2017 IL App (2d) 150563-U
No. 2-15-0563
Order filed August 3, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lee County.
	)	
Respondent-Appellee,	)	
v.	)	No. 07-CF-63
	)	
KENDALL DAVIS,	)	Honorable
	)	Ronald M. Jacobson,
Petitioner-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Hudson and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's postconviction petition was properly dismissed at the first-stage as the argument raised in his petition was positively rebutted by the record.

¶ 2 On September 29, 2010, the defendant was convicted on two counts of violating bail bond (720 ILCS 5/32-10 (West 2006)), and sentenced to eight years' imprisonment. We affirmed the defendant's conviction and sentence on direct appeal. See *People v. Davis*, 2013 IL App (2d) 110639-U. The defendant subsequently filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS5/122-1 *et seq.* (West 2014)). The defendant's petition was summarily dismissed as frivolous and patently without merit by the trial court. The defendant appeals from this order. We affirm.

¶ 3 BACKGROUND

¶ 4 On July 2, 2001, the defendant was charged in Lee County with multiple felonies including two counts of home invasion, two counts of unlawful possession of a weapon, aggravated battery, possession of a controlled substance with intent to deliver, unlawful criminal drug conspiracy, and possession of cannabis with intent to deliver. The defendant posted bond on September 5, 2001. The defendant was present in court on numerous pretrial occasions and during most of the jury trial on those charges. However, on January 31, 2003, the last day of trial, the defendant disappeared when the jury retired to deliberate, and he was not present when the guilty verdicts were announced. Thereafter, the defendant was sentenced *in absentia* to concurrent terms of 20 years' imprisonment on each count of home invasion (the convictions on the other charges were merged into these counts).

¶ 5 Four years later, in January 2007, the defendant was arrested in Maple Grove, Minnesota. He was returned to Illinois and, on June 14, 2007, by second-amended information, the defendant was charged with two counts of violating bail bond. The defendant's prosecution did not commence until three years and 10 months after the alleged offense. As such, the State's information specifically alleged that the three-year statute of limitations was tolled pursuant to 720 ILCS 5/3-7(a) because the defendant "was not usually and publicly a resident within the State of Illinois as the defendant was in Minnesota."

¶ 6 The defendant's trial on those charges commenced on September 28, 2010. (The trial was delayed while the defendant attempted to overturn his January 2003 convictions and changed attorneys several times.) On the morning of trial, defense counsel filed a motion *in limine* arguing that the issue of whether the statute of limitation was tolled in this case was a question of law and that the trial court should decide whether the statute was tolled prior to the commencement of trial. The State agreed that the issue was a question of law but argued that

whether the statute of limitation barred the defendant's prosecution was an affirmative defense that was required to be disclosed prior to trial. The trial court concluded that whether the statute of limitation barred the defendant's prosecution was an issue that should be raised by the defense in a pretrial motion to dismiss. The trial court explained that, in such a motion to dismiss, the defendant could allege facts as to why the prosecution was barred by the statute of limitations, and the burden would then shift to the State to prove at an evidentiary hearing that the prosecution was not barred. The trial court informed defense counsel that if she re-characterized the motion *in limine* as a motion to dismiss, it could then rule on the question of whether the statute of limitation barred the defendant's prosecution. Defense counsel requested a brief recess to discuss the issue with the defendant and find out what he wanted her to do. Following the brief recess, defense counsel withdrew the motion *in limine* and declined to file a motion to dismiss.

¶ 7 At trial, Susan Meany, an employee of the Lee County Circuit Court Clerk's Office, identified several of the State's proffered exhibits as court records. The exhibits essentially established that the defendant was on bail for appearance in court on his 2001 charges and that the bail bond was forfeited.

¶ 8 Katy Winkler, a police officer from Maple Grove, Minnesota, testified that on January 27, 2007, she pulled the defendant's vehicle over due to erratic driving. When she asked for the defendant's license, he gave her an Indiana license in the name of Marcus Jones. The defendant then gave her a Minnesota address and stated that he had been living in Minnesota for "one year." Winkler took the defendant to the police station and booked him, during which his fingerprints were taken. Although Winkler did not testify to this, the parties agree that after running the defendant's fingerprints through a national database, Winkler discovered the defendant's true identity and learned that there was a warrant for his arrest.

¶ 9 Finally, Detective David Glessner, from the Lee County Sheriff's Department, testified that he had attended the defendant's home invasion trial in 2003. Glessner identified the defendant in court. Glessner further testified that the defendant was present at his 2003 trial until the jury retired to deliberate, at which point the defendant left the courtroom and did not return. Glessner next saw the defendant in January 2007, when he and other officers traveled to Minnesota to pick up the defendant and transport him back to the Lee County jail.

