2021 IL App (1st) 190417-U

FOURTH DIVISION
March 4, 2021

No. 1-19-0417

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. MARK HOWARD, Petitioner-Appellant.	)	Appeal from the Circuit Court of Cook County No. 98 CR 27218 (01) Honorable Alfredo Maldonado, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Martin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County denying the petitioner's postconviction petition after a third-stage evidentiary hearing where he failed to make a substantial showing that trial counsel was ineffective during plea negotiations.

¶ 2 Following a bench trial, defendant Mark Howard was found guilty of first degree murder under a theory of accountability and sentenced to 26 years' imprisonment. After this court affirmed defendant's conviction and sentence, defendant filed a *pro se* petition under the Post-

Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2018)). The matter proceeded to a third-stage evidentiary hearing. Defendant presented testimony and evidence that trial counsel was ineffective during plea negotiations with the State and but for counsel's ineffectiveness he would have accepted the State's 12-year plea offer. The circuit court denied the petition, finding (1) trial counsel's conduct was not unreasonable and (2) defendant could not demonstrate prejudice.

¶ 3 Defendant now appeals. He maintains that his trial counsel was ineffective for failing to adequately explain to him during plea negotiations the possibility of a death sentence in a second, separate murder case if he were to be convicted of murder in the present case. For the reasons which follow, we affirm the judgment of the circuit court.

¶ 4 BACKGROUND

¶ 5 In this appeal, defendant challenges only the circuit court's decision following the third-stage evidentiary hearing on his petition for postconviction relief. Therefore, we incorporate by reference our prior decision, where we described the evidence in detail. *People v. Howard*, No. 1-03-0710 (July 21, 2004) (unpublished pursuant to Illinois Supreme Court Rule 23). We repeat only those facts necessary to resolve the claim of ineffective assistance of counsel.

¶ 6 Trial

¶ 7 Defendant's conviction arose from the stabbing death of Donald Bass on September 17, 1998, at the Cook County Department of Corrections (CCDOC). At the time Bass passed away, defendant was in CCDOC facing a murder charge in case 97 CR 09578-01 (the 1997 case), under the name Clarence Williamson[1], before a different judge. The State's theory, in this case, was that Carlos Rocha, an inmate, stabbed Bass, but defendant was accountable as he aligned

[1] Defendant testified at the evidentiary hearing that his name is Clarence Williamson III, but he uses the alias Mark Howard.

himself with the group under a common design to attack Bass. Three other inmates, Theodore Holmes, A.J. Bibbs, and Pedro Barrios all entered guilty pleas to reduced charges for negotiated sentences of five or seven years. In April 2001, the State filed a notice that it would be seeking the death penalty. In July 2001, the State, however, rescinded that notice and filed a document indicating it would not be seeking the death penalty. Prior to trial in June 2002, the State offered defendant a 12-year term if he were to plead guilty to attempted first degree murder. Defendant rejected the plea offer.

¶ 8 The case proceeded to trial where the following evidence was presented. The testimony at trial indicated that Bass threw down a blanket, which hung over a railing, from the second level of the tier. Defendant took exception to this and went up the stairs to the second level to confront Bass. They argued, and Bass went down to the first level. Defendant followed. Five or so other inmates gathered around as defendant and Bass continued to argue. Defendant then punched Bass in the left temple. The other inmates, Rocha, Holmes, Bibbs, and Barrios, then joined in punching and kicking Bass. Rocha retrieved a shank and stabbed Bass twice. When corrections officers entered the tier where the altercation occurred, they found defendant hitting a stabbed and bleeding Bass repeatedly with a food tray.

¶ 9 The trial court found that there was a common design for misdemeanor battery that ended in murder, and that defendant was thus guilty of first-degree murder under the theory of accountability. Immediately after this ruling, the following exchange occurred:

> "THE COURT: Okay. I recognize that there may be some extensive motions to be presented.
>
> [DEFENSE COUNSEL]: I was just talking to my client about that. I'm going to ask at this time for leave to withdraw, and here's the reason why.

