2017 IL App (2d) 151145-U
No. 2-15-1145
Order filed May 3, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MAURICE JONES, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 12-CF-878 Honorable Victoria A. Rossetti, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in summarily dismissing defendant's postconviction petition, as defendant stated a nonfrivolous claim that his attorney was ineffective for not moving to suppress defendant's statements, which he allegedly gave after invoking his right to counsel.

¶ 2 On August 21, 2012, defendant, Maurice Jones, entered a negotiated plea of guilty in the circuit court of Lake County to a single count of armed violence (720 ILCS 5/33A-2(c) (West 2012)). Pursuant to his plea agreement, defendant was sentenced to a 25-year prison term and the State nol-prossed other charges against him, including a charge of attempted first-degree murder. Defendant did not pursue a direct appeal from the conviction. Through counsel,

defendant filed a petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) on August 18, 2015. He alleged that he did not receive the effective assistance of counsel in connection with his plea. The trial court summarily dismissed the petition on October 29, 2015, and this appeal followed. We reverse and remand.

¶ 3 When defendant entered his plea, he was represented by attorney Anthony J. Carullo. As the factual basis for the plea, the prosecutor stated that, if the matter proceeded to trial, officers from the Waukegan police department would testify that, on Saturday, March 24, 2012, Dennis Metz was shot during a robbery. Metz worked at a bowling alley with Jessica Baynes. Baynes had previously told defendant (who was her boyfriend) that cash receipts from the bowling alley were taken to the bank on Saturday mornings. Defendant, Baynes, and Jeremy Miller devised a plan to steal the cash receipts. Defendant and Miller drove in a stolen van to the bowling alley. One of them approached Metz, shot him, and took the receipts. Then they drove to a location where Baynes was waiting in her own car. They all fled in Baynes's car. A witness who observed the offenders getting into Baynes's car was able to identify that vehicle. Defendant and Baynes were arrested the next day. Both admitted their involvement in the plan to rob the bowling alley. Both also admitted that Metz had been shot. Defendant's attorney stipulated to the factual basis, with the proviso that "there was another individual who is an unnamed conspirator in this, and that the State's evidence would show that [defendant] is not, in fact, the shooter in this matter."

¶ 4 Baynes and Miller were also charged in connection with the shooting. On September 10, 2013, Baynes pleaded guilty of aggravated battery (720 ILCS 5/12-3.05(e)(1) (West 2012)) and was sentenced to a 10-year prison term. Although the record indicates that the charges against

Miller resulted in a conviction and a sentence of probation, the record does not indicate specifically what offense Miller was convicted of committing.

¶ 5 In his postconviction petition, defendant alleged that he was arrested at 3:09 p.m. on March 24, 2012; that he was instructed by officers to remove his shirt and shoes; that prior to making any incriminating statements to police, he told the officers that he needed a lawyer; that he told "multiple officers on multiple occasions that he wanted to speak with an attorney"; and that the officers "ignored and/or denied Defendant's requests to speak with an attorney, and continued to question him." Defendant further alleged that he later learned that his family had retained an attorney for him. The attorney, Steven Goldman, arrived at the police station while defendant was being questioned, but defendant was never told. Defendant alleged that a police officer told him that, if he gave a statement, he could see Baynes and she would be released. Defendant made oral and written statements to the police admitting his involvement in the robbery and shooting, but claiming that someone named "Neo" had shot Metz. The written statement is dated "3/25/12 @ 2:00 pm." In his petition, defendant alleged that he advised Carullo of the circumstances under which he gave his statements. Defendant claimed that, by failing to move to suppress his statements and by recommending that defendant enter a negotiated plea, Carullo provided ineffective assistance.

¶ 6 Defendant also claimed that Carullo failed to properly advise him about the penalties he faced if he went to trial. As part of defendant's plea agreement, the State nol-prossed a charge of attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012)). That offense is a Class X felony, but the indictment included notice that "the People are seeking that a sentence of 25 years or up to a term of natural life be added to the term of imprisonment imposed by the court, in that the defendants personally discharged a firearm that proximately caused great bodily

harm to Dennis Metz." See 720 ILCS 5/8-4(c)(1)(D) (West 2012). In contrast, the other charges against defendant carried a maximum sentence of no more than 30 years' imprisonment. According to the petition, the State would not have been able to meet the burden of proving that defendant was guilty of attempted murder or that he personally discharged a firearm. Defendant alleged that Carullo did not explain this to him; had defendant known, he would not have accepted the State's plea offer. Defendant also claimed that Carullo failed to investigate and present mitigating evidence. The allegations of the petition were supported by an affidavit from defendant and various other documents.

¶ 7 We begin our analysis with a brief summary of the general principles governing proceedings under the Act. In *People v. Meeks*, 2016 IL App (2d) 140509, ¶ 3, we observed as follows:

> "Under the Act, a person imprisoned for a crime may mount a collateral attack on his conviction and sentence based on violations of his constitutional rights. [Citation.] Within 90 days after a petition for relief under the Act is filed and docketed, the trial court must examine the petition and either summarily dismiss it or docket it for further proceedings. [Citation.] If the trial court finds that the petition is 'frivolous or is patently without merit,' the petition will be summarily dismissed. [Citation.] Summary dismissal is proper if the petition 'is based on an indisputably meritless legal theory or a fanciful factual allegation.' [Citation.] If the petition is not summarily dismissed, it advances to the next stage of the proceedings, 'at which an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition.' [Citation.] If the State does not move to dismiss the petition, or if its motion is denied, the State must answer the petition, which then proceeds to an evidentiary hearing.

> [Citation.] The summary dismissal of a petition under the Act is subject to *de novo* review on appeal. [Citation.]"

