2020 IL App (2d) 190360-U
No. 2-19-0360
Order filed November 4, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LANGSEE SENGSAVANG, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 14-CF-2050 Honorable James K. Booras, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Birkett and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's postconviction claim of ineffectiveness failed because he could show no prejudice from plea counsel's failure to consult with him about a potential motion to challenge his sentence; while the law at the time of the plea would have permitted a defendant to challenge a sentence entered on a negotiated guilty plea, the law subsequently changed, and, under the rule in *Lockhart v. Fretwell*, prejudice is determined by current law.

¶ 2 Defendant, Langsee Sengsavang, appeals from the second-stage dismissal of his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2018)). In that petition, filed in July 2018, he claimed that the attorney who represented him in a June 2015 negotiated guilty plea was ineffective for failing to consult with him about a motion to reconsider

the sentence entered on that plea. He concedes that, under the law as it has stood since 2019, a defendant who wishes to challenge a sentence entered on a negotiated guilty plea must (barring some exceptions not relevant here) first move to withdraw the plea. Defendant does not claim that counsel should have advised him in 2015 about filing a motion to withdraw his guilty plea. Rather, he asserts that, because the law in 2015 permitted him to a file a motion to challenge his sentence as improper, he has shown the necessary prejudice for his ineffectiveness claim. We conclude that, under the rule set out in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), and adopted by our supreme court in *People v. Coleman*, 168 Ill. 2d 509, 533 (1995), defendant cannot base a showing of prejudice on counsel's failure to take advantage of case law that, though unabrogated at the time, was subsequently overturned—in this case, in 2019. We therefore affirm the dismissal of defendant's petition.

¶ 3 I. BACKGROUND

¶ 4 A grand jury indicted defendant on 16 counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)) and 2 counts of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2012)).

¶ 5 On June 25, 2015, defendant agreed to plead guilty to the first count of the indictment—a count of predatory criminal sexual assault of a child—in exchange for the State's agreement to dismiss the other 17 counts of the indictment. The parties also agreed that the State would argue for a sentence of no less than 12 years' imprisonment and no more than 30 years' imprisonment—the statutory range for a Class X felony being 6 to 60 years' imprisonment. See 720 ILCS 5/11-1.40(b)(1) (West 2012).

¶ 6 At the July 27, 2015, sentencing hearing, the court sentenced defendant to 18 years' imprisonment with mandatory supervised release of 3 years to life. The court admonished

defendant that he could appeal his sentence but that "prior to taking an appeal within 30 days[, he would] first [have to] file in the trial court *** a written motion asking the trial court to reconsider the sentence and for leave to withdraw [the] guilty plea setting forth [the] grounds for said motion." See Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014); Ill. S. Ct. R. 605(b) (eff. Oct. 1, 2001). Defendant did not file a postsentencing motion and did not attempt to appeal.

¶ 7 On July 23, 2018, defendant, who was represented by retained counsel, filed a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2018)) asserting that his "right to the effective assistance of counsel *** was violated where trial counsel failed to consult with [him] about filing a motion to reconsider [his] sentence." Arguing under the two-prong test for ineffectiveness claims set out in *Strickland v. Washington*, 466 U.S. 668 (1984), defendant asserted that counsel's performance was deficient because, given the length of his sentence, counsel had a duty to consult with him about a possible motion to reconsider the sentence. Defendant further contended that counsel's deficient performance prejudiced him. Defendant explained that, because the circuit court did not take into account nonstatutory factors in mitigation and "placed undue emphasis on the offense conduct [*sic*]," counsel could have argued that the 18-year sentence was an abuse of discretion. Due to counsel's failure to file a motion to reconsider the sentence, defendant not only lost the opportunity to bring that challenge in the circuit court but also was barred from taking any appeal from his sentence. See Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014) ("No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment.").

¶ 8 Counsel attached to the petition an affidavit from defendant, alleging that counsel failed to inform him of his right to seek a reduction of the sentence. Defendant did not state in the affidavit

that he ever had an interest in seeking to withdraw his guilty plea. In a later affidavit, defendant stated, "Following sentencing, my defense lawyer did not speak to me about the possibility of filing a motion to reconsider sentence or about appealing my sentence. *** Had I known that I could file a motion to reconsider sentence or appeal my sentence, I would have done so."

¶ 9 Counsel filed a certificate under Rule 651(c) in which he certified that he had "consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights"; "examined the trial court file and Report of Proceedings for the file"; and "made any amendments to Defendant-Petitioner's *pro se* [*sic*] Post-Conviction Petition necessary for adequate presentation of Defendant-Petitioner's contentions." See Ill. S. Ct. R. 651(c) (eff. July 1, 2017).