I did not properly advise my client of the potential death penalty that he was facing as a result of any finding of guilty in this particular case. As a matter of fact, I did not – he has another murder case pending which we were – we had already entered into a potential plea as of this Thursday. And as a result of that, I think there may be – there definitely is an issue of ineffective assistance of counsel.

THE COURT: Okay. Under the circumstances –

[STATE'S ATTORNEY]: If I may Judge?

THE COURT: Sure.

[STATE'S ATTORNEY]: This case has already been dedeathed [*sic*]. We're not seeking death in this case.

[DEFENSE COUNSEL]: I understand that, but they may seek death in the other case, and that's the problem. And I just can't imagine – I have not properly advised him at all, and he has two murder cases that were pending.

But because of the case law in this particular case and my interpretation of the case law, I was – I basically told him that it was a not guilty and that I didn't discuss with him any issue of the fact that he's facing the death penalty as a result of this case at all. That's clearly my error. So, I would ask the court to allow me to withdraw.

THE COURT: I need you to put in writing, okay?

[DEFENSE COUNSEL]: Yes, Your Honor."

The matter was continued for hearing and on that date defense counsel stated:

"I had an opportunity to speak with my client. This matter was up on my possible motion to withdraw. And we had a conversation and based on my research of the law and the mere fact that I made certain statements on the last court date and after conferring with

my client I am ready to proceed and set this down for a motion hearing on the motion for new trial."

The trial court then conducted a hearing on the motion for a new trial and denied the motion. The matter proceeded to a sentencing hearing and defendant was sentenced to 26 years' imprisonment.

¶ 10 Direct Appeal

¶ 11 Defendant appealed arguing his conviction must be reversed because (1) the evidence was insufficient to establish his accountability for the murder; and (2) the trial court erred in failing to investigate defense counsel's possible neglect and incompetence. We affirmed the judgment and conviction in an unpublished order. *Howard*, No. 1-03-0710 (July 21, 2004) (unpublished pursuant to Illinois Supreme Court Rule 23).

¶ 12 Postconviction Petition

¶ 13 Thereafter, defendant filed a *pro se* postconviction petition. The trial court proceeded to the second stage of postconviction proceedings where counsel was appointed to represent defendant. Counsel filed an amended petition followed by a second amended petition. This petition alleged he was denied effective assistance of counsel during the plea negotiation process because: (1) trial counsel failed to advise him on the direct consequences of accepting or rejecting the State's offer of 12 years' imprisonment on a reduced charge; and (2) as a result of that deficient performance he declined the State's offer and proceeded to trial where he received a sentence more than twice as long as he would have received under the proposed plea agreement. Defendant further maintained that trial counsel advised him (1) he should reject the State's offer, (2) that his case was a "not guilty," (3) that his conduct did not satisfy the elements of first-degree murder, (4) the worst possible outcome at trial would be a conviction for

aggravated battery, and (5) in all likelihood he would receive an outright acquittal if he went to trial. Defendant also asserted that "[a]t no time during discussion of the State's offer did trial counsel advise [him] that he was potentially facing the death penalty as a result of the case." Defendant's petition was supported by his own affidavit in which he attested to the veracity of the allegations in the petition. According to defendant, if he had been properly advised that his alleged conduct could support a conviction for first degree murder, he would have accepted the offer made by the State.

¶ 14 The State answered the petition and the matter proceeded to a third-stage evidentiary hearing in August 2018 with defendant and his trial counsel testifying.

¶ 15 Evidentiary Hearing

¶ 16 Defendant testified he was charged with murder in this case, along with codefendants Bibbs, Barrios, Rocha, and Holmes, for the death of Bass that occurred in September 1998 in tier 2-G of division 9 of the CCDOC. At that time, he had another murder case pending (the 1997 case). He had three prior convictions for possession of a stolen motor vehicle and a prior conviction for contraband in a penal institution.

