2016 IL App (3d) 150698-U

Order filed December 20, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0698 Circuit No. 10-CF-1451
JON J. FILIPKOWSKI,	)	Honorable Daniel J. Rozak,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The trial judge properly dismissed defendant's postconviction petition at the first stage because defendant's petition failed to state the gist of a constitutional claim.

¶ 2 On May 18, 2011, the State charged defendant with four counts of aggravated criminal sexual abuse and one count of traveling to meet a minor. A jury convicted defendant on all counts. The trial court sentenced defendant to serve an aggregate of 20 years imprisonment. This court affirmed defendant's conviction in *People v. Jon Filipkowski*, 2014 IL App (3d) 120120-U on May 22, 2014. On August 17, 2015, defendant filed a postconviction petition. The trial court

summarily dismissed defendant's petition at the first stage on September 17, 2015. Defendant appeals the trial court's summary dismissal of his postconviction petition.

¶ 3 FACTS

¶ 4 I. Jury Trial

¶ 5 On July 15, 2010, the State charged Jon J. Filipkowski (defendant) by criminal complaint with two counts of aggravated criminal sexual abuse under section12-16 of the Criminal Code of 1961 (720 ILCS 5/12-16(d) (West 2010)) and one count of traveling to meet a minor under section 11-26 of the Criminal Code of 1961 (720 ILCS 5/11-26 (West 2010)). On August 18, 2010, a Will County grand jury returned an indictment against defendant. The State subsequently filed a first superseding bill of indictment on May 18, 2011, which included two additional counts of aggravated criminal sexual abuse.

¶ 6 We briefly summarize the evidence introduced by the prosecution as recited in detail in our prior decision in *People v. Jon Filipkowski*, 2014 IL App (3d) 120120-U for purposes of this appeal. In this case, the jury received evidence establishing defendant, then 32 years of age, maintained an online relationship with a 13-year old female, A.T. (victim). During these online interactions, defendant and the victim exchanged many sexually explicit messages. Eventually, defendant traveled from Florida to meet the victim where the two engaged in various sexual acts with each other.

¶ 7 Before defendant's jury trial, defense counsel advised the court that M.S., a minor friend of the victim, would be called as a key State witness to describe events she witnessed involving defendant's relationship with the victim. Defense counsel informed the court that M.S.'s credibility was at issue because M.S. also reported she became the victim of a sexual assault in Michigan, by someone other than defendant. Defense counsel indicated to the court that he did

not know the facts of the Michigan case, but intended to elicit testimony from M.S. concerning the events in Michigan because that situation seemed relevant to her credibility.

¶ 8 Subsequently, the State contacted the detective assigned to investigate M.S.'s report in Michigan. According to the detective, the alleged Michigan offender could not be located. Consequently, the investigation concerning M.S.'s accusations was pending and charges had not been filed in that state. Based on the State's cursory investigation, defense counsel agreed the Michigan case was no longer relevant to weaken M.S.'s credibility before the jury.

¶ 9 A jury trial began on May 23, 2011. During trial, the trial judge held an *in camera* review in his chambers regarding M.S.'s medical history. During the review, defense counsel requested permission to inform the jury that M.S. was admitted to the hospital on May 18, 2011, and was currently hospitalized and receiving in-patient treatment for major depression at the time of trial. Defense counsel also wanted to elicit testimony revealing M.S. was under the ongoing care of a psychiatrist, and was in the mental health ward of the hospital. The following exchange took place:

> "MR. ADAMS: I just want it clear - - I'm not going to push this. I'm not going to beat the girl up. I don't want to get into every detail in the report. I just want it apparent that she is there for mental health reasons."
>
> THE STATE: That's argument.
>
> THE COURT: She's there for major depression?
>
> MR. ADAMS: Yes.
>
> THE COURT: Okay. Why can't you just leave it at that? Why do you have to use the phrase mental health? They can draw their own conclusions. Standard instruction, you can use your own experiences in life and so forth.

MR. ADAMS: As long as we're clear she was hospitalized on the 18th."

Defense counsel agreed he would be satisfied if the State first elicited testimony informing the jury that M.S. went in to the hospital, was currently hospitalized for major depression, and was currently on medication. The record reveals the prosecution did address these issues during the direct examination of M.S., who admitted she entered the hospital on May 18, 2011, and came to court directly from the hospital where she was currently receiving treatment for major depression, and was taking Zoloft and Lamictal.

