2020 IL App (5th) 170406-U

NO. 5-17-0406

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Saline County.
	)	
v.	)	No. 15-CF-146
	)	
JEFFREY S. TOWNSEND,	)	Honorable
	)	Todd D. Lambert,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE BOIE delivered the judgment of the court.
Justices Welch and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: Where the circuit court did not err in summarily dismissing the defendant's *pro se* postconviction petition, and any argument to the contrary would lack merit, the defendant's appointed appellate counsel is granted leave to withdraw, and the judgment of the circuit court is affirmed.

¶ 2 In 2015, the defendant, Jeffrey S. Townsend, was found guilty of armed robbery and was sentenced to imprisonment for 29 years. In 2017, the defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)), and the circuit court summarily dismissed the petition. The defendant now appeals from that summary dismissal. The defendant's appointed attorney on appeal, the Office of the State Appellate Defender (OSAD), has concluded that this appeal lacks merit, and on that basis it has filed with this court a motion to withdraw as counsel, along with a memorandum of law in support of the

motion. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The defendant has filed with this court a written response to OSAD's *Finley* motion, asking this court to deny the motion. This court has examined OSAD's *Finley* motion and memorandum, the defendant's written response, and the entire record on appeal. For the reasons that follow, this court has determined that this appeal does indeed lack merit. Accordingly, OSAD's *Finley* motion must be granted, and the judgment of the circuit court must be affirmed.

¶ 3 BACKGROUND

¶ 4 In May 2015, the defendant was charged with armed robbery while carrying a firearm. See 720 ILCS 5/18-2(a)(2) (West 2014). The offense was a Class X felony "for which 15 years shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/18-2(b) (West 2014).

¶ 5 On September 23, 2015, the cause was called for trial by jury. Prior to the arrival of the veniremembers in the courtroom, the court asked the parties whether they had engaged in plea negotiations, and both the trial prosecutor and defense counsel answered in the affirmative. The court asked defense counsel whether he had informed the defendant of any plea offer or offers from the State, and counsel answered that he had done so. The court asked the defendant whether he had spoken with defense counsel about plea offers from the State, and the defendant answered in the affirmative. The court admonished the defendant as to the nature of the armed-robbery charge, and it stated that armed robbery was a nonprobationable offense punishable by imprisonment for a term of 6 to 30 years, plus a required 15-year enhancement for carrying a firearm during the robbery. The defendant indicated his understanding of the charge and the possible penalty. At that point, the prosecutor volunteered that armed robbery was "an 85 percent offense." The court told the defendant that some prison inmates must serve 50% of their sentences while others must serve 85%, depending on the offense committed, and that the defendant would

be required to serve 85%—and not 50%—of his sentence for armed robbery, even assuming that he earned all of the sentence credits offered by the Department of Corrections. The defendant indicated his understanding of the court's explanation of sentence credits. Defense counsel did not comment on the matter of sentence credit. Shortly after the discussion of plea offers, possible sentences, and sentence credits, the veniremembers entered the courtroom and the court began the *voir dire*.

¶ 6 The jury trial was conducted over a two-day period. On the second of those days, which was September 24, 2015, the jury returned a verdict of guilty. The jury also found that the defendant had been armed with a firearm at the time he committed the armed robbery.

¶ 7 On November 25, 2015, the court held a sentencing hearing. The parties presented arguments and discussed the content of the presentence investigation report. The court sentenced the defendant to imprisonment for a term of 14 years, plus the 15-year firearm enhancement, for a total prison term of 29 years, to be followed by mandatory supervised release for a term of 3 years. The court also ordered the defendant to pay restitution to the bank that he had robbed. Subsequently, the court entered a written order that reflected the defendant's sentence. The written order specified that the defendant would be required to serve 50% of his prison sentence.

¶ 8 On December 1, 2015, the defendant filed a *pro se* "motion for ineffective counsel." In that motion, the defendant alleged that trial counsel (1) failed to "argue [the defendant's] case to the best of his ability"; (2) failed to stand during the trial, except during closing argument; (3) failed to "ask any of the questions [the defendant] suggested he ask during [the] trial"; (4) failed to "inform [the defendant] of the alleged fingerprints untill [*sic*] two days before [the] trial"; (5) took a "leave of absence" that postponed the defendant's trial from September 16, 2015, to the week of September 23 and then falsely told the defendant that " 'they' postponed [the] trial because

a witness had missed the bus"; (6) "lied" to the defendant when, in response to the defendant's request to "see these alleged fingerprints" and to "view the video footage from inside the bank," he stated that the defendant was not allowed to see the fingerprints and that the bank's cameras were inoperable at the time of the robbery; and (7) failed to allow the defendant to view the "full discovery" in the case.

¶ 9 Also on December 1, 2015, the defendant filed a *pro se* notice of appeal, thus initiating the appeal in *People v. Townsend*, No. 5-15-0522. This court later dismissed the appeal as premature.