¶ 17 Regarding the present case, defendant testified that in July 2002 he received a 12-year offer from the State but did not know to what charge he would be pleading. According to defendant, counsel told him that because he was not accused of being "the stabber" it "was basically a not guilty" and the "worst case scenario" was that he would be found guilty of aggravated battery. Counsel did not inform him that he could receive the death penalty in the 1997 case if he were to be convicted in the present case. Regarding counsel's advice about the plea offer, defendant explained, "it was more a dominant stance that we will be proceeding to trial." Defendant further testified that he agreed with counsel's assessment that he should

proceed to trial and that he knew that by going to trial he was not accepting the plea offer.

¶ 18 Defendant also testified that if counsel had explained to him that he could be convicted of first-degree murder under a theory of accountability given the evidence that he would have accepted the State's offer of 12 years.

¶ 19 On cross-examination, defendant testified that early in the case the State had petitioned for the death penalty but had thereafter "dedeathed" the case. Defendant further testified he understood he faced the death penalty because he had been charged with two separate murders. In other parts of his testimony, however, defendant claimed he did not understand he faced the death penalty because of the two murder charges. The State confronted defendant with a psychologist's report documenting an interview with defendant during a forensic examination ordered in the 1997 case to evaluate him for fitness. The report indicated that defendant stated he understood he was facing a potential death sentence because of two pending murder charges. He also testified he was aware that the State filed motions indicating its intent to seek the death penalty and later withdrew them. He was also aware of a moratorium on executions at the time and believed that he would not be put to death because of the moratorium. He further believed there would be a plea bargain in the 1997 case in which counsel was negotiating for a 20-year sentence.

¶ 20 Defendant further testified that counsel did not go over discovery with him and never told him the sentencing range for murder. Defendant testified he believed the maximum sentence he could receive was for aggravated battery but did not testify as to the length of that sentence. According to defendant, "If I would have knew [*sic*] I would have been found guilty of any type of murder, I would have took [*sic*] 12 years." When asked, "But you knew you were facing a murder charge, correct?" defendant replied, "I did not." Defendant went on to explain that he

was "under the impression that [the State] broke the case down *** as if it was an aggravated battery" and that counsel told him it was an "aggravated battery on the indictment." When asked if he was told he was facing a murder charge defendant replied, "She did not tell me that." Defendant then clarified that he knew he was charged with murder "at some point" but when he went to trial, he was under the impression that "worst case scenario, I would receive an aggravated battery conviction." Defendant admitted he was present for his trial and heard the State argue that he was responsible for Bass' death.

¶ 21 Joan Hill McClain, defendant's trial counsel, testified she has been a licensed Illinois attorney since 1988 and primarily practices criminal defense. She explained that she had experience with murder cases and handled them when Illinois had the death penalty. According to McClain, she initially represented defendant in the 1997 case and thereafter took on the present case. In both cases defendant was charged with murder. According to defense counsel, she informed defendant of the charges against him, that he could face the death penalty if convicted of murder in these two cases, and that she made no guarantee he would be found not guilty in the present case. She specifically recalled discussing the State's intent to seek the death penalty with defendant prior to the State making an offer.

¶ 22 Regarding the plea offer, McClain testified that the State offered 12 years if defendant pled guilty to attempted murder. She discussed the offer with defendant, including the evidence against him, and advised him—in her opinion—that there was a "great possibility" of winning the case based on this evidence. Despite her confidence, McClain denied pressuring defendant to take the case to trial and stated it was defendant's decision—not hers—to accept or reject the plea. Defendant informed her he wanted to proceed to trial. At no time did defendant say he wanted to accept the offer.

