

2017 IL App (1st) 153139-U

No. 1-15-3139

December 26, 2017

Second 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. 08 CR 10442
)	
MARTIN LYONS,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's first-stage dismissal of defendant's postconviction petition is affirmed over his contention that the court entered an improper partial dismissal of his claims because attachments to the petition raised additional postconviction claims that were not considered by the court.

¶ 2 Defendant Martin Lyons appeals the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He contends that the trial court improperly entered a partial dismissal of his claims, where an

attachment to his petition, labeled as a motion to withdraw guilty plea, raised additional, meritorious claims of constitutional violations. For the reasons set forth herein, we affirm.

¶ 3 On February 23, 2011, defendant pled guilty to first degree murder and aggravated kidnapping and was sentenced to consecutive, respective, terms of 32 and 10 years' imprisonment. We affirmed defendant's convictions on direct appeal. See *People v. Lyons*, 2014 IL App (1st) 121030-U. Because we set forth the evidence presented at defendant's trial on direct appeal, we recount the facts here only to the extent necessary to resolve the issues raised on appeal. See *Lyons*, 2014 IL App (1st) 121030-U, ¶¶ 3-14.

¶ 4 Defendant and codefendant Nico Lewis were charged by indictment with, *inter alia*, multiple counts of first degree murder (720 ILCS 5/9-1(a) (West 2008)) and one count of aggravated kidnapping (720 ILCS 5/10-2(a)(3) (West 2008)) in relation to the death of Tenika Hinton.

¶ 5 The record shows that, on June 22, 2010, defendant's private counsel requested a 402 conference to determine what sentence the trial court would impose in exchange for a guilty plea. See Ill. Sup. Ct. R. 402(d) (effective July 1, 1997). At a subsequent court date, defendant indicated that he did not wish to accept the court's offer of 32 years' imprisonment for first degree murder and 8 years' imprisonment for aggravated kidnapping.

¶ 6 On February 23, 2011, defendant requested that the court reinstate its initial offer and pled guilty to one count of first degree murder and one count of aggravated kidnapping in exchange for the State's agreement to drop the remaining charges. The parties stipulated to a factual basis of the plea, and the trial court sentenced defendant to 32-years for first degree murder and 10-years for aggravated kidnapping to be served consecutively.

¶ 7 On March 22, 2011, defense counsel filed a motion to withdraw guilty plea alleging that: defendant was threatened with a maximum term sentence if he did not plead guilty; defendant did not understand the extent of his guilty plea; defendant had a defense worthy of consideration by a jury; and the ends of justice would be better served by submitting the case to a jury.

¶ 8 Subsequently, defendant filed a *pro se* motion to withdraw his guilty plea. The trial court received the motion on April 22, 2011. In the motion, defendant alleged that he was not mentally competent to enter his plea and his private attorney misled him by telling him that he would not have to “do all the time given to” him. In an affidavit, signed by defendant on April 10, 2011, defendant averred that private counsel failed to inform him that his sentences would run consecutively.

¶ 9 The Office of the Public Defender was appointed to represent defendant, and, on March 21, 2012, the case proceed to a hearing on the private attorney’s motion to withdraw guilty plea, which was adopted by defendant’s appointed counsel. Defendant testified that his private counsel failed to inform him that his sentences for first degree murder and aggravated battery were going to run consecutively. Defendant’s former private attorney testified that he informed defendant, on multiple occasions, that his sentences would run consecutively. After argument, the trial court denied defendant’s motion to withdraw guilty plea, finding that his private counsel told him multiple times that his sentences would run consecutively. In doing so, the court stated that it knew “for a fact that [defendant] was laboring under no misconception” as to what his sentence would be.

¶ 10 On direct appeal, this court affirmed the judgment of the trial court over defendant’s contentions that the trial court violated Illinois Supreme Court Rule 402 (effective July 1, 1997)

by failing to inform him that his sentences would run consecutively, and that his public defender failed to certify, pursuant to Illinois Supreme Court Rule 604(d) (effective July 1, 2006), that he had made amendments to private counsel's motion to withdraw guilty plea prior to adopting it. *Lyons*, 2014 IL App (1st) 121030-U, ¶ 27. In doing so, we found that, although the trial court erred in its 402 admonishments, defendant forfeited the issue, because the record showed that he was not prejudiced or denied real justice by the court's error where private counsel informed him that his sentences would run consecutively. *Id.* at ¶ 24. We also found that appointed counsel had strictly complied with Supreme Court 604 (d). *Id.* ¶ 27.

