2017 IL App (1st) 142975-U

No. 1-14-2975

Order filed October 18, 2017

Third Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 14841
	)	
CRAIG MRAZEK,	)	Honorable
	)	Colleen Ann Hyland,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Cobbs and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant's *pro se* postconviction petition stated an arguable claim of ineffective assistance of counsel, the trial court's summary dismissal of the petition is reversed and the case remanded for second stage proceedings. We lack jurisdiction to consider defendant's challenge to the fines and fees order.

¶ 2 Defendant Craig Mrazek appeals from the trial court's first stage summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* West 2010)). On appeal, defendant contends, and the State concedes, that his petition raised

an arguable claim of ineffective assistance of counsel based on his trial counsel's failure to object to a 15-year mandatory supervised release term. We reverse the trial court's summary dismissal of defendant's postconviction petition and remand to the circuit court for second stage postconviction proceedings. Defendant also challenges his fines and fines order but we lack jurisdiction to consider these arguments.

¶ 3 On August 18, 2009, defendant was charged with six counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 1996)) and nine counts of criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 1996); 720 ILCS 5/12-13(a)(3) (West 1996)) related to acts that occurred between October 1, 1996, and March 31, 2004. The State later amended the indictment to provide that the offenses occurred between October 1, 1996, and February 22, 2001.

¶ 4 On April 19, 2011, the State informed the court that, based on a Rule 402 conference, defendant would plead guilty to three counts of predatory criminal sexual assault of a child and, in exchange for his guilty plea, defendant would be sentenced to six years on each count, to be served consecutively, for a total of 18 years in prison. The State informed the court that it would *nolle pros* the remaining counts. It explained that each count was a Class X felony with a sentencing range of 6 to 30 years in prison and the mandatory supervised release (MSR) period on each offense was "anywhere from three years minimum to a life-time MSR."

¶ 5 Defendant then acknowledged that he wanted to plead guilty to the three separate charges. The court explained the rights he was giving up by pleading guilty, and defendant acknowledged that he understood. The court explained to defendant that each offense was a Class X felony with a sentencing range of 6 to 30 years, the sentences had to be served

consecutively, an MSR term from three years to natural life applied, and it would order defendant to serve 15 years MSR. Defendant acknowledged that he understood, he was not threatened or promised anything to plead guilty, and he was pleading guilty of his own free will.

¶ 6 The State presented its factual basis to support the plea. It explained that, if the case went to trial, it would provide evidence that, during the relevant time period, defendant was at least 17 years old and the victim, J.M., was under the age of 13. J.M. would testify that defendant was her stepfather, the "sexual assaults occurred when she was between the age of 7 and continued until she was 16 years old," and they occurred approximately one time per week. The State set forth the details of the sexual assaults, to which J.M. would testify. Defendant stipulated to the State's factual basis.

¶ 7 The court clarified that defendant committed the offenses between October 1, 1996, and February 22, 2001. It found that defendant understood the nature of the charges and penalties, the plea was being made freely and voluntarily, and there was a sufficient factual basis to support the plea. The court found defendant guilty of three counts of predatory criminal sexual assault of a child and sentenced him to six years in prison on each count, to be served consecutively. It stated that his sentence would be "followed by 15 years on mandatory supervised release."

¶ 8 Defendant did not move to withdraw his plea or file a direct appeal.[1] In April of 2014, defendant filed a *pro se* postconviction petition. He alleged, as relevant here, that his trial

[1] In March 2015, the trial court denied defendant's motion to correct the mittimus *nunc pro tunc* where he sought 625 days of presentence custody credit to be applied against each of his three sentences. On appeal, the State Appellate Defender filed a motion for leave to withdraw as defendant's counsel on appeal based on the conclusion that his appeal lacked merit due to lack of jurisdiction. On August 2, 2017, we issued a summary order dismissing defendant's appeal for lack of jurisdiction. *People v. Mrazek*, No. 1-15-2938 (2017) (unpublished order under Supreme Court Rule 23).

counsel was ineffective for failing to object to the 15-year MSR term and failing to hire "an expert forensic [d]octor" to explain his "medical [b]rain condition."

¶ 9 On July 18, 2014, the trial court issued a written order dismissing defendant's first stage postconviction petition as frivolous and patently without merit, concluding, *inter alia*, that defendant's plea was made voluntarily.