¶ 23 Regarding her oral motion to withdraw from defendant's case upon the finding of guilty, McClain testified that she so moved because she did not think defendant understood that if he were to be found guilty of murder in the 1997 case, he could face the death penalty. She did acknowledge, however, that the death penalty "was not on the table" at the time because it had been withdrawn and that the State never sought the death penalty in the 1997 case.

¶ 24 The parties stipulated that, if called to testify, Assistant State's Attorney Michael Golden would testify that he was assigned to handle the prosecution of this case and that on June 21, 2002, he made an offer to Joan Hill McClain that if Mark Howard were to plead guilty to a reduced charge of attempted murder, that he would receive a sentence of 12 years. They further stipulated that, if called to testify, Judge Crane would testify that he presided over this case; that he accepted the negotiated guilty pleas of A.J. Bibbs, Pedro Barrios, and Theodore Holmes to reduced charges; and that he would have accepted a negotiated guilty plea from defendant with a 12-year sentence on a reduced charge if the plea agreement had been presented.

¶ 25 Trial Court Ruling

¶ 26 In a 19-page written order, the circuit court denied defendant's petition for postconviction relief. The circuit court first addressed the argument that counsel misapprehended the law of accountability when she advised defendant that he would not be found guilty of first degree murder. The circuit court observed that there was sufficient evidence so that defendant could be found accountable under the common design rule and that counsel reviewed this evidence prior to trial. The circuit court further stated that it was reasonable for counsel to argue, as she did, that the incident was a brawl in which someone individually took it upon themselves to stab Bass. The circuit court found that counsel did not grossly mischaracterize the strength of the State's case when advising him and that while her prediction of a likely acquittal "may seem

overconfident or misguided in hindsight" that hindsight "does not render performance that was reasonable at the time unreasonable later."

¶ 27 The circuit court further found that counsel's advice to defendant about his trial prospects was a "prediction of the anticipated probable outcome—not that it was a guarantee of an acquittal, a promise of the impossibility of a conviction or an assessment that an aggravated battery conviction was the worst possible outcome."

¶ 28 Regarding counsel's oral motion to withdraw, the circuit court found that it demonstrated how confident she was in an acquittal, but it did not automatically establish that she was deficient in her representation. The circuit court noted that counsel used the qualifier "basically" when she stated, "I basically told him it was a not guilty" and that the use of this qualifier signaled that counsel did not give defendant an absolute promise of acquittal. According to the circuit court, "The oral motion merely described how strongly she advised her client about his chances for an acquittal. Contrary to [defendant's] post-conviction assertions, a review of the trial record shows McClain understood accountability, knew that the State's case against [defendant] hinged on it, and that he was facing murder, not aggravated battery. McClain's trial performance belies the allegation that her advice to [defendant] did not adequately consider accountability."

¶ 29 The circuit court continued that the trial record also "belies any notion that [defendant] reasonably believed he was only facing aggravated battery and not murder." The circuit court found that throughout the proceedings over several dates, there were numerous references to murder and none to aggravated battery. There was also no indication that the State "broke the case down" and elected to proceed against defendant on aggravated battery instead of murder. On this issue, the circuit court found defendant's testimony to be "simply not credible."

¶ 30 Regarding the issue pertinent to this appeal—whether counsel had advised defendant about the death penalty—the trial court found that counsel informed defendant of the 12-year offer and that he faced a minimum of 20 years if convicted at trial. The circuit court further found as follows:

> "McClain also testified that she did not adequately explain to [defendant] that he faced a potential death sentence in the [1997] murder case before Judge Bowie upon conviction for murder in this case. In contrast, the record reflects that [defendant] understood the possibility of a death sentence because of the two murder cases but that he believed the moratorium on executions precluded the imposition of any death sentence. Ultimately, this all proved to be a non-issue as the State did not seek capital punishment in the other murder case, and McClain won an acquittal in that murder case. Thus, no actual harm resulted from any supposed inadequacies in the advice that McClain gave [defendant] regarding the impact of this matter upon his other murder case. However, considering the evidence presented at this third stage hearing and the common law record, this Court finds that McClain adequately advised [defendant] as to sentencing implications in this matter and that [defendant] sufficiently understood the situation he faced."