¶ 11 On June 29, 2015, defendant filed a *pro se* postconviction petition alleging that: (1) appointed counsel was ineffective for failing to preserve his claim of deficient 402 admonishments in a written post-plea motion pursuant to Illinois Supreme Court Rule 604(d) (effective July 1, 2006); (2) appellate counsel was ineffective for "contending without argument or citation to supporting authority that the court failed to admonish" defendant about his appeal rights pursuant to Illinois Supreme Court Rule 605(b) (effective October 1, 2001); (3) appellate counsel was ineffective for failing to effectively argue that the trial court's deficient 402 admonishments were reviewable as plain error; and (4) appellate counsel was ineffective for failing to argue that appointed counsel was ineffective for failing preserve defendant's 402 claims in a written post-plea motion.

¶ 12 On the same date, defendant filed a "Motion to Withdraw Guilty Plea and Vacate Sentence" and an affidavit. The record shows that on July 7, 2012, the clerk informed the trial court that "[d]efendant filed a petition to withdraw his guilty plea and vacate sentence." Defendant's motion to withdraw guilty plea consisted of five paragraphs and alleged that: (1)

private counsel gave defendant false information to entice him to plead guilty and never told him that his sentences were to run consecutively; (2) that he was not mentally competent to enter a guilty plea; (3) that the factual basis stipulated to by appointed counsel was inaccurate and did not support his plea; and (4) that he was intimidated into pleading guilty by the court's off-the-record threats to sentence him to a term of natural life imprisonment if he went to trial. In the top right-hand corner, on the first page, defendant labeled the motion as "Exhibit 1."

¶ 13 In the affidavit, signed by defendant and dated April, 27, 2011, he averred that his private counsel misinformed him about the implication of his guilty plea by telling him that he would get "good time" if he took the plea, and that he would not have to serve all of the time that he was given. Defendant also averred that private counsel never informed him that the sentences would run consecutively. The affidavit further stated that defendant was not mentally competent to enter a plea, and that the factual basis entered by the State's Attorney was inaccurate and insufficient to support his plea. The affidavit was labeled as "Exhibit 2."

¶ 14 On July 15, 2015, defendant filed a "Supplemental Petition for Post-Conviction Relief" and attached a copy of this court's ruling on direct appeal.

¶ 15 In a September 14, 2015, written order, the trial court analyzed and dismissed the claims raised in defendant's postconviction petition as frivolous and patently without merit. In doing so, the court rejected defendant's claims that appointed counsel was ineffective for failing to add the issue of the 402 admonishments to private counsel's written motion. The court noted that, on direct appeal, this court determined that appointed counsel had strictly complied with Rule 604 (d), and that defendant was not prejudiced by the trial court's deficient 402 admonishments or counsel's failure to amend private counsel's motion to add such claims, where private counsel

testified that he repeatedly told defendant that the sentences would run consecutively. See *Lyons*, 2014 IL App (1st) 121030-U, ¶ 22. The trial court rejected defendant's claim that appellate counsel was ineffective for failing to argue that the court's deficient 402 admonishments satisfied the second prong of the plain error doctrine because this court reviewed the issue and found no plain error. It also found that appellate counsel was not ineffective for failing to argue that the trial court did not admonish defendant about his rights to appeal pursuant to Rule 605(b) because defendant was not prejudiced, where he had filed a *pro se* motion to withdraw his guilty plea despite the lack of admonishments.

¶ 16 In the same written order, the trial court separately dismissed defendant's "Motion to Withdraw Guilty Plea and Vacate Sentence." The court found the motion untimely where defendant filed it nearly four years after he pled guilty. The court noted that:

"[defendant] has already filed a motion to vacate his guilty plea, on March 24, 2011, asserting these same claims; which this court dismissed. This court's dismissal was affirmed on appeal by the Appellate Court on September 30, 2014. Further, his petition for leave to appeal to the Illinois Supreme Court was denied January 15, 2015. Accordingly, this court is without authority to review that which has been decided by the Appellate Court and for which further review has been denied by the Illinois Supreme Court."

¶ 17 On appeal, defendant does not argue that the trial court erred in dismissing the claims contained in the body of his postconviction petition. Rather, he argues that the trial court entered an improper partial dismissal of his *pro se* postconviction petition. In support of this argument, defendant contends that his "Motion to Withdraw Guilty Plea and Vacate Sentence," labeled as

“Exhibit 1,” was a part of his postconviction petition and raised postconviction claims which were improperly dismissed as untimely.

¶ 18 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 et seq. (West 2014)) provides a method by which a defendant can assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Applewhite*, 2016 IL App (1st) 142330, ¶ 9. At the first stage of postconviction proceedings, the trial court may dismiss a petition only if it “ ‘frivolous or is patently without merit.’ ” *People v. Cotto*, 2016 IL 119006, ¶ 26 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2014)). We review the dismissal of a first-stage postconviction petition *de novo*. *People v. Williams*, 2015 IL App (1st) 131359, ¶ 28.