¶ 10 In closing, the State argued that it was required to prove three things: that the defendant was on bail for appearance in a court case against him; that the bail bond was forfeited; and that the defendant willfully failed to surrender himself within 30 days after the forfeiture of the bail bond. The State argued that the evidence presented established the elements of the case. Defense counsel argued, in closing, that the State did not prove its case as the court records did not show that the notice of bond forfeiture was received at the defendant's address, or that the defense attorney who was present in court for the jury's verdict and the defendant's sentencing ever notified the defendant of those events. Defense counsel did not raise the limitations issue in closing arguments or request a jury instruction on the issue.

¶ 11 The jury found the defendant guilty of both counts of violating his bail bond. The defendant was sentenced to eight years' imprisonment on one count of violating bail bond, to run consecutively to his 2003 sentences.

¶ 12 On direct appeal, the defendant argued that the admission of certain court records, the admission of other crimes evidence through Winkler's testimony, and the fact that he was wearing a prison uniform and a leg shackle stigmatized him in the eyes of the jury and made his trial unfair. We found these arguments to be without merit and affirmed the defendant's convictions and sentence. *Davis*, 2013 IL App (2d) 110639-U.

¶ 13 On February 6, 2015, the defendant filed a *pro se* postconviction petition arguing, in relevant part, that he received ineffective assistance of counsel in that trial counsel failed to pursue a motion to dismiss the second-amended information based upon the statute of limitations. The defendant argued that the only evidence that he resided outside Illinois was Winkler's testimony. The defendant further argued that the comment he made to Winkler about living in Minnesota was not accurate and that he only visited Minnesota from time to time. The defendant stated that he did not have a residence in Minnesota and that he maintained his residency in Cook County. In an affidavit attached to his *pro se* petition, the defendant stated that he had asked trial counsel to pursue a motion to dismiss but that she refused to do so. On May 7, 2015, the trial court summarily dismissed the defendant's petition as frivolous and patently without merit. Specifically, the trial court found that the defendant's argument that his trial violated the statute of limitations was without merit as he had absented himself from Illinois for a substantial period of time. The defendant filed a timely notice of appeal from the summary dismissal of his petition.

¶ 14 ANALYSIS

¶ 15 On appeal, the defendant argues that the trial court erred in summarily dismissing his *pro se* postconviction petition. The Act provides a method for a criminal defendant to assert that his or her conviction was the result of "a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2014). The Act provides for three stages of proceedings. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, the trial court must independently review the petition within 90 days of its filing and decide whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). If the court determines that the petition is frivolous or patently without merit, the court must dismiss it in a written order. *Id.*

¶ 16 To survive summary dismissal, a petition need present only the "gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). The "gist" standard is "a low threshold." *Id.* To set forth the "gist" of a constitutional claim, the petition "need only present a limited amount of detail" (*id.*) and thus need not set forth the claim in its entirety. *People v. Edwards*, 197 Ill. 2d 239, 244-45 (2001). A claim is frivolous or patently without merit if it is based on an indisputably meritless legal theory or fanciful or delusional factual allegations. *Hodges*, 234 Ill. 2d at 16. All well-pleaded facts not positively rebutted by the trial record are taken as true. *People v. Sparks*, 393 Ill. App. 3d 878, 883 (2009). Our review of the trial court's dismissal of the defendant's petition is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 17 The defendant contends that he stated the gist of a constitutional claim for ineffective assistance because trial counsel failed to properly litigate the issue of whether his prosecution was barred by the statute of limitations. The defendant argues that trial counsel not only failed to move to dismiss the information on the basis of the statute of limitations but subsequently failed to seek the relevant jury instruction or a jury verdict on the question of whether the State proved an exception to the limitations period. The defendant further contends that his prosecution was barred by the statute of limitations because, as alleged in his *pro se* petition, he had never established a residence outside Illinois.

¶ 18 The State argues that the defendant's claim is forfeited because neither post-trial nor appellate counsel raised the issue earlier. The State argues that, to have properly preserved the issue, the defendant should have alleged ineffective assistance of appellate counsel, for failing to have alleged the ineffective assistance of post-trial counsel, for failing to have alleged the ineffective assistance of trial counsel, for failing to have moved to dismiss the information. However, a *pro se* petition should not be construed so strictly during the first stage of postconviction proceedings. Rather, a *pro se* petition should be given a liberal construction and

should be reviewed " 'with a lenient eye, allowing borderline cases to proceed.' " *Hodges*, 234 Ill. 2d at 21 (quoting *Williams v. Kullman*, 722 F.2d 1048, 1050 (2d Cir.1983)). "While in a given case the *pro se* defendant may be aware of all the facts pertaining to his claim, he will, in all likelihood, be unaware of the precise legal basis for his claim or all the legal elements of that claim." *People v. Edwards*, 197 Ill. 2d 239, 245 (2001). It is for this reason that a *pro se* defendant is required to present only the "gist" of a constitutional claim, which is "something less than a completely pled or fully stated claim." *Edwards*, 197 Ill. 2d at 245. Accordingly, we decline to find the defendant's claim forfeited.