¶ 10 On December 8, 2015, the defendant filed a *pro se* motion to reduce or vacate his sentence. In the postsentencing motion, the defendant alleged that he did not receive a fair trial, that his trial attorney was ineffective, and that the State had failed to present any physical evidence connecting him to the armed robbery. In regard to the claim of ineffective counsel, the defendant stated that counsel had failed to stand during the trial, had "lied to [the defendant] on several occasions," and had previously served as the state's attorney of Saline County.

¶ 11 On April 21, 2016, the court held a hearing on the defendant's December 1, 2015, *pro se* "motion for ineffective assistance." Addressing the court, the defendant made five distinct allegations of ineffective assistance by his trial attorney. The first of those five allegations is the only one that needs to be described in this order. In regard to the first allegation, the defendant told the circuit court the following:

> "[F]rom the beginning I was told that no matter what if I was found guilty in trial that my sentence would be at 85 percent. And not until the day of my sentencing [*sic*] I was told it would actually be 50 percent. And I feel like, you know, if I would have known that it was 50 percent from the beginning I may have—things may have turned out differently. It may have not even went [*sic*] to trial. The first offer was 20 years at 85 percent and, you know,

that was pretty scary. My lawyer told me I'd only do 17.5, and that's a long time. And, you know, if I would have known it was 50 percent I would have—maybe I would have negotiated or something like that. I didn't even know at the time anything about negotiating because I've never even been at trial before."

¶ 12 After the defendant finished discussing all of his ineffective-assistance allegations, the circuit court asked trial counsel to respond. Trial counsel began by noting that the defendant's "motion for ineffective assistance" did not include the allegation that the defendant, prior to trial, had been misinformed about the level of sentence credit applicable to his offense. Counsel stated that due to the passage of time, he did not recall anything about the sentence-credit matter. The court then asked the prosecutor to comment on the defendant's claim concerning what he had been told about the level of sentence credit applicable to his offense. The prosecutor replied that the State had advised defense counsel of the sentencing range for the offense and also had advised counsel that the defendant would need to serve 50% of his prison sentence. In reply to additional questioning from the court, the prosecutor stated that he was present when the defendant was informed, prior to trial, that he would need to serve only 50% of his prison sentence. The defendant disputed the prosecutor's comments to the court, and stated that the transcript showed that on the day the trial began, the prosecutor stated that the defendant would need to serve 85%, and not 50%, of any prison sentence that was imposed. The court took the matter of the defendant's *pro se* "motion for ineffective assistance" under advisement.

¶ 13 On April 25, 2016, the court entered a docket-entry order denying the defendant's *pro se* "motion for ineffective assistance."

¶ 14 On May 20, 2016, the defendant filed a *pro se* notice of appeal from the judgment entered on "Nov. 26, 2015", thus initiating the appeal in *People v. Townsend*, No. 5-16-0211. On the

defendant's motion, this court soon dismissed the appeal as premature, given that the defendant's December 8, 2015, motion to reduce or vacate sentence remained pending before the circuit court.

¶ 15 On February 9, 2017, the circuit court held a hearing on the defendant's motion to reduce or vacate his sentence. The court denied the motion.

¶ 16 On February 24, 2017, the defendant filed a *pro se* notice of appeal, which specified that the appeal was from the judgment entered on "Sept. 23, 2015." (September 23, 2015, was the first day of the defendant's two-day jury trial.) He thereby initiated the appeal in *People v. Townsend*, No. 5-17-0069, an appeal that this court dismissed on March 14, 2017, due to a lack of appellate jurisdiction.

¶ 17 On September 1, 2017, the defendant filed a two-page *pro se* petition for postconviction relief. In the gravamen of the petition, the defendant alleged that he had been "led into trial believing that his offense was an 85% offense" but learned at sentencing that he would actually have to serve only 50% of his prison sentence, and that his trial attorney "should have been aware of this issue and certainly should have informed defendant of this issue, thus preventing defendant from ever going to trial." According to the defendant, this scenario deprived him of his constitutional rights to the due process of law and the effective assistance of trial counsel.

¶ 18 On September 28, 2017, the circuit court entered a written order summarily dismissing the postconviction petition, upon a finding that the petition was frivolous or patently without merit.

¶ 19 The defendant perfected the instant appeal from the circuit court's summary-dismissal order. The circuit court appointed OSAD as his appellate attorney.

¶ 20 ANALYSIS

¶ 21 This appeal is from the circuit court's summary dismissal of the defendant's petition for postconviction relief. Appellate review is *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 22 As previously mentioned, the defendant's appointed attorney in this appeal, OSAD, has concluded that this appeal lacks arguable merit, and on that basis OSAD has filed a *Finley* motion to withdraw as counsel, along with a memorandum of law in support thereof. In its memorandum of law, OSAD discusses three potential issues, which this court considers in turn.

