2017 IL App (4th) 140986-U

NO. 4-14-0986

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 6, 2017
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
MICHAEL J. HOGAN,	)	No. 10CF189
Defendant-Appellant.	)	
	)	Honorable
	)	Robert M. Travers,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Turner and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in summarily dismissing defendant's *pro se* postconviction petition as frivolous and patently without merit.

¶ 2 Defendant, Michael J. Hogan, appeals the circuit court's summary dismissal of his postconviction petition, wherein he alleged his trial counsel was ineffective for failing to preserve the claims set forth in his motion to suppress. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In July 2010, defendant's landlord entered defendant's residence and noticed what he believed to be cannabis plants throughout the home. After the execution of a search warrant of the premises, police seized between 2,000 grams and 5,000 grams of cannabis. The State charged defendant with unauthorized production of cannabis, a Class 2 felony (count I) (720

ILCS 550/8(d) (West 2008)), unlawful manufacture of cannabis, a Class 1 felony (count II) (720 ILCS 550/5(f) (West 2008)), and possession of a controlled substance, a Class 4 felony (count III) (720 ILCS 570/402(c) (West 2008)).

¶ 5 In February 2012, in an open plea agreement, defendant pleaded guilty to counts II and III in exchange for the State's dismissal of count I. As an open plea, the parties had reached no agreement as to sentencing. The trial court advised defendant he would be facing a potential range of punishment on count II, a Class 1 felony, of 4 to 15 years in prison and, on count III, a Class 4 felony, a potential range of punishment of probation to 6 years in prison, as an extended term. Defendant stated he (1) understood all of the court's admonishments regarding his rights and the waiver of those rights and (2) was pleading guilty of his own free will. The court accepted defendant's plea, finding it knowingly and voluntarily entered and ordered the preparation of a presentence investigation report (PSI).

¶ 6 The trial court sentenced defendant to 15 years in prison and a 2-year term of mandatory supervisory release on count II. The court also imposed a three-year term on count III. The sentences were ordered to run concurrent to one another. The court awarded defendant sentencing credit of 352 days for time spent in pretrial custody. Defendant filed a motion to withdraw his guilty plea as well as a motion to reconsider his sentence, both challenging only his sentence.

¶ 7 Defendant appealed, raising issues related to his sentencing. This court affirmed defendant's 15-year sentence, but we remanded for the proper award of sentencing credit. *People v. Hogan*, 2013 IL App (4th) 120684-U, ¶ 19.

¶ 8 On August 1, 2014, defendant filed a *pro se* postconviction petition pursuant to

the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)), alleging ineffective assistance of trial and appellate counsel. Defendant alleged his trial counsel was ineffective for failing to refile a previously withdrawn motion to suppress or, at least, properly preserve the claims set forth in the motion. Defendant asserted his trial counsel assured him the charges would be dismissed, or, if not dismissed, he would refile the motion to suppress. The charges were not dismissed, and the motion to suppress was not refiled. Defendant claims, had he known the motion to suppress was not refiled, he would not have pleaded guilty. He also alleged ineffective assistance of appellate counsel for failing to raise this issue on direct appeal. Defendant supported his petition with his own affidavit and various court documents and transcripts.

¶ 9 On October 28, 2014, the circuit court entered a written order dismissing defendant's petition as frivolous and patently without merit. This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 Defendant contends he had stated sufficient allegations in his postconviction petition to survive first-stage summary dismissal. In particular, defendant argues he stated the gist of an ineffective-assistance-of-counsel claim when he alleged his trial counsel failed to properly preserve his claims by failing to refile defendant's motion to suppress after counsel had earlier withdrawn the motion. We disagree and affirm.

> "In a noncapital case, a postconviction proceeding contains three stages. At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether ' "the petition is frivolous or is patently without merit." ' [Citations.] A petition may be summarily dismissed as

> frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. [Citation.] This first stage in the proceeding allows the circuit court 'to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit.' [Citation.] Because most petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low. At this initial stage of the proceeding, there is no involvement by the State." *People v. Tate*, 2012 IL 112214, ¶ 9.

