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2016 IL App (3d) 140744-U

Order filed October 25, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-14-0744
)	Circuit No. 09-CF-1208
NORA J. PATTON,)	
Defendant-Appellant.)	Honorable David A. Brown, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant's postconviction petition that alleged defendant did not receive a fair trial. The petition failed to state the gist of a constitutional claim because the absence of a trial directly resulted from defendant's decision to enter a guilty plea as part of a fully negotiated plea agreement with the State.

¶ 2 On May 2, 2011, defendant pled guilty to first degree murder and was sentenced to 28 years of incarceration in the Illinois Department of Corrections. On May 12, 2014, defendant

filed a *pro se* petition for postconviction relief. The trial court dismissed defendant's petition on July 9, 2014, after finding the petition frivolous and patently without merit. Defendant appeals.

¶ 3

FACTS

¶ 4

On November 10, 2009, the State charged Nora J. Patton (defendant) with two counts of the first degree murder of Johnny Tyler pursuant to 720 ILCS 5/9-1(a)(1) and (a)(2) (West 2008). On May 2, 2011, defendant entered into a fully negotiated plea agreement with the State. In exchange for a plea of guilty to the charge of first degree murder, the State agreed to dismiss count II and amended count I by striking the reference to a firearm. In addition, defendant agreed to waive "all appeal rights." The parties recommended a sentence of 28 years in the Illinois Department of Corrections, along with three years of mandatory supervised release. The proceedings took place as follows:

“THE COURT: All right. Does that suggest that she doesn't have a right to file a motion to withdraw the guilty plea?

MS. HOOS: That's correct. All appeal rights would be waived. But it's our position, when we've done situations like this in the past, she should still be admonished as to what they would be. But she is giving them up. So this would be the final, I guess, disposition then to this case. There will be nothing further after this as far as appeal rights.

MR. LOEFFEL: Your Honor, it is rare. It is also constitutionally permissible and we do it from time to time in federal court. But that is part of the bargain that we are proposing today would [*sic*] be the waiver of the appeal rights.

THE COURT: Is that your agreement, Miss Patton?

THE DEFENDANT: I really don't understand it, but I did go ahead with it.

THE COURT: You know what? We're going to break and I want you to talk it over in private with Mr. Loeffel because I don't want you to take something that you don't want to take. And I don't want you to accept something that you don't understand.

So, I want you to talk with Mr. Loeffel and have him answer any and all questions that you have. And then we'll reconvene.

It's okay if you don't understand it. But I need to know that you understand it and that you agree with it. Okay. Let's take a five or ten minute break while that happens."

* * *

"THE COURT: All right. We're back on the record. Miss Patton is back in the courtroom with her attorney, Mr. Loeffel.

Miss Patton, have you had an opportunity to talk this over further with Mr. Loeffel?

THE DEFENDANT: Yes.

THE COURT: Has he answered all of your questions?

THE DEFENDANT: Yes.

THE COURT: Is there anything about this you don't understand?

THE DEFENDANT: No, your Honor, just want to go and get this over with.

MS. HOOS: Judge, if I could? Just for the Court's edification, with regards to the defendant's knowledge of what's going on today, the parties have been in discussion over the weekend regarding possible plea. I know Mr. Loeffel spoke to the defendant, I believe, on a couple different occasions Saturday and Sunday this weekend regarding this. This isn't something we sprung on the defendant at 9:00 this morning.

MR. LOEFFEL: Yeah. I'll just state for the record, your Honor, up until the weekend, not counting the weekend, I visited with Miss Patton 18 times out at the jail. I visited her Saturday morning. And then I visited her again on Sunday, yesterday. We discussed the parameters of the plea. And then once again this morning discussed the parameters of the plea, discussed the plea, the plea of guilty, the minimum/maximum sentences, and her constitutional rights.

She did have a little confusion regarding the constitutional waiver, which is an unusual thing, but I have spoken to her about it. We're all on board now.

THE COURT: Why don't you outline it for us all one more time then what the terms of the agreement are?

MR. LOEFFEL: It's to the amended Count 1. The dismissal of Count 2. Miss Patton would enter a plea to the count of first degree murder as amended.

There would be a -- there would be a proposed negotiated disposition to present to the Court.

