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2012 IL App (3d) 100446-UB

Summary Order filed December 21, 2011
Modified Upon Denial of Rehearing April 11, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14th Judicial Circuit, Whiteside County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-10-0446
)	Circuit No. 2004-CF-279
)	
PATRICK M. KENDELL,)	Honorable
Defendant-Appellant.)	John Hauptman, Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Schmidt and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant voluntarily dismissed his appeal after the appointment of appellate counsel. Several years later, defendant filed a postconviction petition alleging the ineffective assistance of his appellate counsel caused his decision to voluntarily dismiss his direct appeal. The trial court summarily dismissed defendant's postconviction petition. We affirm.

¶ 2 After a bench trial, the trial court found defendant Patrick M. Kendell guilty of the

offenses of Class X armed robbery, Class 2 armed violence, and Class 3 aggravated battery. The court sentenced defendant to 15 years' incarceration and ordered defendant to pay restitution for the Class X armed robbery, and a concurrent 14 years' incarceration for the armed violence conviction; and dismissed the aggravated battery charge as a lesser included offense. The court admonished defendant that the 85% truth in sentencing laws applied to the sentence for armed robbery based on a finding the victim suffered great bodily harm. Defendant filed a timely notice of appeal, but voluntarily dismissed his appeal approximately four months later.

¶ 3 Four years later, defendant filed a postconviction petition claiming he received ineffective assistance of trial counsel during his sentencing hearing and ineffective assistance of appellate counsel while his timely-filed appeal was pending. Defendant now appeals the trial court's summary dismissal of his postconviction petition.

¶ 4 After this court affirmed the dismissal of the postconviction petition by summary order, defendant filed a petition for rehearing in this court. Upon further review of defendant's petition for rehearing, we issue a modified order upon denial of rehearing which again affirms the dismissal of the postconviction petition.

¶ 5 **BACKGROUND**

¶ 6 On August 5, 2004, the State filed a complaint, followed by a subsequent information, alleging defendant Patrick M. Kendell committed the offenses of Class X armed robbery, Class 2 armed violence, and Class 3 aggravated battery. Defendant retained his own attorney to represent him throughout the trial proceedings. Defendant waived a jury trial and the court set the case for a bench trial. On April 15, 2005, the trial court found defendant guilty of all three offenses.

¶ 7 **I. Sentence**

¶ 8 On May 27, 2005, the court held a sentencing hearing and sentenced defendant to serve 15 years in the Department of Corrections (DOC) for the armed robbery conviction, with credit for time served, and to pay restitution in the amount of \$5,828.73. The court found the victim suffered great bodily harm and included this finding in the written sentencing order. In addition, at the close of the sentencing hearing, the court verbally admonished defendant that, based on the great bodily harm finding, defendant's sentence fell under the truth-in-sentencing provisions of the Unified Code of Corrections (730 ILCS 5/3-6-3(a)(2)(ii) (West 2004)), and defendant would have to serve 85% of his sentence for the armed robbery conviction, receiving no more than 4.5 days of good conduct credit per month on that sentence. The court also sentenced defendant to serve 14 years in DOC for the armed violence conviction, to be served concurrently with the armed robbery sentence, with defendant receiving day-for-day credit for the armed violence conviction. The court dismissed the aggravated battery charge as a lesser included offense.

¶ 9 The court denied defendant's "Motion to Vacate and Reconsider," filed on May 27, 2005. Thereafter, defendant filed a timely notice of appeal. The court appointed the appellate defender to represent defendant on September 9, 2005. After receiving copies of the transcripts of the circuit court proceedings, the defense filed a motion to dismiss the appeal, which this court granted, on November 16, 2006.

¶ 10 **II. Postconviction Petition**

¶ 11 On February 2, 2010, defendant filed a "Pro Se Post Conviction Petition," which consists of an unverified, four-page, handwritten document alleging defendant's appellate counsel was ineffective for allowing defendant to voluntarily dismiss the appeal, and his trial counsel was ineffective during the sentencing phase of the criminal proceeding. The postconviction petition

is not supported by affidavit. Relevant portions of defendant's *pro se* postconviction petition state:

“6. One issue defendant intended to raise on appeal was the implamenting [*sic.*] of 85% and/or term of his sentence. (It should be noted that other issues were and are under further consideration).

7. At sentence the court made note of ‘great bodily harm’ (R.44) and noted an 85% sentence (R.58). It was with this that defendant believed his sentence to be at 85%.

8. Despite the above, the sentence order of the court failed to note 85% which was further supported by the calculation of the Department of Corrections. (See Exhibit 1 and Exhibit 2 that note a 50% sentence.)¹

9. Upon further thought and instruction of counsel on appeal defendant moved to have Appeal dismissed as one issue of relief seemed to be corrected, thereby [*sic.*], reducing his sentence. This reduction was further supported on 7-21-08 by yet another calculation. (See Exhibit 3, compare all exhibits to sentence order at Exhibit 4).