¶ 10 Following the presentation of the State's case-in-chief, the court addressed defense counsel regarding how the defense would like to proceed. The following exchange between court and counsel took place:

"MR. ADAMS: Judge, my client is not going to testify. I'll put on the record that I have advised him it's his absolute constitutional right. We have been clear throughout the trial strategy is my province. Whether he wanted a jury or bench, and whether he wanted to testify is his province, his absolute right. He's not going to testify. I will put on the record that that's pursuant to my advice.

THE COURT: Is all that correct, Mr. Filipkowski?

THE DEFENDANT: Yes, sir.

THE COURT: You do understand that you have a right to testify and nobody can keep you off that witness stand, not your lawyer, not the state's attorney, not me, nobody? Do you understand that?

THE DEFENDANT: Understood, your Honor.

THE COURT: There's nobody that can force you to testify either; do you understand that?

THE DEFENDANT: Yes. I do.

THE COURT: If you don't testify, I assume your attorney will ask for and I can tell you right now I will give an instruction that directs the jurors that they are not to consider that in any way in arriving at their verdicts, so they shouldn't hold it against you, it's your right. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Has anybody promised you anything to keep you from testifying in this case?

THE DEFENDANT: No your Honor.

THE COURT: Has anybody forced you, threatened you, coerced you in any way to keep you from testifying?

THE DEFENDANT: No.

THE COURT: Is your decision to not testify your free and voluntary act after consultation with your attorney?

THE DEFENDANT: Yes. It is.

THE COURT: Are there any questions I can answer for you regarding testifying versus not testifying?

THE DEFENDANT: No, sir.

THE COURT: Let me just ask you straight out, having been admonished on all those matters, do you wish to testify in this case?

THE DEFENDANT: No. I do not."

¶ 11 The jury found defendant guilty of four counts of aggravated criminal sexual abuse and one count of traveling to meet a minor. Subsequently, the trial court sentenced defendant to serve an

aggregate of 20 years' imprisonment in the Illinois Department of Corrections (IDOC). On direct appeal, this court affirmed defendant's convictions and sentences in *People v. Jon Filipkowski*, 2014 IL App (3d) 120120-U.

¶ 12 II. Postconviction Proceedings

¶ 13 Defendant filed a postconviction petition (petition) on August 17, 2015. Count I of defendant's petition states:

> "Petitioner was denied his rights to testify at trial, to effective assistance of counsel, and to due process of law where his trial attorney employed excessive and improper pressures to persuade him not to testify."

Defendant's petition further explained, *inter alia*, that:

> "In order to dissuade petitioner from taking the stand as a witness, counsel told him that he had no questions to ask him and nothing for him to say, and if petitioner insisted on testifying, counsel would ask him only whether he committed the crime and, upon his denial, would turn him over for cross-examination."

In addition, count II of defendant's petition alleged he:

> "was denied his constitutional right to testify and to effective assistance of counsel at sentencing when his attorney failed to explain to him that he had a right to testify as well as to make a statement in allocution."

¶ 14 Count III of defendant's petition states he received ineffective assistance from appellate counsel on direct appeal because his appointed attorney failed to raise the issue of:

> "whether the trial judge improperly restricted the defense cross-examination of prosecution witness [M.S.] regarding her history of mental illness, psychiatric

hospitalization, and use of psychotropic medication, and about her alleged involvement in a similar incident in Michigan."

¶ 15 Count IV of defendant's petition alleged:

"Petitioner has a good faith basis to believe that the State withheld or failed to disclose exculpatory evidence and asks the court to exercise its discretionary authority to allow discovery and subpoena duces tecum to explore whether a meritorious claim of due process violation can be asserted."

¶ 16 Count V of defendant's petition states:

"Petitioner was denied due process of law when the Illinois Department of Corrections added to the court's sentence a two-year term of supervised release which had not been ordered by the sentencing judge, and he was further denied effective assistance of counsel on direct appeal when his appointed attorney failed to raise meritorious constitutional and statutory claims regarding the imposition of the term of supervision."

¶ 17 The trial court summarily dismissed defendant's petition on September 17, 2015, at the first stage. The court's order stated:

"1) That the facts underlying petitioner's claims were of record and/or known to him at the time of his direct appeal. Because he failed to raise them on appeal, those claims are deemed waived and barred from consideration in the instant proceeding."

2) That this court routinely admonishes defendants regarding their right to testify and the fact that it is their decision and not their attorney's.

3) Appellate counsel is not obligated to brief every conceivable issue on appeal and it is not incompetence of counsel to refrain from raising issues which in his/her judgment are without merit.

4) That this court, in it's [*sic*] discretion, denies petitioner's request for discovery at this stage of the proceedings.