¶ 31 The circuit court concluded that, "[w]hile this Court does not find McClain's performance in this matter to be constitutionally deficient, and that alone precludes a finding of ineffective assistance, the Court also does not believe [defendant] would have otherwise accepted the plea offer." The court observed that defendant was "well acquainted with the plea bargaining" process from his prior felony cases and was given sufficient information about the possible penalties in this matter, "including being apprised of the potential for capital punishment." Consequently, the circuit court found defendant failed to make a substantial

showing that his counsel's performance was deficient or that he was prejudiced by her performance and denied the petition. This appeal followed.

¶ 32 ANALYSIS

¶ 33 On appeal, defendant raises the sole contention that the circuit court's denial of his postconviction petition was based on a manifestly erroneous ruling that defendant failed to demonstrate he would have accepted the State's offer of 12 years on a reduced charge of attempted murder had trial counsel properly advised him that he faced a death penalty sentence in a pending murder case upon a conviction of murder in this case.

¶ 34 In response, the State asserts that the circuit court's determination was not manifestly erroneous where defendant offered no evidence to substantiate this claim and, regardless, he cannot demonstrate he was prejudiced by his trial counsel's performance as he did not actually receive a sentence of death.

¶ 35 The Act

¶ 36 Defendant seeks relief under the Act (725 ILCS 5/122-1 *et seq.* (West 2018)), which provides for three stages of review by the trial court. *People v. Domagala*, 2013 IL 113688, ¶ 32. At the first stage, the trial court may summarily dismiss a petition only if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2018); *Domagala*, 2013 IL 113688, ¶ 32.

¶ 37 At the second stage, counsel is appointed if a defendant is indigent. 725 ILCS 5/122-4 (West 2018); *Domagala*, 2013 IL 113688, ¶ 33. After counsel determines whether to amend the petition, the State may file either a motion to dismiss or an answer to the petition. 725 ILCS 5/122-5 (West 2018); *Domagala*, 2013 IL 113688, ¶ 33. At this stage, the circuit court must determine "whether the petition and any accompanying documentation make a substantial

showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). If the defendant makes a "substantial showing" at the second stage, then the petition advances to a third-stage evidentiary hearing. *Domagala*, 2013 IL 113688, ¶ 34.

¶ 38 Standard of Review

¶ 39 In this appeal, the petition was denied after a third-stage evidentiary hearing. At such a hearing, the circuit court acts as factfinder, determines witness credibility and the weight to be given to the testimony and evidence, and resolve any evidentiary conflicts. *Domagala*, 2013 IL 113688, ¶ 34. When an issue at a third-stage evidentiary hearing involves fact-finding and credibility determinations, we will not reverse the circuit court's finding on that issue, unless the finding is manifestly erroneous. *People v. Williams*, 2017 IL App (1st) 152021, ¶ 22. However, if an issue involved no fact-finding or credibility determinations, then our review is *de novo*. *People v. Andrews*, 403 Ill. App. 3d 654, 659 (2010).

¶ 40 We apply a mixed standard of review to claims of ineffective assistance of counsel. *People v. Peterson*, 2015 IL App (3d) 130157, ¶ 222. The circuit court's fact-finding and credibility assessments in deciding whether or not counsel was ineffective are reviewed under the ordinary standard for the dismissal of a postconviction petition following the third-stage evidentiary hearing. *Id.* "However, the ultimate question of whether counsel's actions support a claim of ineffective assistance is a question of law that is subject to *de novo* review on appeal." *Id.*; see also *People v. Hale*, 2013 IL 113140, ¶ 15 (applying a *de novo* standard of review to a claim of ineffective assistance of counsel).