¶ 19 Partial summary dismissal of a postconviction petition is not permitted by the Act and “[i]f a single claim in a multiple-claim postconviction petition survives the summary dismissal stage of proceedings under the Post-Conviction Hearing Act, then the entire petition must be docketed for second-stage proceedings regardless of the merits of the remaining claims in the petition.” *People v. Romero*, 2015 IL App (1st) 140205, ¶ 27. Postconviction claims cannot be dismissed at the first stage for being untimely. *People v. Allen*, 2015 IL 113135, ¶ 25. Thus, if we determine that Exhibit 1, which the court treated as a separate motion to withdraw guilty plea and dismissed as untimely, contained postconviction claims, defendant’s case must be remanded for second-stage proceedings.

¶ 20 Our supreme court has held that *pro se* postconviction petitions should be given a liberal construction and that “courts should review their petitions ‘with a lenient eye, allowing borderline cases to proceed.’ ” *People v. Hodges*, 234 Ill. 2d 1, 21 (2009) (quoting *Williams v. Kullman*, 722 F.2d 1048, 1050 (2d Cir.1983)). “Because most petitions are drafted at the first

stage by defendants with little legal knowledge or training, this court views the threshold for survival as low.” *People v. Mabery*, 2016 IL App (1st) 141359, ¶ 34. However, applying a “liberal construction does not mean that we distort reality.” *People v. Mars*, 2012 IL App (2d) 110695, ¶ 32.

¶ 21 Here, even a liberal construction of defendant’s petition shows that neither Exhibit 1 nor Exhibit 2 raised additional postconviction claims of constitutional violations. We initially note that both exhibits were intended to be part of defendant’s postconviction petition. Our review of the record shows that defendant intended to attach Exhibit 1 and Exhibit 2 to his postconviction petition to support his claim that that private counsel was ineffective for failing to preserve the 402 issue for appeal. His petition states, in pertinent part, that, “[i]t was [defendant] in his *pro se* motion and affidavit who alleged he was unaware and did not know his time was consecutive and he would of never pled guilty if he knew his time was running consecutive. See exhibit 1 and 2.”

¶ 22 However, these materials were either filed separately from defendant’s petition, or treated as such by the court due to a clerical error. The record shows that defendant filed his petition and the exhibits on June 29, 2015. The record also shows that, on July 7, 2012, the clerk informed the trial court that “[d]efendant filed a petition to withdraw his guilty plea and vacate sentence.” In its September 14, 2015, written order dismissing defendant’s postconviction petition, the court considered and, separately dismissed, his motion to withdraw his guilty plea.

¶ 23 That said, the exhibits—the motion to withdraw guilty plea and the affidavit—were defendant’s attempts to recreate his original *pro se* motion to withdraw guilty plea and the affidavit that was attached to it, which were originally filed on April 22, 2011. The fact that

Exhibit 2, the affidavit, was purportedly signed on April 27, 2011, which was 17 days after the original affidavit supporting his original *pro se* motion to withdraw guilty plea, and four years before the filing of his postconviction petition, makes it clear that these documents were intended to revisit issues previously raised in earlier pleadings. As mentioned, defendant attempted to attach these documents to his petition in support of his claim that private counsel was ineffective for failing to preserve the 402 issue for appeal.

¶ 24 In its written order, the trial court dismissed this claim as frivolous and patently without merit because this court, on direct appeal, determined that defendant was not prejudiced by any defect in the trial court's 402 admonishments, where private counsel testified that he repeatedly informed defendant that his sentences were to run consecutively. Moreover, in the order, the court also considered the claims in defendant's motion to withdraw guilty plea, Exhibit 1, and noted that it had previously dismissed these claims. Although the court should have considered Exhibit 1 as part of defendant's postconviction petition, the record shows that the exhibit does not raise new claims of constitutional violations. Given the fact that Exhibit 1 did not raise new claims involving a denial of constitutional rights and that the trial court ultimately dismissed the claim that Exhibit 1 was meant to support, we find that the court did not enter an improper partial dismissal of defendant's postconviction petition.

¶ 25 In reaching this conclusion, we are not persuaded by defendant's reliance on *People v. Sparks*, 393 Ill. App. 3d 878, 886 (2009) and *People v. Mabrey*, 2016 IL App (1st) 141359. Here, unlike *Sparks* and *Mabrey*, the materials allegedly attached to defendant's postconviction petition did not allege newly discovered facts, which had not previously been considered by the trial or appellate court. Further, unlike in *Sparks*, the record at bar does not suggest that the trial

court, in dismissing the petition, did not consider these supporting materials. Rather, the record shows that the court expressly considered the motion to withdraw guilty plea and affidavit, albeit separately from defendant's postconviction petition. As such, the court was aware of the alleged claims and contents raised in the exhibits. Under these circumstances, we cannot say that the trial court failed to consider the contents of the attachments, and entered an improper partial summary dismissal of defendant's petition.

¶ 26 For the reasons set forth herein, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.