¶ 10 The circuit court did not dismiss the petition at the first stage. On February 19, 2019, the State filed a motion to dismiss the petition, arguing that, because the plea had a negotiated sentence, defendant's only option under Rule 604(d) was to file a motion to withdraw his plea. Moreover, there was little reason for counsel to believe that defendant might wish to withdraw his plea, given that he was facing what amounted to a life sentence:

> "[Based on the indictment,] Defendant's exposure prior to the negotiated plea of guilty in this matter was a minimum of 96 years in the Department of Corrections to be served at 85% plus an[] additional minimum of 3 years in the Department of Corrections to be served at 50% if convicted of all counts. The maximum if convicted of all counts would be 120 years in the Department of Corrections to be served at 85%."

¶ 11 Defendant did not file a response to the motion. The court granted the State's motion to dismiss on March 19, 2019. Defendant filed a timely notice of appeal.

¶ 12 II. ANALYSIS

¶ 13 The parties' arguments on appeal narrow our focus to this issue: whether defendant can claim that counsel was ineffective for failing to consult with him in 2015 about a potential motion to reconsider his sentence when subsequent case law has clarified that, with exceptions not pertinent here, a defendant wishing to challenge a sentence entered on a negotiated plea of guilty must first move to withdraw his guilty plea. Stated more generally, can a defendant base an ineffectiveness claim on counsel's failure to rely on precedent that was later overturned? The answer is no.

¶ 14 The Act provides for a three-stage process for adjudicating the merits of petitions. *People v. Lesley*, 2018 IL 122100, ¶ 31. "At the first stage, the circuit court determines whether the petition is 'frivolous or is patently without merit' " and dismisses it if it is. *Lesley*, 2018 IL 122100, ¶ 31 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2012)). Otherwise, the petition advances to the second stage. *Lesley*, 2018 IL 122100, ¶ 31. At the second stage, the State may choose, as it did here, to file a motion to dismiss the petition; the court then holds a hearing on the motion. *People v. Alexander*, 2014 IL App (2d) 120810, ¶ 24. At that hearing, the court must "accept as true 'all well-pleaded facts that are not positively rebutted by the trial record.' " *Alexander*, 2014 IL App (2d) 120810, ¶ 25 (quoting *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006)). If the petitioner makes a substantial showing that a constitutional violation occurred, the petition advances to the third stage for an evidentiary hearing. *Alexander*, 2014 IL App (2d) 120810, ¶ 25.

¶ 15 "The question raised in an appeal from an order dismissing a postconviction petition at the second stage is whether the allegations in the petition, liberally construed in favor of the petitioner and taken as true, are sufficient to invoke relief under the Act." *People v. Sanders*, 2016 IL 118123, ¶ 31. Our review of the dismissal of a postconviction petition when it has occurred without an evidentiary hearing is *de novo*. *Sanders*, 2016 IL 118123, ¶ 31.

¶ 16 In his opening brief, defendant largely reiterates the argument that he made in his postconviction petition. The State responds by repeating the argument of its motion to dismiss but also maintains that defense counsel had no reason to consult with defendant about a motion to withdraw the plea. In his reply brief, defendant explicitly concedes that he *is not* claiming that counsel was ineffective for failing to consult with him about filing a motion to withdraw his guilty plea. Further, defendant admits that the current interpretation of Rule 604(d), as set out in *People v. Johnson*, 2019 IL 122956, would bar him from seeking reconsideration of his sentence. *Johnson* holds that Rule 604(d) precludes a defendant who entered into a negotiated guilty plea—including one that sets a sentencing cap—from moving to reconsider a sentence that is statutorily authorized, constitutional, and within the terms of the plea agreement. *Johnson*, 2019 IL 122956, ¶¶ 49-51, 57.

¶ 17 Defendant does not suggest that his sentence falls within any of the exceptions that *Johnson* recognized. Instead, he argues that counsel's performance, and its prejudice to him, should be judged by existing case law in 2015 interpreting Rule 604(d). At that time, he claims, Second District case law would have permitted him to bring a motion to reconsider his sentence on the ground that the sentence was improper. He explains:

> "Prior to *Johnson*, the Second [District in *People v. Martell*, 2015 IL App (2d) 141202)] and [the] Fourth District[in *People v. Johnson*, 2017 IL App (4th) 160920 and *People v. Palmer-Smith*, 2015 IL App (4th) 130451] had drawn a distinction between an 'excessive' sentencing challenge and an 'improper' sentencing challenge, finding the latter challenge not barred by Rule 604(d). [Citation.] The Third District [in *People v. Rademacher*, 2016 IL App (3d) 130881, ¶¶ 58-60] rejected this argument, finding it would reduce the

> withdrawal requirement of Rule 604(d) to 'nothingness' and would deny the State the benefit of its bargain in negotiated pleas. [Citation.]
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> [Defendant] was sentenced on July 27, 2015. *Martell* was decided several months later on September 23, 2015, but *Palmer-Smith*, which *Martell* cited in support of the above proposition, [citation] was decided on March 26, 2015. Therefore, at the time in which [defendant] was sentenced, he did not have to move to withdraw his guilty plea prior to asking the court to reconsider his sentence, so long as 'the motion and the appeal are based on something other than a contention that the sentence is merely excessive.' [Citation.] *Martell* and *Smith* remained good law until these decisions were overruled by *Johnson* ***. *** But this was not the state of the law until 2019, well after [defendant] was sentenced. Therefore, the State's discussion about [defendant's] failure to withdraw his plea before moving to reconsider his sentence is irrelevant because [defendant] would have been permitted to move for reconsideration of his sentence without first moving to withdraw his guilty plea prior to *Johnson*."

