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2017 IL App (3d) 140459-U

Order filed August 1, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-14-0459 Circuit No. 13-CF-117
MICHAEL R. BAKER,)	
Defendant-Appellant.)	Honorable Daniel J. Bute, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Holdridge and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in dismissing defendant’s postconviction counsel at the second stage of proceedings. Defendant made a substantial showing of ineffective assistance of counsel.

¶ 2 Defendant, Michael R. Baker, appeals from the La Salle County circuit court’s second-stage dismissal of his petition for postconviction relief. On appeal, defendant argues he is entitled to a third-stage evidentiary hearing because he made a substantial showing of ineffective assistance of counsel at the second stage of postconviction proceedings. Alternatively, he argues

we should reverse and remand for further second-stage proceedings because his waiver of postconviction counsel was inadequate. We reverse and remand for further proceedings.

¶ 3

FACTS

¶ 4

On March 12, 2013, the State charged defendant with possession of between 2000 and 5000 grams of cannabis with intent to deliver. These charges stemmed from a February 19, 2013, traffic stop conducted by the La Salle County State’s Attorney’s Felony Enforcement Unit (hereinafter SAFE Unit).

¶ 5

Defendant proceeded with private counsel. On May 23, 2013, counsel filed a motion to suppress, arguing that the SAFE Unit did not have authority to stop defendant’s vehicle based on several theories. Specifically, the motion alleged that the SAFE Unit lacked jurisdiction, as the SAFE Unit officers were based out of the Spring Valley police department, which had no legal authority to operate in La Salle County. In addition, the motion alleged that the SAFE Unit lacked statutory authority, had engaged in an illegal “fishing expedition,” and had violated the equal protection clause by exclusively seizing out-of-state motorists. Counsel tendered the motion to suppress in open court. The trial court never ruled on the motion to suppress.

¶ 6

On June 12, 2013, defendant entered a negotiated guilty plea whereby he was to serve 5½ years in prison, 2 years of mandatory supervised release, and pay \$28,800 in fines and fees. Defendant did not file a direct appeal.

¶ 7

On November 27, 2013, defendant filed a petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). In his petition, defendant alleged ineffective assistance of trial counsel for trial counsel’s failure to consult with him on the motion to suppress. Defendant claimed he would not have pled guilty if he had known about the allegations in the motion and the case law supporting them. In addition, he claimed his plea was

induced by nonexistent additional charges, and that the trial court had violated his due process rights when it did not advance the motion *sua sponte* despite knowing the seriousness of the allegations.

¶ 8 In support of his postconviction allegations, defendant attached his own handwritten affidavit. In the affidavit, defendant claimed, *inter alia*, his trial counsel had told him the State had indicted him on charges of conspiracy and trafficking, that it would be seeking a 60-year sentence, and that counsel “cannot win this case in this county anyway.” In addition, defendant claimed counsel had informed him that the State had made a onetime offer: it would drop the additional charges in exchange for him paying a \$30,000 fine, plus 4 years’ incarceration if the fine was paid up front, or 5½ years’ incarceration if the fine was paid after his sentence. Shortly thereafter, defendant’s wife told him that counsel had contacted her and asked that she urge defendant to take the offer because there was no hope of winning defendant’s case in La Salle County. Defendant further claimed he first learned of the motion to suppress when he received a copy of the State’s “Statement of Facts.” He asserted he would not have pled guilty if he knew of the motion’s existence.

¶ 9 Defendant also filed a motion to substitute judge and to change venue, claiming the trial judge in his case had participated in the violations and that the rest of the La Salle County judiciary was biased in favor of the SAFE Unit. The trial court failed to rule on defendant’s postconviction petition within 30 days, and the State filed a motion to dismiss.

¶ 10 On January 8, 2014, defendant filled out an affidavit of assets and liabilities, stating under oath that he was without adequate assets to retain postconviction counsel. At a hearing later that day, the trial court offered to appoint defendant postconviction counsel, at which point defendant accused the court of “trying to get [him] to take the Public Defender,” and stated that

he did not want the court to appoint the public defender. The court asked defendant if he would be representing himself, at which point defendant stated he would be hiring private counsel.

¶ 11 On May 9, 2014, defendant filed a motion asking the trial court to appoint him counsel other than the public defender, as the public defender’s office “routinely” litigated SAFE Unit cases without challenging the authority of the SAFE Unit. He explained that he needed counsel because he did not have the resources to litigate his claims *pro se*, and argued that he did not have access to “forms and service of process” by which to issue subpoenas, conduct “pre-hearing depositions,” and conduct the “usual and customary other elements of effective defense of his motion.”

¶ 12 The trial court conducted a hearing on May 16, 2014. At that time, the court advised defendant it would not appoint him a private attorney, but that it would appoint the public defender. In response, defendant asked, “Well, what are we going to do today? Is that what we’re talking about?” The court responded that it wanted to do the motion to dismiss and asked defendant if he was ready. Defendant responded, “Let’s do it.”

¶ 13 The trial court then denied defendant’s motion to substitute judge and venue and found that defendant had not carried his burden of alleging facts sufficient to make a substantial showing of a constitutional violation. The court then dismissed defendant’s postconviction petition.

¶ 14 Defendant appealed.

