2023 IL App (3d) 210353-U

Order filed March 31, 2023

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2023

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-21-0353
v.	)	Circuit No. 15-CF-29
	)	
JOHNNY J. MARIZETTS,	)	Honorable Kevin W. Lyons, Judge, Presiding.
Defendant-Appellant.	)	

JUSTICE PETERSON delivered the judgment of the court.
Justices McDade and Albrecht concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in denying defendant's postconviction petition following a third-stage evidentiary hearing.

¶ 2 Defendant, Johnny J. Marizetts, appeals the denial of his postconviction petition following a third-stage evidentiary hearing. Defendant argues the Peoria County circuit court should have granted postconviction relief and allowed him to withdraw his guilty plea because the plea was unknowing and involuntary due to plea counsel's failure to explain the meaning of the term "concurrent." We affirm.

¶ 3 I. BACKGROUND

¶ 4 A grand jury charged defendant with three counts of first degree murder (720 ILCS 5/9-1(a)(1)-(3) (West 2006)), aggravated battery with a firearm (*id.* § 12-4.2(a)(1)), aggravated discharge of a firearm (*id.* § 24-1.2(a)(2)), unlawful possession of a weapon by a felon (*id.* § 24-1.1(a)), and attempted mob action (*id.* § 25-1(a)(1)). Defendant informed the court that he was serving a federal sentence of 210 months. The court appointed counsel to represent defendant.

¶ 5 On September 11, 2015, defendant entered a fully negotiated plea agreement in which defendant agreed to plead guilty to first degree felony murder. In exchange for his plea, the State agreed to dismiss the remaining charges and recommended a sentence of 36 years' imprisonment to be followed by 3 years' mandatory supervised release. The sentence was to be served concurrently with his federal sentence. Defendant indicated to the court that he understood the terms of the plea agreement.

¶ 6 After hearing the terms of the plea, the court admonished defendant of the charges against him, the possible sentences, and his trial rights. Defendant indicated that he understood and did not have any questions. The court explained that defendant would ordinarily have the right to appeal and explained those rights. It then reminded defendant that he was waiving not only his trial rights but also his appeal rights and his right to collaterally attack the judgment. Defendant stated that he understood those rights, as well as the rights that he was relinquishing. The court asked if defendant still wanted to enter the guilty plea, and defendant responded affirmatively. Defendant also signed a written appeal and collateral attack waiver. The waiver form stated that defendant waived his right to appeal and to collaterally attack his conviction and sentence.

¶ 7 The court accepted and imposed the parties' 36-year prison sentence recommendation noting,

> "He will be eligible for credit for time served from January 13th of this year through today's date and also through transport to the Department of Corrections. This sentence will run concurrent with [defendant's] sentence in 08 CR 10074 the Federal Court Central District of Illinois conviction under which he is presently serving the time on."

Defendant expressed no concern during the court's sentence pronouncement and simply responded "Thank you, [Y]our Honor" to the sentence pronouncement.

¶ 8 After the court entered the sentence, defendant's federal sentence was reduced to 88 months' imprisonment. Defendant was immediately released from federal prison for time served and transferred to the Illinois Department of Corrections.

¶ 9 Three months after his release from federal prison, defendant filed a motion to withdraw his guilty plea alleging that the plea was induced by threats and promises made by plea counsel. The court denied the motion as untimely, and we dismissed the subsequent appeal for lack of jurisdiction. *People v. Marizetts*, No. 3-15-0863 (2016) (unpublished minute order).

¶ 10 Defendant then filed, as a self-represented litigant, a postconviction petition making similar allegations. He claimed that plea counsel was ineffective for failing to properly advise him before entering a plea of guilty. He also alleged that his guilty plea was involuntary due to "force and threats" made by counsel. Defendant claimed that counsel knew but did not tell him that his federal sentence would be reduced shortly after he entered his plea in the instant case from 210 months to 88 months. Defendant asserted that based on the reduction of his federal sentence, he would be immediately released from federal custody and, had he known that would

happen, he would not have pled guilty. Finally, he claimed that his plea agreement was null and void because counsel did not properly inform him about his appeal remedies and "put the defendant under duress to take guilty plea."

¶ 11 The circuit court summarily dismissed defendant's petition at the first stage of the postconviction proceedings finding that it violated his agreement not to collaterally attack the conviction. We reversed and remanded for further proceedings. *People v. Marizetts*, 2018 IL App (3d) 160257-U.

¶ 12 Following remand, the court appointed postconviction counsel. Postconviction counsel filed an amended postconviction petition which alleged plea counsel provided ineffective assistance by "misinforming [defendant] regarding his federal sentence in that, [plea] counsel advised [defendant] that his federal sentence would be reduced from 210 months to 88 months and he would be immediately released from federal prison." The petition further alleged that "[h]ad [plea] counsel advised [defendant] that his state and federal sentences would be served consecutively, [defendant] would not have pled guilty." In an attached affidavit, defendant claimed that plea counsel "never advised [him] what concurrent meant or what time [he] would be acredited [*sic*]." Postconviction counsel filed a Rule 651(c) certificate. The State filed an answer requesting the court deny defendant's petition.