5) That the allegations in the petition are frivolous and patently without merit, thereby failing to raise a sufficient constitutional question upon which relief can be granted."

Defendant filed a timely notice of appeal on October 1, 2015.

¶ 18 ANALYSIS

¶ 19 On appeal, Defendant contends the trial court improperly summarily dismissed his postconviction petition at the first stage. Defendant asserts that the allegations contained in his petition set out an arguable basis for a claim of a constitutional violation. The State argues the trial judge properly dismissed defendant's petition because the petition was frivolous on its face and patently without merit.

¶ 20 Pursuant to section 122-2.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-2.1(a)(2) (West 2014)), a postconviction petition may be summarily dismissed at the first stage of proceedings if the petition is frivolous or patently without merit. Such petitions are considered frivolous or patently without merit where they are based on fanciful factual allegations or predicated on an indisputably meritless legal theory. *People v. Hodges*, 234 Ill. 2d 1, 16-17 (2009).

¶ 21 To survive the first stage of 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. *Id*. at 9-12. To show a violation of constitutional rights, the allegations set forth in defendant's petition must be supported by the record. See generally *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998).

¶ 22 Summary dismissal of a postconviction petition is reviewed *de novo*. *Hodges*, 234 Ill. 2d at 9. Appellate courts review the trial court's judgment, not the reasons cited. Therefore, "we may affirm on any basis supported by the record if the judgment is correct." *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010). We separately review the sufficiency of all five grounds supporting defendant's request for postconviction relief below.

¶ 23 I. Denial of Right to Testify at Trial

¶ 24 First, defendant claims trial counsel exerted undue pressure on him not to testify, thereby overriding defendant's free will. For this reason, defendant claims trial counsel was ineffective.

¶ 25 It is well established that defendants enjoy the constitutional right to testify or not to testify at trial. *People v. Frieberg*, 305 Ill. App. 3d 840, 851 (1999). Accused persons are also guaranteed to have effective 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). At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance of counsel "may not be summarily dismissed 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." *Hodges*, 234 Ill. 2d. at 17.

¶ 26 Here, the record directly contradicts defendant's assertion that he was subjected to undo threats resulting in his decision to waive his right to testify. Defense counsel advised the court as follows:

> "I have advised him it's his absolute constitutional right. We have been clear throughout the trial strategy is my province. Whether he wanted a jury or bench, and whether he wanted to testify is his province, his absolute right. He's not going to testify. I will put on the record that that's pursuant to my advice."

Following this exchange between the court and defense counsel, the trial court conducted a thorough examination of defendant on the record to insure defendant's decision not to testify was knowingly and voluntarily made. Specifically, the court asked: "Has anybody forced you, threatened you, coerced you in any way to keep you from testifying?" Defendant replied that he had not been threatened and freely and voluntarily made this election after consultation with his attorney.

¶ 27 After trial, defendants often raise claims that they intended to testify, but trial counsel prevented their testimony. *Frieberg*, 305 Ill. App. 3d at 852. Appellate courts routinely advise trial judges to carefully admonish defendants regarding their right to testify to insulate the record from such postconviction attacks. *Id*. at 852-53.

¶ 28 The record in this case directly contradicts defendant's claim regarding threats from defense counsel. When directly asked by the trial court regarding any pressure to waive his right to testify, defendant denied he was subjected to any threats. The trial court's admonishments were very detailed and designed to expose any unfair threats defendant may have endured. Based on this record, we conclude defendant's own statements on the record refute his claims. Since defendant was not coerced, we cannot conclude defense counsel acted ineffectively on this basis.

¶ 29 II. Denial of Right to Testify at Sentencing

¶ 30 Next, Defendant claims on appeal that trial counsel was ineffective because counsel failed to explain that defendant had "the right to give testimony" under oath at the sentencing

hearing. The case law provides that relief under the Act is limited to constitutional deprivations which occurred at the original trial." *Coleman*, 183 Ill. 2d at 380. Depriving a defendant of the opportunity to make a statement prior to sentencing is not a constitutional violation. *Hill v. United States*, 368 U.S. 424, 428 (1962); *People v. Kokoraleis*, 132 Ill. 2d 235, 281 (1989). Also, the record in this case documents that defendant spoke directly to the court and made unsworn statements in his defense during his sentencing hearing.

¶ 31 Therefore, this contention did not support a request for postconviction relief.

¶ 32 III. Cross-Examination of M.S.

¶ 33 Third, we turn to defendant's contention that he did not receive effective assistance from appellate counsel based on an issue appellate counsel omitted on direct appeal. Specifically, defendant asserts the trial court interfered with defense counsel's ability to rigorously cross-examine the State's witness, M.S.