10. On 11-06-06 motion to dismiss appeal was allowed and defendant withdrew from further attempts of relief.

11. On 8-27-09 defendant was now notified that his sentence had been changed and calculated to reflect that of an 85% sentence (See Exhibit 5).

12. Due to the new information defendant[']s sentence was/is now on a release date of 5-8-17 instead of the prior 2-8-12 outdate.

¹ These exhibits refer to DOC documents showing calculations for defendant's release date.

* * *

14. Defendant now seeks relief for the violation of his Due Process where he received ineffective assistance of counsel on appeal.

15. In all the above stated issues counsel was of the knowledge and/or should have been of the knowledge to correct defendants belief of misguided sentence. Counsel should have advised further relief by way of appeal on remaining issues, not dismiss on side of workload as it seems.

16. Counsel was notified of issues desired for appeal would consist of, but not limited to, counsel at trial failure to raise further mitigating factors, sentence claim, informant issues in violation of, etc.

17. Defendant further raises neglect on trial counsel on this filing for the same above stated claims on his counsel for appeal.

18. In order to meet the two prong test defendant notes that he was prejudiced by counsel in the failure to even file an appeal. Secondly, that but for counsel's actions, an appeal would have been filed resulting in a lesser sentence and/or reversal on the basis of violations of informant. i.e. credibility, overhear, etc.

19. Defendant further notes that all known acts of trial counsel[']s neglect may be supported by the record. Therefore, said issues should have been raised on appeal and this now post conviction petition better rests on counsel for appeal.”

¶ 12

III. Trial Court's Ruling

¶ 13 The trial court engaged in a “Stage 1 review” of defendant's postconviction petition on April 30, 2010, and entered a finding that defendant's *pro se* postconviction petition was based

on an “indisputably meritless legal theory or fanciful factual allegation in that the claim is contradicted by the record.” Consequently, the court dismissed defendant’s postconviction petition. Defendant appeals the summary dismissal of his postconviction petition.

¶ 14 Thereafter, on December 21, 2011, this court entered a summary order affirming the trial court’s summary dismissal of defendant’s postconviction petition. On January 10, 2012, defendant filed a petition for rehearing arguing this court affirmed the trial court’s dismissal of the postconviction petition based upon defendant’s challenge regarding serving 85% of his sentence, without considering the issue raised in this appeal regarding the conduct of appellate counsel and other events which took place immediately prior to the voluntary dismissal of his direct appeal, effectively denying him his right to a direct appeal.

¶ 15 ANALYSIS

¶ 16 On appeal, and in his petition for rehearing, defendant argues his *pro se* postconviction petition raised the gist of a constitutional claim based on the ineffective assistance of *appellate* counsel which resulted in defendant’s decision to voluntarily dismiss and erroneously forfeit his right to review of all errors in a direct appeal. In his initial appellant brief, defendant argued he “intended to challenge his sentence and other issues on appeal, but after consulting with appellate counsel he agreed to dismiss his appeal based on the incorrect belief that he would receive day for day good conduct credit against his prison sentence.”

¶ 17 On appeal, the State asserts that defendant’s petition is not verified by affidavit as required by statute. Further, even if the unverified allegations were taken as true for purposes of this appeal, the facts in defendant’s postconviction petition did not present even a “gist of a constitutional claim” and the petition was properly dismissed by the trial court.

¶ 18 Section 122-2.1(a)(2) of the Post-Conviction Relief Act (Act) provides the court shall examine such postconviction petition and, if the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision. 725 ILCS 5/122-2.1(a)(2) (West 2004). The Act also provides the postconviction petition shall clearly set forth the respects in which petitioner's constitutional rights were violated, and requires the petition “shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.” 725 ILCS 5/122-2 (West 2004). This court reviews a trial court’s summary dismissal of a postconviction petition *de novo*. *People v. Edwards*, 197 Ill. 2d 239, 247 (2001); *People v. Coleman*, 183, Ill. 2d 366, 389 (1998).

¶ 19 Our supreme court has held that “[a] postconviction petition is considered frivolous or patently without merit if the petition's allegations, taken as true, fail to present the ‘gist of a constitutional claim.’ ” *People v. Delton*, 227 Ill. 2d 247, 254 (2008) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). Additionally, since many postconviction petitions are prepared by a *pro se* defendant, a petitioner “ ‘need only present a limited amount of detail’ ” in the petition (*Gaultney*, 174 Ill.2d at 418), and need not make legal arguments or cite to legal authority. *Delton*, 227 Ill. 2d at 254. However, our supreme court stressed that “a ‘limited amount of detail’ does not mean that a *pro se* petitioner is excused from providing any factual detail at all surrounding the alleged constitutional deprivation.” *Id.* The purpose for detailing the requirements of the contents of the postconviction petition is to establish a petition's allegations are capable of “ ‘objective or independent corroboration.’ ” *Delton*, 227 Ill. 2d at 254 (quoting *People v. Hall*, 217 Ill. 2d 324, 333 (2005)). Non-factual and non-specific allegations in

a postconviction petition, which merely amount to conclusions, are not sufficient to require a Stage 2 hearing under the Act. *People v. Morris*, 236 Ill. 2d 345, 354 (2010).