¶ 12 In *Tate*, our supreme court discussed the distinction between ineffective-assistance-of-counsel claims that challenge what counsel did versus what counsel should have done. *Tate*, 2012 IL 112214, ¶ 14. In this case, defendant raises a claim of the latter type. " '[A] claim based on what ought to have been done may depend on proof of matters which could not have been included in the record precisely because of the allegedly deficient representation.' " *Tate*, 2012 IL 112214, ¶ 14 (quoting *People v. Erickson*, 161 Ill. 2d 82, 88 (1994)). That is, forfeiture of the claim may not apply in such circumstances. *Tate*, 2012 IL 112214, ¶ 14. Thus, the fact this claim was not raised on direct appeal is not fatal to the issue raised here.

¶ 13 " 'At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced.' " (Emphases in original.) *Tate*, 2012 IL 112214, ¶ 19 (quoting *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). This "arguable" standard is a lower pleading standard than similar claims judged at the second stage. *Tate*, 2012 IL 112214, ¶ 20.

¶ 14 Defendant insists counsel could have preserved the issues raised in his motion to suppress by, for example, requesting a stipulated bench trial. This way, defendant argues, he could have taken advantage of the benefits of entering a plea agreement while still preserving the issues raised in the motion to suppress.

¶ 15 However, defendant has not demonstrated a connection between counsel's failure to preserve the issues and the voluntariness of his guilty plea. The issues of an improper search or seizure of evidence would have no effect on the voluntariness of defendant's plea, as these would not be proper grounds in support of a motion to withdraw his plea. See *People v. Whitfield*, 217 Ill. 2d 177, 183-84 (2005) ("When seeking relief from a guilty plea, either directly or collaterally, there are two separate, though closely related, constitutional challenges that may be made: (1) that the plea of guilty was not made voluntarily and with full knowledge of the consequences, and (2) that defendant did not receive the benefit of the bargain he made with the State when he pled guilty."). Defendant has not convinced this court he could have challenged his guilty plea if counsel would have preserved the search and seizure issues. Regardless of how liberally we construe defendant's *pro se* allegations, we find no connection between the issues allegedly not preserved and the voluntariness of defendant's guilty plea.

¶ 16 Although defendant maintains counsel's alleged ineffective assistance rendered his guilty plea involuntary, the possibility that defendant would not have pleaded guilty had the motion been refiled does not establish that, under the circumstances, his guilty plea was not knowingly and intelligently made. To the contrary, the fact defendant entered his guilty plea after the motion to suppress was voluntarily withdrawn suggests his decision to plead guilty was intentional and well-reasoned. The trial court admonished defendant, found his plea had a factual

basis, and determined he pleaded guilty freely and voluntarily. Under *Tollet*, defendant cannot now raise an "independent claim" of alleged ineffective assistance that occurred prior to the entry of his guilty plea. *Tollet v. Henderson*, 411 U.S. 258, 267 (1973) (after pleading guilty, a defendant may not generally raise claims of deprivation of constitutional rights occurring prior to the entry of the guilty plea); see also *People v. Ivy*, 313 Ill. App. 3d 1011, 1017 (2000) (defendant barred from arguing in postconviction petition that trial counsel was ineffective for failing to file motion to suppress, as the alleged failure "occurred prior to the entry of defendant's guilty plea"). Defendant's claim of alleged constitutional deprivation may not be raised now, as the deprivation, according to him, occurred prior to the entry of his guilty plea. We conclude defendant's petition contained no arguable basis either in law or in fact.

¶ 17 III. CONCLUSION

¶ 18 For the foregoing reasons, we affirm the circuit court's judgment and award the State its $50 appeal costs against defendant.

¶ 19 Affirmed.