¶ 18 Defendant's claim fails as a matter of law. Under the rule in *Fretwell*, which was adopted in *Coleman*, a defendant cannot satisfy *Strickland*'s prejudice component by claiming that counsel failed to rely on then-extant case law, if that law was later overturned. Rather, prejudice is judged under current law, which, in this case, is *Johnson*, and defendant does not dispute that *Johnson* forecloses his ineffectiveness claim.

¶ 19 In *Fretwell*, the issue before the United States Supreme Court was "whether counsel's failure to make an objection in a state criminal sentencing proceeding—an objection that would have been supported by a decision which subsequently was overruled—constitutes 'prejudice'

within the meaning of [the Court's] decision in *Strickland v. Washington*, [466 U.S. 668] (1984)." *Fretwell*, 506 U.S. at 366. The *Fretwell* court held that, "[b]ecause the result of the sentencing proceeding in [the] case was rendered neither unreliable nor fundamentally unfair as a result of counsel's failure to make the objection," no prejudice in the sense required under *Strickland* occurred. *Fretwell*, 506 U.S. at 366.

¶ 20 In *Fretwell*, an Arkansas jury sentenced defendant to death for murder. On direct appeal, the defendant argued that the imposition of death was improper because the jury, contrary to the rule in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), relied on an aggravating factor that was also part of the elements of the offense. The Arkansas Supreme Court held that the defendant forfeited the issue by failing to object below. *Fretwell*, 506 U.S. at 367. The defendant then filed a federal *habeas corpus* petition in which he asserted that trial counsel was ineffective for failing to raise the *Collins* issue. *Fretwell*, 506 U.S. at 367. This petition was successful in the district court, and the Eighth Circuit affirmed even though it had previously overruled *Collins* in light of the Supreme Court's decision in *Lowenfield v. Phelps*, 484 U.S. 231 (1988). *Fretwell*, 506 U.S. at 367-68. The Eighth Circuit reasoned that the defendant had satisfied *Strickland*'s prejudice prong by showing that an objection based on *Collins* would have been successful at the time of the defendant's trial and would have prevented his death sentence. *Fretwell*, 506 U.S. at 368.

¶ 21 The Supreme Court rejected the Eighth Circuit's reasoning. It noted that its "decisions have emphasized that the Sixth Amendment right to counsel exists 'in order to protect the fundamental right to a fair trial.' " *Fretwell*, 506 U.S. at 368 (quoting *Strickland*, 466 U.S. at 684). Thus, " '[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.' " *Fretwell*, 506 U.S. at 369 (quoting *United States v. Cronic*, 466 U.S. at 648, 658 (1984)). Under *Strickland* and its progeny, "a criminal

defendant alleging prejudice [as a result of counsel's deficient representation] must show 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' " *Fretwell*, 506 U.S. at 369 (quoting *Strickland*, 466 U.S. at 687). Thus, to show prejudice from counsel's deficient representation, it is *not* sufficient to show that counsel's action produced a bad outcome for a defendant; it is *also* necessary to show that that outcome was unfair or unreliable. *Fretwell*, 506 U.S. at 369-70. But, where a defendant claims that counsel was ineffective for failing to rely on precedent that is later overturned, he or she is claiming prejudice based on counsel's failure to cause the court to make an error in his or her favor. An outcome is not unfair or unreliable because defendant lacks the benefit of court error. *Fretwell*, 506 U.S. at 371-72. Thus, under *Fretwell*, counsel cannot be deemed ineffective for failing to rely on case law that has since been overruled.

¶ 22 As noted, our supreme court has adopted the rule in *Fretwell*. *Coleman*, 168 Ill. 2d at 533.

¶ 23 Defendant claims that his counsel was ineffective for failing to consult with him in 2015 about a motion to reconsider his sentence, and he cites Second District precedent extant in 2015 that would have permitted counsel to file a motion challenging the sentence as improper. However, defendant likewise recognizes that *Johnson*, in 2019, overruled that Second District precedent and held (with exceptions that defendant does not claim here) that a defendant cannot challenge a sentence entered on a negotiated plea of guilty without first moving to withdraw his plea. Under *Fretwell* and *Coleman*, the change in the law undermines defendant's claim of prejudice. Thus, the circuit court properly dismissed defendant's petition.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm the circuit court's second-stage dismissal of defendant's petition under the Act.

¶ 26 Affirmed.