¶ 41 Ineffective Assistance of Counsel

¶ 42 The Illinois Constitution, like the United States Constitution, guarantees all criminal defendants the right to effective assistance of counsel. *Hale*, 2013 IL 113140 ¶ 15. This right

extends to the plea-bargaining process, including situations where a defendant rejects a guilty plea offer and subsequently receives a fair trial. *Id.* ¶ 16. " 'A criminal defendant has the constitutional right to be *reasonably* informed with respect to the direct consequences of accepting or rejecting a plea offer.' " (Emphasis in original.) *Id.* ¶ 16 (quoting *People v. Curry*, 178 Ill. 2d 509, 528 (1997)). "Concomitantly, a criminal defense attorney has the obligation to inform his or her client about the maximum and minimum sentences that can be imposed for the offenses with which the defendant is charged." *Curry*, 178 Ill. 2d at 528. The right to effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial. *Id.* at 518.

¶ 43 Claims of ineffective assistance of counsel are reviewed under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hale*, 2013 IL 113140, ¶ 15. To prevail on such a claim, a defendant must demonstrate that counsel's performance was both deficient and prejudicial. *Curry*, 178 Ill. 2d at 519. "More precisely, a defendant must show that his attorney's assistance was objectively unreasonable under prevailing professional norms, and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id.* (quoting *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* test. Therefore, the failure to establish either proposition will be fatal to the claim. *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 44 In its extensive 19-page written order, the circuit court expressly found that trial counsel's conduct was not objectively unreasonable stating that "McClain adequately advised [defendant] as to sentencing implications in this matter and that [defendant] sufficiently understood the situation he faced" including the possibility of the death penalty. As previously discussed, we review such findings that are based on the evidence under a manifestly erroneous

standard. *People v. Jones*, 2012 IL App (1st) 093180, ¶ 49. Under that standard, a finding is manifestly erroneous only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented. *People v. Miraglia*, 2013 IL App (1st) 120286, ¶ 28. We further observe that, following a third-stage evidentiary hearing, we give substantial deference to the circuit court as the finder of fact. *Jones*, 2012 IL App (1st) 093180, ¶ 49. This is because the fact finder is in the best position to observe the conduct and the demeanor of the parties and the witnesses. *Miraglia*, 2013 IL App (1st) 120286, ¶ 28.

¶ 45 Based on our review of the record, we cannot say that this finding is manifestly erroneous. See *Jones*, 2012 IL App (1st) 093180, ¶ 49. While in her oral motion to withdraw counsel stated to the court that she did not adequately advise defendant regarding the consequences of a murder conviction in this case, this statement is belied by the record. The record demonstrates that counsel informed defendant about the consequences of being found guilty of two murders—that he could face the death penalty. Counsel testified she advised defendant about the death penalty when the State filed its intent to seek the death penalty. Specifically, she told defendant that two murders allowed the State to seek the death penalty. Indeed, defendant testified he understood he faced the death penalty because he had been charged with two separate murders. Yet, in other portions of his testimony defendant claimed he did not understand he faced the death penalty. The psychologist's report, however, indicates that defendant did understand the State was seeking the death penalty but later withdrew its intent to do so. Defendant further testified that he was aware of a moratorium on executions at the time and believed he would not be put to death due to the moratorium. Accordingly, we find the circuit court's determination that counsel adequately advised defendant as to sentencing implications in this matter is not manifestly erroneous. See *Curry*, 178 Ill. 2d at 528 ("A

criminal defendant has the constitutional right to be *reasonably* informed with respect to the direct consequences of accepting or rejecting a plea offer." (Emphasis in original.)). Because we reach this determination regarding the first *Strickland* prong, we need not address defendant's argument that he was prejudiced by counsel's alleged deficiency. See *Simms*, 192 Ill. 2d at 362 (A defendant must satisfy both prongs of the *Strickland* test and the failure to establish either proposition will be fatal to the claim).

¶ 46 CONCLUSION

¶ 47 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 48 Affirmed.