At the first stage, the petitions allegations are taken as true. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). We note, however, that section 122-2 of the Act (725 ILCS 5/122-2 (West 2014)) provides that the petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." Failure to comply with this requirement is grounds for summary dismissal. *People v. Collins*, 202 Ill. 2d 59, 69 (2002).

¶ 8 Defendant claims that his constitutional right to the effective assistance of counsel was violated in the proceedings leading to his conviction. In support of this claim, defendant argues that counsel's performance was deficient inasmuch as counsel: (1) failed to move to suppress defendant's incriminating statements to police; (2) failed to properly advise defendant about the risks of going to trial; and (3) failed to investigate and present mitigating evidence germane to the determination of defendant's sentence.

¶ 9 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984), which requires a showing that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance was prejudicial in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." To establish that counsel's performance was deficient, "the defendant must overcome the 'strong presumption' that his counsel's representation fell within the 'wide range of reasonable professional assistance.' " *People v. Franklin*, 135 Ill. 2d 78, 117 (1990) (quoting *Strickland*, 466 U.S. at 689). Furthermore, "[t]o demonstrate prejudice in the context of a guilty plea, the defendant must show a reasonable probability that, but for counsel's errors, he would not have pleaded

guilty but rather would have insisted on a trial." *People v. Carranza-Lamas*, 2015 IL App (2d) 140862, ¶ 35. This entails more than simply alleging that the defendant would have opted for a trial. Rather, the defendant "must either assert a claim of actual innocence or articulate a plausible defense that could have been raised at trial." *Id.*

¶ 10 Mindful of these principles, we consider defendant's claim that counsel should have moved to suppress his incriminating statements. According to defendant, the statements should have been suppressed because, although he invoked his Fifth Amendment right to counsel, he was questioned without counsel present and was not told that an attorney retained by his family had come to the police station. Defendant also contends that the statements were involuntary because he was detained for nearly 24 hours, had been directed to remove his shirt and shoes, and was told that Baynes would be released if he made a statement. Defendant alleged that he advised his attorney of these circumstances, but that his attorney failed to seek suppression of his confession. These factual allegations are not "fanciful," so we must consider whether the legal basis of defendant's claim is "indisputably meritless."

¶ 11 As we explained in *People v. Stolberg*, 2014 IL App (2d) 130963, ¶ 37:

> "The fifth and fourteenth amendments to the United States Constitution and article I, section 10, of the Illinois Constitution of 1970 prohibit the government from compelling citizens to incriminate themselves. In *Miranda v. Arizona*, 384 U.S. 436, 474 (1966), the United States Supreme Court articulated rules to ensure that the right to be free from coerced self-incrimination retained meaning, including, upon request by the suspect, that the suspect have counsel present during custodial interrogation. An 'accused *** having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made

> available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). Thus, the exclusionary rule bars the prosecution from using statements obtained after a defendant invokes his right to counsel, unless the State can establish that (1) the defendant initiated further conversations; and (2) he knowingly and intelligently waived the right he had invoked. [Citation.] The State bears the burden of proving that a defendant initiated further conversations, in that he ' "evinced a willingness and a desire for a generalized discussion about the investigation" ' [Citations.]"

If, as defendant alleged in his petition, he asked for an attorney but then gave the police his statements without counsel present, the statements would have to be suppressed unless the State could show that defendant thereafter initiated conversations about the crime. On the record here, it is not clear that the State would have been able to sustain that burden. Under these circumstances, Carullo's otherwise unexplained failure to move to suppress defendant's statements would be objectively unreasonable. Furthermore, it does not appear that, without defendant's statements, the State could have introduced substantial evidence of defendant's guilt. Accordingly, if it is true that defendant asked for an attorney, but none was provided, there is a reasonable probability that defendant would have chosen to go to trial.[1] Defendant would therefore be able to satisfy both prongs of the *Strickland* test. Moreover, defendant would be

[1] We note that defendant's affidavit avers that he asked for an attorney while being questioned and that he later made Carullo aware that he had done so. Moreover, it may be inferred that others with knowledge of the pertinent allegations (*i.e.* Carullo and the officers who obtained defendant's statements) would be unwilling to provide affidavits. Accordingly, section 122-2 of the Act does not require such affidavits. *Collins*, 202 Ill. 2d at 67.

entitled to relief on this basis even if he could not prove that his family had secured counsel for him[2] or that his statements were involuntary because of the circumstances of his detention and interrogation. Accordingly, this claim is not indisputably meritless.

¶ 12 In view of the foregoing, we conclude that defendant's petition was not frivolous or patently without merit and that summary dismissal was therefore improper. Our conclusion obviates the need to consider the merits of defendant's claims that counsel misinformed defendant about the risks associated with going to trial and failed to investigate and present mitigating evidence. Because the Act does not permit *partial* summary dismissal of a petition during the first stage of a postconviction proceeding, the entire petition must be docketed for further proceedings. *People v. White*, 2014 IL App (1st) 130007, ¶ 33.

¶ 13 For the foregoing reasons, the judgment of the circuit court of Lake County is reversed and the cause is remanded for further proceedings.

¶ 14 Reversed and remanded.

[2] Under the Illinois Constitution, "due process is violated when police interfere with a suspect's right to his attorney's assistance and presence by affirmatively preventing the suspect, exposed to interrogation, from receiving the immediately available assistance of an attorney hired or appointed to represent him." *People v. McCauley*, 163 Ill. 2d 414, 444 (1994). However, a mere request for an attorney is sufficient to invoke the protections of the fifth amendment. See *Stolberg*, 2014 IL App (2d) 130963, ¶ 37.