¶ 34 The case law provides that appellate counsel is not obligated to raise every conceivable issue. *People v. Easley*, 192, Ill. 2d 307, 329 (2000). Further, appellate counsel is not ineffective for refraining to raise issues which, in their judgment, lack merit. *Id*.

¶ 35 The record before this court documents the trial judge held a hearing before M.S.'s testimony. During the hearing, defense counsel advised the court that defense counsel wanted to make sure the jury was made aware that M.S. was hospitalized on May 18, 2011, for major depression and remained hospitalized at the time she testified before the jury. However, defense counsel desired to elicit these facts without appearing unduly harsh when cross-examining a young witness. After some discussion regarding the best approach, defense counsel advised the court that counsel would be satisfied if the State elicited testimony that M.S. went in to the hospital, was currently hospitalized for major depression, and was currently on medication.

¶ 36 Consistent with defense counsel's position, the record reveals that on direct examination, the State elicited information from M.S. indicating the young witness was admitted to the hospital on May 18, 2011, came to court directly from the hospital, and was currently receiving treatment for major depression that included taking prescribed medication such as Zoloft and Lamictal.

¶ 37 Based on this record, we conclude that the trial court did not restrict defense counsel's cross-examination of M.S. in any fashion. Therefore, we conclude appellate counsel was not ineffective for failing to raise an issue that does not exist.

¶ 38 IV. Discovery Request Denial

¶ 39 Fourth, defendant asserts a *Brady* claim *might* exist depending on the contents of the information he encrypted on his own computer, which the State was unable to decode or retrieve. Defendant urges this court to conclude the trial court erroneously denied his request for postconviction discovery.

¶ 40 We emphasize defendant does not contend a *Brady* violation preceded the trial. Instead, defendant speculates that some information might be retrievable from his computer, which remains in the State's possession. Therefore, defendant seeks to have this court enter an order compelling the State to return his computer to allow defendant to search for information the State has been unable to harvest from the hard drive.

¶ 41 Discovery for purposes of a postconviction proceeding is not subject to civil or criminal discovery rules and is therefore a matter that is purely within the scope of the trial court's discretion. *People ex rel. Daley v. Fitzgerald*, 123 Ill. 2d 175, 183 (1988). A defendant must first establish good cause before postconviction discovery should be ordered by the trial court. *People v. Johnson*, 205 Ill. 2d 381, 408 (2002).

¶ 42 Since defendant admits the State could not have decoded the information without the encryption key in his possession, the State could not have been intentionally withholding exculpatory evidence. Consequently, we conclude the trial court did not abuse its discretion by denying defendant's unusual postconviction discovery request.

¶ 43 V. Mandatory Supervised Release/Due Process

¶ 44 Finally, defendant's petition alleged the IDOC imposed a term of mandatory supervised release which violated his right to due process of law because the trial court's sentencing order did not include a written recitation of the mandatory supervised release (MSR) term following a period of incarceration as required under section 5-8-1 of the Unified Code of Corrections. 730 ILCS 5/5-8-1(d) (West 2012). At the time of defendant's sentencing hearing, the statute provided that: "the parole or mandatory supervised release term *shall be written* as part of the sentencing order," but does not specify a remedy for failure to do so. (Emphasis added.) 730 ILCS 5/5-8-1(d) (West 2010).

¶ 45 Our supreme court in *People v. McChriston*, 2014 IL 115310 analyzed the application of section 5-8-1(d)(1) before its recent amendment. In that case, the trial court also failed to mention a term of MSR at the sentencing hearing or in the sentencing order. The *McChriston* court reasoned that the plain language of the statute indicated that "the MSR term was included automatically into the sentence, even if not specifically written." Id. ¶ 16. Therefore, the court concluded the MSR term reflected by the DOC records did not add onto defendant's sentence, and the defendant's due process rights were not violated. See *Id.*

¶ 46 Here, we realize the statute prescribes that the MSR term be specifically written. However, nothing about the statute's recent amendment changes the fact that MSR attaches by operation of law regardless of whether or not the trial court included the term in the sentencing

order. While we encourage trial courts to strictly comply with the provisions set forth in section 5-8-1(d), lack of compliance does not rise to the level of a due process violation. Therefore, the MSR term was not unconstitutionally imposed by the IDOC. Further, because defendant's claim lacks legal merit, appellate counsel was not ineffective for failing to raise this issue.

¶ 47 CONCLUSION

¶ 48 The judgment of the circuit court of Will County is affirmed.

¶ 49 Affirmed.