¶ 10 On appeal, defendant contends that his petition raised two arguable claims of ineffective assistance of counsel based on his trial counsel's failure to (1) request a fitness hearing and (2) object to the 15-year MSR term, which violated the prohibition against *ex post facto* laws. Defendant requests that we therefore reverse the trial court's first stage summary dismissal of his postconviction petition and remand the matter for second stage postconviction proceedings. Defendant also contends that various fines and fees were erroneously assessed against him.

¶ 11 The State agrees that defendant stated an arguable claim of ineffective assistance of counsel in his postconviction petition based on his trial counsel's failure to object to the 15-year MSR term. The State does not address defendant's other two contentions. It asserts that, as partial summary dismissals are not permitted under the Act, the need for this court to address the other claims in defendant's petition is obviated. The State does not mention defendant's challenge to the fines and fees order, which were not raised in the petition.

¶ 12 Under the Act, a defendant may attack a conviction by asserting that it resulted from a substantial denial of his or her constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2010); *People v. Tate*, 2012 IL 112214, ¶ 8. "[I]ssues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited." *Tate*, 2012 IL 112214, ¶ 8. The postconviction petition process involves three stages. *Id.* ¶ 9.

¶ 13 At the first stage, which applies here, after independently reviewing the petition and taking all allegations as true, under the Act, the trial court may summarily dismiss the petition "as frivolous or *** patently without merit *** if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). If the petition is not dismissed at the first stage, then it proceeds to the second stage of postconviction proceedings. *People v. Cotto*, 2016 IL 119006, ¶ 26. To dismiss a postconviction petition at the first stage, the court must find that the petition is "based on an indisputably meritless legal theory," *i.e.,* a legal theory that is "completely contradicted by the record," or a "fanciful factual allegation," *i.e.,* "fantastic or delusional." *Hodges*, 234 Ill. 2d at 16. To advance to the second stage, the petition must present "the gist of a constitutional claim." *People v. Harris*, 224 Ill. 2d 115, 126 (2007). We review the trial court's summary dismissal of a postconviction petition *de novo*. *Hodges,* 234 Ill. 2d at 9.

¶ 14 Defendant's petition alleged that his trial counsel was ineffective for failing to request a fitness hearing and object to the 15-year MSR term. In the first stage of a postconviction proceeding, the trial court may not summarily dismiss a petition that alleges ineffective assistance of counsel if it is "(i) arguable that counsel's performance fell below an objective standard of reasonableness and (ii) arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17. Defendant here was convicted pursuant to a guilty plea. When a defendant pleads guilty, a counsel's conduct is considered deficient if he or she "failed to ensure that the defendant entered the plea voluntarily and intelligently." *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). To prove prejudice, "a defendant must show that there is a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " *Rissley*, 206 Ill. 2d at 457 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

¶ 15 A defendant has the right to be sentenced under either the law that was in effect at the time he committed the offense or the law in effect at the time of sentencing. *People v. Vlahon*, 2012 IL App (4th) 110229, ¶ 17. "[A]bsent a showing the defendant was advised of his right to elect and an express waiver of that right, he is denied due process of law." *Vlahon*, 2012 IL App (4th) 110229, ¶ 17. The constitutions of the United States and Illinois both prohibit *ex post facto* laws. *Vlahon*, 2012 IL App (4th) 110229, ¶ 17. A law violates the *ex post facto* prohibition if it is retroactive and, as relevant here, "increases the punishment for a previously committed offense." *People v. Malchow*, 193 Ill. 2d 413, 418 (2000).

¶ 16 We agree with the parties that defendant's first stage postconviction petition is not frivolous or patently without merit because he has stated an arguable claim for ineffective assistance of counsel based on his trial counsel's failure to object to the 15-year MSR sentence imposed on him when he entered his guilty plea.

¶ 17 Under the plea agreement, on April 19, 2011, defendant was convicted of committing three counts of predatory criminal sexual assault of a child, Class X felonies, between October 1, 1996, and February 22, 2001. At the time of defendant's offenses, the statute authorizing the required MSR term provided that a Class X felony was subject to a MSR term of three years. 730 ILCS 5/5-8-1(d)(1) (West 2000).

¶ 18 However, at the time of the sentencing, following amendments, the MSR statute provided that an MSR term of three years to the natural life of the defendant applied to defendants who committed, as relevant here, predatory criminal sexual assault of a child, on or after the effective date of January 1, 2006. 730 ILCS 5/5-8-1(d)(4) (West 2010). Accordingly, because defendant committed the predatory criminal sexual assault of child offenses between October 1, 1996, and

February 22, 2001, *i.e.* before January 1, 2006, the statute authorizing an MSR term of three years to the natural life did not apply to him. Thus, the MSR term in effect at the time defendant committed the offenses was three years.