¶ 15 ANALYSIS

¶ 16 I. Ineffective Assistance of Counsel

¶ 17 On appeal, defendant claims his postconviction petition made a substantial showing of ineffective assistance of counsel in that he alleged counsel (1) communicated a potentially

unconstitutional and unenforceable plea offer, (2) advised him to accept that offer without discussing with him the contents and merits of a pending motion to suppress that established a defense to the charges, and (3) implied that defendant could not receive a fair trial in La Salle County. In response, the State argues defendant has forfeited his first and third arguments by failing to allege them in his postconviction petition. With regard to the State's forfeiture argument, we agree. Although defendant's affidavit mentioned the potentially unconstitutional plea offer and the statement that he could not win in La Salle County, these allegations were not specifically plead in defendant's postconviction petition and were not before the trial court at the second stage of postconviction proceedings. Defendant cannot argue the merits of these claims for the first time on appeal. See *People v. Cathey*, 2012 IL 111746, ¶ 21; *People v. Pendleton*, 223 Ill. 2d 458, 470 (2006).

¶ 18 With regard to defendant's second allegation—that his attorney provided ineffective assistance when he failed to communicate the contents and merits of the pending motion to suppress—the State claims defendant's argument fails to evince that trial counsel's performance fell below an objective standard of reasonableness, let alone that he was prejudiced by such performance.

¶ 19 The Act provides a three-stage review process for a defendant to challenge his conviction based upon a substantial violation of his constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2012). Here, the trial court dismissed defendant's postconviction petition at the second stage of review. At the second stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. The trial court must assume the truth of the allegations contained in the petition unless positively rebutted by the record. *Id.* The sole issue for the court to determine at the second stage is whether the petition being attacked is

proper as a matter of law. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). Accordingly, our review of a second-stage dismissal is *de novo*. *Id.* at 389.

¶ 20 Ineffective assistance of counsel claims are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To survive second-stage review, a postconviction petition must make a substantial showing that (1) counsel’s performance fell below an objective standard of reasonableness and (2) but for counsel’s deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). Failure to meet either prong of the *Strickland* test defeats an ineffective assistance of counsel claim. *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 21 Here, defendant’s postconviction petition specifically alleged ineffective assistance of counsel for failing to consult with him on the motion to suppress. Defendant claimed he would not have pled guilty had he known about the allegations in the motion and the case law supporting them.

¶ 22 The sixth amendment requires that defense counsel keep a criminal defendant informed of developments in his case and to consult with the defendant on all major decisions. *People v. Smith*, 268 Ill. App. 3d 574, 579 (1994). This concept is codified in the Illinois Rules of Professional Conduct Rule 1.4(b), which states that counsel has a duty to inform the defendant of important matters related to the case, and to explain matters to the extent reasonably necessary to make informed decision regarding the representation. Ill. S. Ct. Rules of Prof. Conduct, Rule 1.4(b).

¶ 23 Although defense counsel has the authority to make many decisions as a matter of trial strategy, one decision that belongs to defendant is the decision whether to plead guilty. *People v.*

Medina, 221 Ill. 2d 394, 403 (2006). Although the ultimate decision to plead guilty belongs to the defendant, counsel has a duty to aid a defendant in making an informed choice whether to plead guilty. *People v. Mendez*, 336 Ill. App. 3d 935, 939 (2003). Counsel's failure to advise a defendant of an available defense can amount to a violation of that duty. *Id.*

¶ 24 In *People v. Ringland*, 2015 IL App (3d) 130523, ¶ 42, this court held that the La Salle County State's Attorney did not have the authority to outfit his own drug interdiction unit. We explained that while the State's Attorney does have the authority to appoint special investigators to conduct investigations that assist him with his duties, such authority cannot reasonably be interpreted to extend to the policing activities conducted by the La Salle County SAFE Unit. *Id.* (citing 55 ILCS 5/3-9005(b) (West 2012)).

¶ 25 The State admits defendant's motion to suppress based on the SAFE Unit's lack of authority likely would have been successful, but argues that fact was not known at the time, as *Ringland* was not decided until after defendant entered his guilty plea. Given the fact that our decision in *Ringland* was predicated on basic statutory interpretation, we agree with defendant that he made a substantial showing of a constitutional violation at the second stage of postconviction proceedings.

¶ 26 As stated above, defense counsel has a duty to advise a defendant of available defenses. *Mendez*, 336 Ill. App. 3d at 939. Here, defendant's postconviction petition alleged that his attorney failed to consult with him on the pending motion to suppress. Defendant claimed that had he known about the allegations in the motion and the law supporting those allegations, he would not have pled guilty. We find this contention, in combination with the substantive strength of the motion to suppress, sufficient to advance defendant's petition to a third-stage

evidentiary hearing. Accordingly, we reverse the trial court's second-stage dismissal of defendant's postconviction petition and remand for further proceedings.

¶ 27 This ruling renders defendant's other argument on appeal, that his waiver of counsel at the second stage was legally insufficient, moot. We have no reason to anticipate any problems in that regard at the third-stage evidentiary hearing. Therefore, we find no reason to address it.

¶ 28 **CONCLUSION**

¶ 29 For the foregoing reasons, we reverse the circuit court of La Salle County's second-stage dismissal of defendant's postconviction petition. We remand to the trial court for further proceedings.

¶ 30 Reversed and remanded.