¶ 20 We note defendant’s postconviction petition generally alleges defendant formulated an incorrect “belief” he would receive day-for-day credit against his sentence or, in other words, would not be required to serve 85% of his sentence for the offense of armed robbery due to DOC’s miscalculations. However, defendant does not allege the facts which linked his “incorrect belief” directly, or even indirectly, to the specific advice he received from appellate counsel before dismissing his appeal.

¶ 21 In the petition for rehearing before this court, appellate counsel now clarifies the *pro se* postconviction petition “explains that it had been his [defendant’s] desire to challenge the 85% sentence in his direct appeal, *among other things*.” (Emphasis added). At this point, defendant contends he lost his right to a direct appeal due to his first *appellate* counsel’s improper advice and, therefore, defendant is not required to make any showing to the trial court, in the postconviction petition, as to the “the merits of his hypothetical appeal,” relying on *Edwards*, 197 Ill. 2d at 254.

¶ 22 However, *Edwards* is distinguishable from the instant case in two ways. *Edwards* involved a trial attorney’s failure to file a timely motion to withdraw his client’s guilty plea which extinguished defendant’s right to file any direct appeal. *Edwards*, 197 Ill. 2d at 254. Consequently, *Edwards*, unlike this defendant, did not file a notice of appeal or have the benefit of the advice of appointed appellate counsel. *Id.*

¶ 23 Here, defendant’s trial attorney preserved defendant’s right to a direct appeal, by first requesting the trial court to reconsider and vacate the sentence imposed, which required

defendant to serve 85% of the sentence, and then by filing a timely notice of appeal after the court refused to reconsider the sentence imposed. Unlike the defendant in *Edwards*, in the case at bar, defendant then filed a timely notice of appeal and was afforded appellate counsel to assist in that direct appeal. Therefore, defendant was afforded the right to appeal, but voluntarily dismissed his direct appeal after receiving transcripts and the benefit of appellate counsel. Thus, we conclude *Edwards* does not apply to the circumstances presented in this appeal.

¶ 24 We note defendant dismissed his appeal on November 6, 2006. At that time, according to the exhibits defendant attached to his postconviction petition, DOC records reveal that DOC, not appellate counsel, miscalculated defendant's release date to be in 2012 rather than 2017.

¶ 25 Three years later, on August 7, 2009, DOC notified defendant his release date would be May 8, 2017. This release date was consistent with the trial court's finding that great bodily harm occurred to the victim requiring defendant to serve 85% of his sentence, rather than just 50%, and also was consistent with the trial court's admonishments that defendant would serve 85% of the sentence as required by the truth in sentencing statutes. On February 2, 2010, defendant filed a *pro se* postconviction petition claiming: "Upon further thought and instruction of counsel on appeal defendant moved to have Appeal dismissed as one issue of relief seemed to be corrected, thereby [*sic.*] reducing his sentence."

¶ 26 Defendant's postconviction petition presented facts and supporting documents revealing DOC initially miscalculated defendant's release date to be a date in 2012, consistent with defendant receiving day-for-day credit and serving only 50% of his sentence. Surely defendant has not stated the gist of a constitutional claim due to defendant's incorrect belief that perhaps DOC would not detect this miscalculation in the event the appeal was dismissed. Nor does the

postconviction petition allege appellate counsel advised defendant the original sentence had been changed or that the DOC first release date of 2012 was correctly calculated causing defendant to decide to dismiss his pending appeal.

¶ 27 To present a “gist of a constitutional claim” for ineffective assistance of counsel, the facts must show counsel's actions fell below an objective standard of reasonableness and prejudiced the defense. *People v. Hodges*, 234 Ill. 2d 1, 22 (2009), (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Here, the postconviction petition is deficient because it does not identify the actions of appellate counsel, namely, the specific and deficient legal advice appellate counsel provided to defendant, that fell below an objective standard of reasonableness. Without an affidavit or any factual allegations concerning appellate counsel’s erroneous legal advice, defendant’s postconviction petition does not provide any basis to support the contention that appellate counsel unfairly caused defendant to dismiss his direct appeal under “false pretenses.”

¶ 28 It is well settled in Illinois that a judge may dismiss a postconviction petition when the allegations are contradicted by the record. See *Coleman*, 183 Ill. 2d at 381-82. Here, the record shows the trial court admonished defendant he would have to serve 85% of his sentence. There is nothing in the record to suggest appellate counsel provided advice that was contrary to the accurate information provided by the trial court at the time of sentencing. Thus, defendant’s “mistaken belief” may have been attributable to DOC’s error, but has not been linked to appellate counsel’s actions by this record.

¶ 29 Therefore, based upon our careful review of the record, we affirm the trial court’s decision that defendant’s postconviction petition was based on an “indisputably meritless legal theory or fanciful factual allegation in that the claim is contradicted by the record.”

¶ 30

CONCLUSION

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 32 Affirmed.