¶ 23 OSAD's first potential issue in this appeal is "whether the trial court ruled on [the defendant's] *pro se* post-conviction petition within 90 days of the date that it was filed and docketed as required by section 122-2.1 of the Post-Conviction Hearing Act." Under section 122-2.1 of the Act, a circuit court is required to examine a defendant's postconviction petition, and enter an order thereon, within 90 days after the petition is filed and docketed. 725 ILCS 5/122-2.1(a) (West 2016). A circuit court needs to determine within the 90-day timeframe whether it should summarily dismiss the defendant's petition as frivolous or patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2016)) or order the petition to be docketed for further consideration (see 725 ILCS 5/122-2.1(b) (West 2016)). In the instant case, the circuit court summarily dismissed the defendant's petition as frivolous or patently without merit. The record on appeal shows that on August 29, 2017, the defendant placed his postconviction petition into the mail system of the prison where he was incarcerated, and on September 1, 2017, the petition was file-stamped by the circuit clerk and docketed. The record further shows that on September 28, 2017, which was only 27 days after file-stamping and docketing, the circuit court entered a written order summarily dismissing the postconviction petition. Obviously, the circuit court entered its order within the 90-day timeframe, and OSAD's first potential issue has no merit whatsoever.

¶ 24 OSAD's second potential issue is "whether [the defendant's] [postconviction] claims are barred by *res judicata*." As noted *supra*, the defendant, in his postconviction petition filed on September 1, 2017, claimed to have been deprived of his constitutional rights to the due process

of law and the effective assistance of trial counsel where he had been "led into trial believing that his offense was an 85% offense" but learned at sentencing that he would have to serve only 50% of his prison sentence, and his trial attorney "should have been aware" and "should have informed [him]" that he would have to serve only 50% of his prison sentence for armed robbery, "thus preventing [him] from ever going to trial." These postconviction factual allegations were essentially the same as the factual allegations that the defendant presented to the circuit court on April 21, 2016, during the court's hearing on the defendant's *pro se* "motion for ineffective assistance," approximately 16 months before the postconviction petition was filed. (The allegations that the defendant presented at the hearing on April 21, 2016, are quoted *supra*.) The circuit court considered the defendant's allegations, and it entered an order denying the "motion for ineffective assistance" on April 25, 2016. Because this issue was raised and ruled upon in the circuit court in April 2016, *res judicata* principles clearly barred the issue from the postconviction proceeding, which began in September 2017 with the filing of the petition. See *People v. Scott*, 194 Ill. 2d 268, 273-74 (2000) (under *res judicata* principles, a postconviction petitioner is limited to constitutional matters that have not previously been adjudicated).

¶ 25 OSAD's third potential issue is "whether [the defendant's] claim[s] in his *pro se* post-conviction petition have arguable merit," *res judicata* notwithstanding. In his postconviction petition, the defendant claimed to have been deprived of the due process of law and the effective assistance of trial counsel when counsel failed to inform him, prior to trial, that he would need to serve only 50%, and not 85%, of any prison sentence for his charged offense, armed robbery, where such information would have "prevent[ed] defendant from ever going to trial." This court notes that the postconviction petition did not include any explanation of exactly how this information about sentencing credit might have "prevent[ed]" the defendant from going to trial;

the petition did not include any description of any plea offer that the State had made or that the defendant had rejected due to his false belief that he would need to serve 85% of any prison sentence.

¶ 26 Criminal defendants have a sixth amendment right to the effective assistance of counsel, and this right extends to the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). When a defendant claims that his trial attorney provided him with constitutionally ineffective assistance, he must show that (1) "counsel's representation 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." *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). A postconviction claim of ineffective assistance of counsel is not frivolous or patently without merit if "(i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). Where a court can readily conclude that a defendant suffered no prejudice from counsel's actions, a claim of ineffective assistance of counsel may be disposed of without considering any deficiency in counsel's conduct. *People v. Albanese*, 104 Ill. 2d 504, 527 (1984).

¶ 27 Assuming *arguendo* that trial counsel failed to correctly inform the defendant of the level of sentencing credit he would receive for his offense (50% versus 85%), and further assuming that this performance fell below an objective standard of reasonableness, the defendant still fails to show that he was prejudiced as a result of counsel's deficient performance. To make a showing of prejudice, the defendant needed to show a reasonable probability that, but for counsel's deficient performance, (1) the defendant would have accepted a plea offer from the State, (2) the prosecution would not have withdrawn its plea offer in light of intervening circumstances, (3) the court would

have accepted the plea offer's terms, and (4) the sentence under the plea offer's terms would have been less severe than the sentence that actually was imposed. *Cooper*, 566 U.S. at 164. In his postconviction petition, the defendant did not even describe the terms of any plea offer that the State allegedly made to him. Where no plea offer was even described, the defendant could not have shown any of the four items that he needed to show. For example, where the plea offer's terms were not described, there was no way for the defendant to show that his sentence under the plea offer's terms would have been less severe than the sentence that actually was imposed. Hence, there was no showing that the defendant was prejudiced by trial counsel's alleged failure to inform the defendant of the correct level of sentence credit that he would receive. The defendant's postconviction claim lacked any support, even if it had not been barred by *res judicata*.

¶ 28 CONCLUSION

¶ 29 For all of the foregoing reasons, this court concludes that there was no error in the circuit court's summary dismissal of the defendant's *pro se* postconviction petition, and no argument to the contrary would have any merit. Therefore, OSAD's *Finley* motion to withdraw as counsel on appeal is granted, and the judgment of the circuit court is affirmed.

¶ 30 Motion granted; judgment affirmed.