¶ 13 At a third-stage evidentiary hearing, defendant testified that he understood the terms of the plea agreement to mean he would serve his federal and state sentences at the same time. He testified that plea counsel gave him the impression that he would serve the two sentences together. After the plea hearing, defendant returned to jail. He claimed that 40 days later he learned of a new law that would reduce his federal sentence to approximately 88 months. Defendant was discharged from his federal sentence since he already served more than 88

months. Only defendant's state sentence remained. Defendant was not aware that the federal sentence would be discharged at the time of his plea hearing. Postconviction counsel asked "[h]ad you been aware that the federal sentence would be discharged at the time of your plea hearing, would you have taken that agreement?" Defendant answered "[n]o, ma'am. I would not have."

¶ 14 On cross-examination, defendant claimed he did not know his federal sentence could be reduced before he entered into the plea agreement.

¶ 15 Plea counsel testified that defendant faced a substantially higher sentence without a guilty plea. Counsel did not represent defendant in his federal case and did not make any promises regarding that case. The two sentences were meant to run concurrently. Plea counsel testified that he had no basis to believe that defendant's federal sentence would be reduced.

¶ 16 The court admitted the State's exhibit No. 3, which was a letter written by defendant to the Federal District Court in Peoria, Illinois. In the letter, defendant requested that the court appoint a federal public defender so that he "may seek relief in my sentence pertaining to the new 782 amendment." The letter was filed November 1, 2014.

¶ 17 The court noted that defendant knew that his federal sentence was going to be reduced based on the letter that defendant wrote to the federal court. Regardless, the court determined that it did not affect his plea or his sentence. The court denied defendant's amended postconviction petition. Defendant appeals.

¶ 18 II. ANALYSIS

¶ 19 Defendant argues that the circuit court erred in denying postconviction relief. Defendant specifically contends that he made a substantial showing at the third-stage evidentiary hearing that he received ineffective assistance of plea counsel who failed to explain to defendant the

meaning of the term "concurrent." Counsel's alleged failure caused defendant to misunderstand the terms of his plea agreement which rendered his plea involuntary. At the time of the plea, defendant thought that "he would receive credit for *all* of the time he had 'already' served thus far in federal custody, not just for the time served in federal custody since pleading guilty." (Emphasis in original.) For the reasons that follow, we conclude that the court did not err in denying postconviction relief.

¶ 20 The Post-Conviction Hearing Act provides a three-stage process by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. 725 ILCS 5/122-1 (West 2016). At the third stage of postconviction proceedings, defendant must show a substantial deprivation of his federal or state constitutional rights to obtain postconviction relief. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). After an evidentiary hearing where fact-finding and credibility determinations are involved, the circuit court's decision will not be reversed unless it is manifestly erroneous. *People v. English*, 2013 IL 112890, ¶ 23. " 'Manifest error' is error which is clearly plain, evident, and indisputable." *People v. Taylor*, 237 Ill. 2d 356, 373 (2010) (quoting *People v. Morgan*, 212 Ill. 2d 148, 155 (2004)).

¶ 21 "Challenges to guilty pleas which allege ineffective assistance of counsel are subject to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)." *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). "Under *Strickland*, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and the defendant was prejudiced by counsel's substandard performance." *People v. Hall*, 217 Ill. 2d 324, 335 (2005). "Counsel's conduct is deficient under *Strickland* if the attorney failed to ensure that the defendant entered the plea voluntarily and intelligently." *Rissley*, 206 Ill. 2d at 457.

> "To establish the prejudice prong of an ineffective assistance of counsel claim in these circumstances, the defendant must show there is a reasonable probability that, absent counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial. [Citations.] A bare allegation that the defendant would have pleaded not guilty and insisted on a trial if counsel had not been deficient is not enough to establish prejudice. [Citation.] Rather, the defendant's claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *Hall,* 217 Ill. 2d at 335-36.

¶ 22 First, defendant has not established the prejudice prong of the *Strickland* test. Specifically, defendant does not articulate any plausible trial defense or that he is innocent. Rather, defendant simply claims that he would not have pled guilty if he was aware his federal sentence would be discharged at the time of his plea hearing.

¶ 23 Second, defendant's claim that he did not know that the sentence in the instant case would be served concurrent to the sentence in his federal case such that he would not get credit for the time he spent in federal prison prior to the entry of the instant conviction is rebutted by the record. After accepting defendant's plea, the court imposed the parties' recommended sentence and explained to defendant that he would receive "credit for time served from January 13th of this year" to September 11, 2015, the date the plea was accepted and the sentence was imposed. Defendant's response indicated that he understood this to be the full extent of the sentence credit.

¶ 24 Finally, the record rebuts defendant's claim that he was unaware that his federal sentence could be reduced at the time he entered his guilty plea in the instant case. The State's exhibit No.

3, established that in 2014, almost one year before defendant entered the instant plea, defendant had contacted the federal court regarding reducing his sentence. Having found that defendant failed to establish prejudice, we need not determine whether counsel's performance was deficient. See *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 25 We conclude that the court did not manifestly err in denying defendant postconviction relief, as defendant was unable to establish prejudice necessary for a finding of ineffective assistance of plea counsel.

¶ 26 III. CONCLUSION

¶ 27 The judgment of the circuit court of Peoria County is affirmed.

¶ 28 Affirmed.