¶ 19 Claims for ineffective assistance of counsel are analyzed under the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The petitioner must show counsel's performance was deficient and that prejudice resulted from the deficient performance. *People v. Houston*, 226 Ill. 2d 135, 143 (2007). A postconviction petition alleging ineffective assistance of counsel may not be dismissed at the first stage of the proceedings if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result. *Hodges*, 234 Ill. 2d at 17.

¶ 20 In the present case, trial counsel's failure to file a motion to dismiss based on the statute of limitations did not fall below an objective standard of reasonableness. Defense counsel was not required to file a motion to dismiss to raise a limitations defense because an exception to the statute of limitations is an element of the State's case that must be proved at trial. *People v. Lutter*, 2015 IL App (2d) 140139, ¶¶ 7, 29. Accordingly, failing to raise the limitations issue in a pretrial motion to dismiss, under the circumstances in this case, was not ineffective assistance of counsel. *Id.*

¶ 21 The defendant next argues that trial counsel was ineffective in failing to request a jury instruction or a jury verdict on the question of whether the State proved an exception to the

limitations period. The State argues that this contention is forfeited because it was not specifically raised in the defendant's *pro se* postconviction petition. 725 ILCS 5/122-3 (West 2008); *People v. Jones*, 211 Ill. 2d 140, 146-47 (2004) (holding that claims not raised in a *pro se* postconviction petition may not be raised for the first time on appeal from the first-stage dismissal of that petition). The State points out that, in his petition, the defendant never argued that trial counsel should have requested a jury instruction or a jury verdict on the limitations issue. Rather, the defendant argued only that trial counsel was ineffective in failing to file a motion to dismiss based on the limitations period. We find this argument to be without merit. Both the argument in the petition and the postconviction appellate argument were related to the same subject matter: trial counsel's failure to raise any challenge regarding the exception to the statute of limitations. This is sufficient to avoid forfeiture. *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 66 (on appeal from first stage dismissal of postconviction petition, issue not forfeited when the petition and postconviction appellate argument both alleged ineffective assistance of counsel based on the same underlying subject matter).

¶ 22 Turning to the merits, the defendant's argument nonetheless fails. At the first stage of postconviction proceedings all well-pleaded factual allegations must be taken as true unless they are positively rebutted by the record. *Sparks*, 393 Ill. App. 3d at 883. The defendant's claim that trial counsel was ineffective in failing to request a jury instruction or a jury verdict on the exception to the statute of limitations is based on the defendant's allegation in his petition that he never resided in Minnesota and had always maintained his residence in Cook County. This allegation is positively rebutted by the record of the trial proceedings. Winkler's uncontroverted testimony at trial was that, during the traffic stop, when she asked the defendant how long he had been living in Minnesota, his response was "one year." As the defendant's allegation regarding his residence is positively rebutted by the record, it is not arguable that he was prejudiced by trial

counsel's failure to request a jury instruction or jury verdict on the exception to the statute of limitations. The defendant's prosecution commenced within three years and 10 months of the alleged offense and living in Minnesota for one year would have tolled the statute of limitations for a sufficient period of time. Accordingly, we affirm the first stage dismissal of the defendant's *pro se* postconviction petition.

¶ 23 In so ruling, we note that the defendant argues that his allegation—that the comment he made to Winkler about living in Minnesota for one year was inaccurate—is sufficient to raise a factual issue that can only be resolved at an evidentiary hearing. However, as this court has stated, at the first stage of postconviction proceedings, "the trial court may not engage in fact-finding (such as hearing witnesses), but that foreclosure does not prevent the trial court at the first stage from making findings based only on the petition and the records of the relevant proceedings." *People v. Dominguez*, 356 Ill. App. 3d 872, 880-881 (2005) (also noting that "it would be unreasonable and inefficient if a defendant's misrepresentation of the facts could permit a petition to proceed to the second stage when the defendant's rendition of the facts is rebutted by the record, thereby rendering the petition frivolous or patently without merit"), *vacated on other grounds*, 366 Ill. App. 3d 468, 473-474 (2006). The defendant's allegation, which is positively rebutted by the record, is not sufficient to withstand summary dismissal.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the circuit court of Lee County is affirmed. As part of our judgment, we grant the State's request that the defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 26 Affirmed.