Miss Patton would be surrendering her -- or waiving her right of appeal the sentence, right to file a motion to withdraw the guilty plea within 30 days. There would be a definite sentence of 28 years in the Department of Corrections. Three years mandatory supervised release. Court costs. DNA fee, which as I indicated the DNA fee would be offset by her 556 days served. She gets credit for all time served, of course, since October 23rd, 2009.

I think that's everything.

THE COURT: A hundred percent?

MR. LOEFFEL: It's a hundred percent satisfied by law, your Honor.

THE COURT: Three years mandatory supervised release upon your release.

THE DEFENDANT: Okay.

THE COURT: Do you understand all of that, Miss Patton?

THE DEFENDANT: Yes.

MS. HOOS: Judge, I'm sorry. I don't mean to interrupt again. Mr. Loeffel just indicated it would be the appeal right of withdrawing her guilty plea, which that's the one that would start the course.

MR. LOEFFEL: Right.

MS. HOOS: Just so the defendant is clear, it's all appeal rights. She won't be able to appeal any other hearings we had or anything that occurs today. I want to make sure that's clear.

MR. LOEFFEL: That's correct, your Honor.

THE DEFENDANT: Yeah.

THE COURT: You won't be able to bring any legal proceedings to contest this matter.

THE DEFENDANT: I understand.

THE COURT: You understand?

THE DEFENDANT: Yes.

THE COURT: All right. Is that your agreement?

THE DEFENDANT: Yes.

THE COURT: How old are you?

THE DEFENDANT: 49.

THE COURT: I'm sorry?

THE DEFENDANT: 49.

THE COURT: Your date of birth?

THE DEFENDANT: September 28, '61.

THE COURT: September 28th?

THE DEFENDANT: '61.

THE COURT: '62?

THE DEFENDANT: '61.

THE COURT: 19 –

THE DEFENDANT: 1961.

THE COURT: Okay. September 28, 1961?

THE DEFENDANT: (Nodding.)

THE COURT: Are you an American citizen?

THE DEFENDANT: Yes, I am.

THE COURT: You read and write the english language?

THE DEFENDANT: Yes.

THE COURT: How many years of education do you have?

THE DEFENDANT: 16.

THE COURT: Are you on any drug or alcohol as you sit here today?

THE DEFENDANT: No.

THE COURT: Have you talked this over with your attorney?

THE DEFENDANT: Yes, I have.

THE COURT: He's answered all of your questions?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with his services?

THE DEFENDANT: Yes.

THE COURT: I'm going to go over with you in some detail what you're charged with, possible penalties, what your rights are.

You're charged with a Class M felony, first degree murder. It's alleged that on or about October 23, 2009, through October 24, 2009, you without legal justification and with the intent to kill Johnny Tyler shot Johnny Tyler thereby cause [sic] causing the death of Johnny Tyler. Is that what you're pleading guilty to?

THE DEFENDANT: Yes.

THE COURT: If were you [sic] convicted of that offense, without the firearm provision that has been deleted, if you were convicted of the offense as outlined, you could receive a sentence of 20 to 60 years in the state penitentiary, up to \$25,000 of fines, three years mandatory supervised release attaches to any Department of Corrections sentence. And there is no option for probation. It's a mandatory prison sentence. You serve 100 percent of that time.

Do you understand the possible penalties?

THE DEFENDANT: Yes.

THE COURT: You have certain rights. You have the right, even as you sit here today, to stand on your plea of not guilty. In which event, you would have the right to have a trial, which is scheduled for today and throughout this week. That trial can be in front of a judge or a jury trial. You select what type of trial to have not the State.

The State has the burden of proof, must prove the allegations that I have just read beyond a reasonable doubt.

You have a right to have an attorney with you at all times. As long as you cannot afford one, one would be provided to you free of charge.

You have the right to cross-examine any witness that the State calls against you. You have the right to call or subpoena your own witnesses. You have the right to testify. In other words, to tell your side of this. You're not required to testify. You're not required to say a word about the merits of the case. If you choose not to testify, it will not be used against you in any way.

Do you understand your rights?

THE DEFENDANT: Yes.

THE COURT: Do you understand that by pleading guilty here today there will be no trial, you won't be cross-examining any witnesses, and you'll be giving up all the other rights I have just gone over?

THE DEFENDANT: Yes.”