¶ 19 At the April 19, 2011, plea hearing, the court informed defendant that, "based upon the law," it could "impose a mandatory supervised release which means after you are released from custody, you would be required to serve anywhere from three years to natural life on mandatory supervised release and in this case, [it] will be ordering that you serve 15 years on mandatory supervised release." Defense counsel did not take issue with this statement. The court then sentenced defendant to 18 years in prison, followed by a 15-year MSR term. There is nothing in the record to indicate that defendant knew of, or waived, his right to be sentenced under the law that was in effect at the time he committed the offenses. See *People v. Anderson*, 93 Ill. App. 3d 646, 656 (1981) (vacating defendant's sentences, noting, "The record is devoid of any evidence that defendant knew of his right to elect to be sentenced under the law in effect at the time the offenses were committed."). Thus, because the MSR term in effect at the time defendant committed the offenses was three years but the court sentenced him under the plea deal to a 15-year MSR term, his sentence was subject to an *ex post facto* violation, as his punishment was greater than the punishment that existed at the time he committed the crime. See *Vlahon*, 2012 IL App (4th) 110229, ¶¶ 17, 26.

¶ 20 Because defendant's sentence was subject to an *ex post facto* violation, defendant has sufficiently alleged an arguable claim of ineffective assistance of counsel based on his trial counsel's failure to object to the 15-year MSR term. With respect to the deficient performance prong, it is arguable that his trial counsel's conduct fell below an objective standard of

reasonableness when counsel failed to object to the imposition of the 15-year MSR term when the maximum MSR term applicable to each offense was 3 years. With respect to the prejudice prong, it is arguable that defendant was prejudiced by his counsel's failure to object to the 15-year MSR term. There is a reasonable probability that, but for counsel's error, defendant would not have pled guilty in exchange for a sentence that included a 15-year MSR term had he known the maximum MSR term for each offense was 3 years, not life.

¶ 21 Accordingly, defendant's postconviction claim of ineffective assistance of counsel based on his trial counsel's failure to object to the 15-year MSR term stated the gist of a constitutional claim and was not frivolous or patently without merit. Thus, we must remand this matter to the circuit court to advance defendant to the second stage of the postconviction proceedings. See *People v. Cathey*, 2012 IL 111746, ¶ 32.

¶ 22 Defendant also contends on appeal that his trial counsel was ineffective for failing to request a fitness hearing. Partial summary dismissals are not permitted under the Act. *Cathey*, 2012 IL 111746, ¶ 34. Therefore, because we have determined that defendant has stated an arguable claim for ineffective assistance of counsel based on his trial counsel's failure to object to the 15-year MSR term, we need not address this argument and must remand the entire petition for second stage proceedings. See *Id*.

¶ 23 Defendant next contends that certain fines and fees were erroneously assessed against him. He asserts that the $10 mental health court fine, the $5 youth diversion/peer group fine, the $5 drug court fine, the $30 Children's Advocacy Center fine, the $20 Violent Crime Victim Assistance fine (VCVA), and the $25 court services fee were erroneously imposed and should be

vacated. He also claims that he is entitled to $5 per day of presentence custody credit to be applied against the $50 court system fee.

¶ 24 Under section 110-14 of the Code of Criminal Procedure, at the time defendant committed the offenses, between October 1, 1996, and February 22, 2001, he was entitled to a credit of $5 per day toward his fines for each day he spent in presentence custody. [2] 725 ILCS 5/110-14(a) (West 2002). The statute applies only to "fines" that were imposed after a conviction and not to other costs or "fees." *People v. Tolliver*, 363 Ill. App. 3d 94, 96 (2006). Our review of the imposition of fines and fees is *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 25 Defendant's challenge to the assessed fines and fees is arguably forfeited, as he did not raise his claims at trial, on a direct appeal, or in his postconviction petition. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010); see *People v. Brown*, 2017 IL App (1st) 150203, ¶ 35. Defendant asserts that we have authority to review his challenge to the assessed fines and fees under Illinois Supreme Court Rule 615(b). The State does not address defendant's challenge to the assessed fines and fees. It asserts that, because defendant stated an arguable claim for ineffective assistance of counsel based on his trial counsel's failure to object to the 15-year MSR term, we need not address the other claims raised in defendant's petition. Defendant did not raise his fines and fees claims in the petition.

