance, it is not sufficient that a defendant show that counsel's representation was imperfect, as *Strickland* guarantees only a reasonably competent attorney. *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Rather, a defendant must show that the representation undermined the proper functioning of the adversarial process to the extent that the defendant was denied a fair trial. *Id.* (citing *Strickland*, 466 U.S. at 686).

¶ 31 To show prejudice, defendant must demonstrate "that 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 (quoting *Strickland*, 466 U.S. at 694). "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 112. "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.

¶ 32 2. *Consideration of Defendant for Drug Treatment*

¶ 33 Defendant first claims that trial counsel provided ineffective assistance because counsel did not argue that the trial court should consider defendant for drug treatment. Appellate counsel in its brief notes that because defendant was subject to Class X sentencing he was ineligible for a drug treatment program. We agree with appellate counsel.

¶ 34 a. The Applicable Law

¶ 35 Section 40-10 of the Substance Use Disorder Act explains that "[i]f a court has reason to believe that an individual who is charged with or convicted of a crime suffers from a substance use disorder" then that individual may be sentenced to probation with treatment as a condition of that probation. 20 ILCS 301/40-10 (West 2014). Section 40-5 of that same act explains how a person generally may qualify for this probation. *Id.* § 40-5. However, section 5-4.5-95(b) of the Unified Code of Corrections specifically states that "[a] person sentenced as a Class X offender under this subsection (b) is not eligible to apply for treatment as a condition of probation as provided by Section 40-10 of the Alcoholism and Other Drug Abuse and Dependency Act (20 ILCS 301/40-10)." 730 ILCS 5/5-4.5-95(b) (West 2014).

¶ 36 b. The Inapplicable Law

¶ 37 Defendant cites *People v. Meeks*, 236 Ill. App. 3d 193, 603 N.E.2d 757 (1992), in support of his argument. While at first glance this case may appear to be helpful, it is not. In 1992, when *Meeks* was decided, the laws were quite different than they are today. *Meeks* addresses a person sentenced under Class X guidelines pursuant to Ill. Rev. Stat. 1989, ch. 38, ¶ 1005-5-3(c)(8). *Meeks* does not address the issue in this case because the law which decides defendant's eligibility for "Treatment Alternatives for Safe Communities" (TASC) probation did not come into effect until 2009, long after *Meeks* was decided. See Pub. Act 95-1052 (eff. July 1, 2009) (adding 730 ILCS 5/5-4.5-95(b)). Therefore, defendant's cited authority is outdated and inapplicable.

¶ 38 c. This Case

¶ 39 Trial counsel was correct when he did not argue for drug treatment as a condition of probation. Defendant was not eligible for that kind of sentence, and, therefore, trial counsel

would have been wrong if he had argued for the treatment. A claim of ineffective assistance of counsel requires that there be deficient performance. Because trial counsel correctly did not argue for an illegal sentence, there is no possible basis for an ineffective assistance of counsel claim.

¶ 40 3. *Failure to Inform Court of a Prior Plea Offer*

¶ 41 Second, defendant argues that he received ineffective assistance because trial counsel did not inform the court of a prior favorable plea offer. OSAD argues that defendant's argument lacks any basis in the law and that failure to notify the trial court of a prior plea offer is not ineffective. We agree with OSAD.

¶ 42 Defendant provides no law, and we have found none, that indicates that failing to tell a court about plea negotiations is an error. Defendant does not explain how trial counsel not telling the court this information prejudiced him, nor does he explain what he thinks telling the court this information would have done to benefit him. Part of asserting a cognizable claim is explaining a factual and legal basis defendant believes fulfills each element of the claim being advanced. Because defendant did not claim he suffered a particular prejudice from this alleged error, there is no possible basis for an ineffective assistance of counsel claim.

¶ 43 4. *Informing Defendant of Possible Penalty*

¶ 44 Third, defendant argues that because the trial counsel informed him that he could get more than 20 years for his offense, this was ineffective assistance of counsel. Appellate counsel correctly points out that the possible prison term for defendant was 6 to 30 years. Trial counsel simply told defendant the sentencing law for a Class X felony. This cannot be ineffective assistance of counsel because there is no error.

¶ 45 C. Defendant's Guilty Plea Was Not Involuntary

¶ 46 Defendant also argues that his plea was not knowing and voluntary because he entered into it due to the alleged ineffective assistance of counsel detailed above. Defendant claims that because of the alleged errors, he was unable to make an informed, voluntary, or knowledgeable decision to plead guilty, and instead felt he had no choice but to plead guilty. Defendant also makes general claims that he entered into his plea based upon incorrect information told to him by his attorney but, outside of the aforementioned, does not specify what that information was.

¶ 47 As noted previously, none of the errors raised by defendant are actual errors. Counsel could not have asked for drug treatment, counsel was not obliged to tell the court that there had previously been a different plea offer, and counsel did the right thing when it told defendant the correct maximum sentence. Defendant may rest easy knowing that he in fact made his decision to plead guilty based on the correct information, and his belief that he has discovered errors since his plea is mistaken. Based upon what has been alleged in the petition, in light of the record and the law, there is no meritorious argument to be made that defendant's plea was involuntary.

¶ 48 D. Defendant's Sentence Is Not Excessive

¶ 49 Defendant next argues that his sentence of 20 years is excessive in light of his conduct. OSAD disagrees because (1) an excessive sentence argument is not cognizable in a postconviction petition and (2) defendant's sentence was not excessive. We agree with OSAD for the first reason, and therefore need not approach the second.

¶ 50 While a person may challenge the length of his sentence through methods such as a motion to reconsider or a direct appeal, one can only challenge the length of a sentence through postconviction proceedings in very limited circumstances. This is because postconviction

proceedings are only for substantial constitutional violations. 725 ILCS 5/122-1(A)(1) (West 2016). "[W]here the sentence imposed is within the statutory limits prescribed for the offense of which the defendant is convicted, the issue of sentence excessiveness does not involve a constitutional question." *People v. Rife*, 18 Ill. App. 3d 602, 610, 310 N.E.2d 179, 186 (1974). Therefore, "the allegation of excessiveness raises no issue cognizable under the Post-Conviction Hearing Act." *People v. Ballinger*, 53 Ill. 2d 388, 390, 292 N.E.2d 400, 401 (1973).

¶ 51 In this case, the sentence of 20 years is well within the statutory range. Therefore, this is not a cognizable claim for postconviction proceedings.

¶ 52 III. CONCLUSION

¶ 53 For the reasons stated, we grant counsel's motion and affirm the trial court's judgment.

¶ 54 Affirmed.