* * *

“THE COURT: Miss Patton, did anybody make any threats or promises to you to force you into pleading guilty?

THE DEFENDANT: No, your Honor. I'm just tired that they have not discovered the individual that actually committed this crime. So I'm ready just to go ahead with what's been offered me today so I can go on with my life.

(Pause.)

THE DEFENDANT: So I'm not contesting the evidence against me.

THE COURT: Did you listen when the State was going through all of their evidence?

THE DEFENDANT: Yes, I did.

THE COURT: Do you believe that's what the State's evidence would show if we had a trial?

(Pause.)

THE DEFENDANT: I can't dispute that's what their evidence shows.

THE COURT: Do you want to have a trial?

THE DEFENDANT: No, I don't, your Honor. I just want to go on with my life and get this over with. I will sign these papers today.

(Pause.)

THE COURT: Is it your desire to plead guilty to the charge of murder?

THE DEFENDANT: I'm taking that plea.

THE COURT: Is it your desire to plead guilty to the charge of murder?

(Pause.)

THE DEFENDANT: Yes.

THE COURT: Do you need any more time to think about it?

THE DEFENDANT: No, I do not. No.

THE COURT: The plea is given voluntarily and knowingly. The plea is accepted and entered of record.

Mr. Loeffel, do you waive presenting evidence in mitigation and a presentence investigation?

MR. LOEFFEL: Yes, your Honor.

THE COURT: Defendant's criminal history?

MS. CRUZ: She has a 1980 court supervision for resisting, obstructing, Class A misdemeanor.

THE COURT: The Court accepts and approves the plea agreement. On the plea of guilty, the defendant stands convicted of a Class M felony, first degree murder. She will be sentenced to Illinois Department of Corrections for a term of 28 years. No day-for-day. 100 percent of that time must be served. You will get credit for the days that you have already put in.

Upon your release, there will be a three-year mandatory supervised release period imposed on top of the 28 years that you're being sentenced to.

You would normally have the right to appeal. You have waived those rights. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: I'm going to tell you what those rights would have been. The right to appeal would begin within 30 days of today's date. You would have to file a motion to withdraw the guilty plea listing all the reasons why the Court should allow you to withdraw the plea.

If that motion were to be allowed, the case will be -- would be reinstated as originally filed, both counts, without the amendment to Count 1 that was adopted today. If the motion would be denied, you would have 30 days from that date to file a Notice of Appeal. If you would need any assistance with that, the Court would provide you with a court appointed attorney and a transcript of today's proceedings.

Any questions about anything that's transpired here today?

(No verbal response.)

THE COURT: Is that a no?

THE DEFENDANT: No.

THE COURT: All right. Good luck to you.

THE DEFENDANT: Thank you.”

¶ 5 On July 20, 2011, defendant filed several *pro se* pleadings, including a late notice of appeal. Defendant’s appeal was dismissed on October 4, 2011, for lack of compliance with Supreme Court Rule 604(d).

¶ 6 On April 18, 2012, defendant filed a *pro se* motion to withdraw guilty plea and vacate sentence. Defendant’s motion was denied on July 9, 2012, as untimely.

¶ 7 On May 12, 2014, defendant filed a *pro se* postconviction petition (petition) alleging that her 5th, 6th, and 14th amendment rights were violated. In support of the petition, defendant alleged she received ineffective assistance of counsel because defense counsel neglected to require testing of shell casings for the absence of her fingerprints, obtain a gun powder residue test for her body and clothes, interview Bobby Garvey, obtain phone records, and secure the testimony of Terry Blakes or Robert Weeks. Defendant argued in her petition that counsel’s actions, or lack thereof, denied her a fair trial. Defendant later amended her petition by adding an affidavit from Robert Weeks. The trial court dismissed defendant’s petition on July 9, 2014, as being frivolous and patently without merit.

¶ 8 On September 15, 2014, defendant filed a notice of appeal. This court allowed defendant’s request to file the late notice of appeal on February 24, 2014.

¶ 9 ANALYSIS

¶ 10 On appeal, defendant challenges the trial court’s ruling dismissing defendant’s postconviction petition (petition) alleging that defense counsel’s failure to conduct an adequate

pretrial investigation resulted in a violation of her constitutional right to receive a fair trial.