¶ 26 Section 110-14 provides that the court may award a defendant presentence custody credit on "application of the defendant." 725 ILCS 5/110-14 (West 2000); *Brown*, 2017 IL App (1st) 150203, ¶ 36. Under section 110-14, claims for presentence custody credit may be raised "at any

[2] Effective January 1, 2005, section 110-14 was amended to provide that presentence incarceration credit does not apply to a defendant incarcerated for, as relevant here, predatory criminal sexual assault of a child. 725 ILCS 5/110-14(a), (b) (West 2006). 730 ILCS 5/5-9-1.7(a)(1) (West 2010).

time and at any stage of court proceedings, even on appeal in a postconviction petition." *Brown*, 2017 IL App (1st) 150203, ¶ 36; *People v. Grigorov*, 2017 IL App (1st) 143274, ¶ 7; *People v. Caballero*, 228 Ill. 2d 79, 88 (2009). When a postconviction petition and subsequent appeal are properly filed and the appeal is properly before the court, as here, a defendant may raise a mathematical error or a claim under section 110-14 for *per diem* credit. *Brown*, 2017 IL App (1st) 150203, ¶¶ 35-37. However, a defendant may not "raise *substantive* issues concerning whether particular assessments apply to his case or whether they are properly categorized as fines or fees." *Brown*, 2017 IL App (1st) 150203, ¶ 40. (Emphasis in original.)

¶ 27 Defendant asserts that the imposition of the $10 mental health court fine (55 ILCS 5/5-1101(d-5) (West 2010)), the $5 youth diversion/peer court fine (55 ILCS 5/5-1101(e) (West 2010)), the $5 drug court fine (55 ILCS 5/5-1101(f) (West 2010)), and the $30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West 2010)) constituted violations of the *ex post facto* prohibition, as the statutes authorizing these fines were not in effect at the time he committed the offenses.[3] He argues that he is entitled to $5 per day presentence custody credit to be applied against the $50 court system fee (55 ILCS 5/5-1101(c)(1) (West 2010)) because it is actually a fine even though it is labeled a fee. He claims that the $25 court services fee (55 ILCS 5/5-1103 (West 2010)) was improperly imposed because the statute authorizing this fee does not list predatory criminal sexual assault of a child as an applicable offense. He argues that the $20 VCVA fine (725 ILCS 240/10(c)(2) (West 2010)) was unauthorized because it is only applicable when no other fines are imposed.

---

[3] The mental health and youth diversion/peer court fines became effective on January 1, 2005. 55 ILCS 5/5-1101(d-5), (e) (West 2006). The drug court fine became effective on June 30, 2006. 55 ILCS 5/5-1101(f) (West 2006). The Children's Advocacy Center fine became effective on January 1, 2008. 55 ILCS 5/5-1101(f-5) (West 2008).

¶ 28 Defendant's arguments show he is not arguing that there was a mathematical error in the fines, fees, or costs order or that he was not awarded *per diem* credit for the assessed fines. See *Brown*, 2017 IL App (1st) 150203, ¶¶ 35, 36, 39; See *Grigorov*, 2017 IL App (1st) 143274, ¶ 10. Rather, he is raising "substantive" issues regarding whether the challenged assessments apply to his case and whether, with respect to the court system fee, the charge was properly labeled as a fine or fee. See *Brown*, 2017 IL App (1st) 150203, ¶ 40. Thus, section 110-14 does not permit him, and there is no statute authorizing him, to raise these claims at this stage in the proceedings. *Brown*, 2017 IL App (1st) 150203, ¶ 40. *Grigorov*, 2017 IL App (1st) 143274, ¶ 8. And, as we have recently held, "fees assessed in error are not void, nor are they independently reviewable under Illinois Supreme Court Rule 615(b)." *Brown*, 2017 IL App (1st) 150203, ¶ 40. *Grigorov*, 2017 IL App (1st) 143274, ¶¶ 12-14; *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9. We therefore do not have independent subject matter jurisdiction over defendant's challenges to the assessed fines and fines, and will not address the merits of these arguments. *Brown*, 2017 IL App (1st) 150203, ¶¶ 40-41.

¶ 29 For the reasons explained above, we reverse the judgment of the circuit court and remand for further proceedings.

¶ 30 Reversed and remanded.