Defendant claims the petition presented the gist of a constitutional claim based on ineffective assistance of counsel. Therefore, defendant concludes the trial court should not have summarily dismissed the petition.

¶ 11 We agree that all accused persons are constitutionally guaranteed the right to a fair and impartial trial. *People v. Martin*, 29 Ill. App. 3d 825, 828 (1975). Accused persons are also guaranteed to have the assistance of counsel for their defense. U.S. Const. amends. VI, XIV; Ill. Const. 1970 art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 685-686 (1984).

¶ 12 To survive the first stage of postconviction proceedings, a *pro se* petitioner must set out the gist of a constitutional claim by setting forth enough objective facts to show that their constitutional rights were arguably violated. *People v. Hodges*, 234 Ill. 2d 1, 9-12 (2009). Pursuant to the Code of Criminal Procedure of 1963 (725 ILCS 5/122-2.1(a)(2) (West Supp. 2003)), postconviction petitions may be summarily dismissed at the first stage of proceedings if the petition is frivolous or patently without merit.

¶ 13 Petitions should be viewed as frivolous or patently without merit if they are predicated on an indisputably meritless legal theory. *Hodges* at 16-17. Summary dismissal of a defendant's *pro se* postconviction petition is reviewed *de novo*. *Id.* at 9.

¶ 14 Initially, the State asserts that as part of the plea agreement, defendant bargained away both her right to appeal and her right to collaterally challenge her conviction. On this basis alone, the State argues this court should affirm the trial court's summary dismissal of the petition based on the nature of the plea agreement.

¶ 15 We note that the language utilized by the trial court and the parties during the plea proceeding is arguably unclear concerning whether a postconviction petition would be barred

under the terms of the plea agreement. Rather than resolving the issue related to the scope of the plea agreement, we elect to first determine whether defendant's petition stated the gist of a constitutional claim. If the petition failed to state the gist of a constitutional claim and was properly dismissed on this basis, it is not necessary to determine whether the terms of the negotiated agreement would have provided a second justification for a decision affirming the dismissal of the petition.

¶ 16 The crux of defendant's claim on appeal is that she was deprived of her right to a fair trial and proper assistance of counsel because her attorney did not conduct a sufficient investigation of the evidence before the guilty plea took place. In order to succeed on the ineffective assistance of counsel claim raised on the face of this petition, defendant must allege that counsel's representation arguably caused her prejudice. Since a negotiated agreement obviates the need for a trial on the merits, we conclude it is not objectively reasonable for defense counsel to become fully prepared for a trial that never occurred.

¶ 17 It should not go unnoticed that defendant's petition does not allege defense counsel's failure to conduct his own independent investigation of the evidence resulted in an unfair plea agreement causing defendant prejudice. Based on this record, the factual basis for defendant's guilty plea indicated that defendant shot the victim, thereby causing the victim's death. Yet, the plea agreement, negotiated with the assistance of defense counsel, avoided the risk of a sentence enhanced by the significant add-on penalties the trial court would have been required to impose due to the use of a firearm. Based on the facts of record, we conclude defense counsel was sufficiently prepared and structured a plea agreement with the State that eliminated the risk of a sentence subject to the mandatory add-on penalties resulting from the use of a firearm.

¶ 18 On appeal, defendant attempts to rewrite the petition considered by the trial court and now claims her guilty plea was involuntary because defense counsel had not completed a full investigation. Yet, the voluntariness of defendant's guilty plea was not challenged in defendant's petition on any basis, including ineffective assistance of counsel, during the plea proceeding. Allegations excluded from defendant's petition concerning whether her guilty plea was voluntary are not properly before this court and will not be reviewed.

¶ 19 The record in this case reveals defendant waived her right to a fair trial in exchange for the benefit of the bargain she received from the State. Hence, the fact that defendant did not receive a trial is attributable to defendant's decision to forego this right. Accordingly, we agree that defendant's petition was patently without merit and failed to state the gist of a constitutional claim for ineffective assistance of counsel.

¶ 20 By concluding defendant's petition did not state the gist of a constitutional claim, we affirm the trial court's dismissal of the petition. We do not reach the issue of whether the trial court could have also dismissed the petition on grounds that defendant waived her right to file a postconviction petition pursuant to the terms of the negotiated plea agreement.

¶ 21 CONCLUSION

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

¶ 23 Affirmed.