2017 IL App (4th) 141071-U

NO. 4-14-1071

FILED
January 26, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
JOSHUA J. SKINNER,	)	No. 13CF614
Defendant-Appellant.	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed defendant's postconviction petition at the first stage where defendant's claim of ineffective assistance of counsel failed to state the gist of a constitutional claim.

¶ 2 In November 2013, the State charged defendant, Joshua J. Skinner, with burglary (720 ILCS 5/19-1(a) (West 2012)). In May 2014, pursuant to a plea agreement, defendant pleaded guilty to an amended charge of attempt (burglary) (720 ILCS 5/8-4(a), 19-1(a) (West 2012)) with an agreed sentence of eight years' imprisonment, and the State agreed to take no position on defendant's request for boot camp. At a July 2014 sentencing hearing, the Vermilion County circuit court sentenced defendant to eight years' imprisonment and approved defendant's consent for boot camp.

¶ 3 In November 2014, defendant filed a *pro se* postconviction petition, which the circuit court summarily dismissed as frivolous and patently without merit. Defendant appeals,

arguing his claim of ineffective assistance of counsel stated the gist of a constitutional claim. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The State's November 2013 charge asserted defendant committed the offense of burglary on November 16, 2013, when he knowingly and without authority entered Daniel Keith's 2001 Buick with the intent to commit therein a theft. Burglary is a Class 2 felony. 720 ILCS 5/19-1(b) (West 2012). Due to his prior convictions, defendant was subject to Class X sentencing on the Class 2 felony. See 730 ILCS 5/5-4.5-95(b) (West 2012).

¶ 6 In May 2014, the circuit court held defendant's plea hearing. The parties agreed defendant would plead guilty to an amended charge of attempt (burglary), a Class 3 felony (720 ILCS 5/8-4(c)(4) (West 2012)), with an eight year prison sentence. Defense counsel listed defendant's felonies as three prior burglary convictions, an attempt (burglary) conviction, two possession of a stolen vehicle convictions, and one escape conviction. The State noted it was taking no position on defendant's request for boot camp but was not agreeing to boot camp for defendant. The prosecutor agreed the law provided defendant could get boot camp. The court admonished defendant, *inter alia*, the sentencing range for a Class 3 felony was 2 to 5 years and defendant was eligible for an extended term, which has a sentencing range of 5 to 10 years in prison. See 730 ILCS 5/5-4.5-40(a) (West 2012). After hearing the factual basis for the guilty plea, the court accepted defendant's plea.

¶ 7 At his July 2014 sentencing hearing, defendant testified he believed the drug treatment, discipline, and work readiness aspects of boot camp would help him. Defendant testified he needed help with his alcohol and prescription drug problems. Defendant signed the consent to participate in boot camp. The prosecutor asked defendant if he understood his prior

felonies for which he was sentenced to the Department of Corrections (DOC) might prevent him from getting boot camp. Defendant indicated he was not aware of that. The court sentenced defendant to eight years' imprisonment and approved his consent for boot camp. Defendant did not file any postjudgment motions and did not appeal.

¶ 8 On November 20, 2014, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2012)). Therein, defendant claimed counsel was ineffective for failing to tell him his prior escape conviction could "stop" him from going to boot camp. Defendant claimed he was never told it was impossible for him to receive boot camp. Defendant attached no documents to his petition. On November 25, 2014, the circuit court entered an order, dismissing defendant's petition as frivolous and patently without merit.

¶ 9 On December 9, 2014, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Feb. 6, 2013). Accordingly, this court has jurisdiction of defendant's postconviction petition under Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013).

¶ 10 II. ANALYSIS

¶ 11 Defendant argues the circuit court erred in summarily dismissing his postconviction petition, claiming his counsel provided constitutionally ineffective assistance by failing to tell him his escape conviction made it impossible for him to receive boot camp. We disagree.

¶ 12 The Postconviction Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075

(2010). A proceeding under the Postconviction Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 13 The Postconviction Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). To survive dismissal at this initial stage, the postconviction petition "need only present the gist of a constitutional claim, "which is "a low threshold" that requires the petition to contain only "a limited amount of detail." *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). Our supreme court has held "a *pro se* petition seeking postconviction relief under the [Postconviction] Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212. "In considering a petition pursuant to [section 122-2.1 of the Postconviction Act], the court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in

such proceeding and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2012); see also *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 20, 963 N.E.2d 394.

¶ 14 Claims of ineffective assistance of counsel are evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Enis*, 194 Ill. 2d 361, 376, 743 N.E.2d 1, 11 (2000). A defendant raising a claim of ineffective counsel "must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). At the first stage of postconviction proceedings, "a petition alleging ineffective assistance of counsel 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." *Petrenko*, 237 Ill. 2d at 497, 931 N.E.2d at 1203 (citing *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212).

¶ 15 Defendant's sole ineffective assistance of counsel argument is based on his contention that his escape conviction made it "impossible" for him to be selected for boot camp. However, that argument lacks an arguable legal basis. Section 5-8-1.1 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-1.1 (West 2012)) addresses impact incarceration, also known as boot camp. If a court finds at the sentencing hearing a defendant may meet DOC's eligibility requirements for impact incarceration, the court may in its sentencing order approve the defendant "for placement in the impact incarceration program conditioned upon his acceptance into the program by [DOC]." 730 ILCS 5/5-8-1.1(a) (West 2012). Section 5-8-1.1(b) of the Unified Code (730 ILCS 5/5-8-1.1(b) (West 2012)) lists eight requirements the

defendant must meet to be able to participate in the program. None of the requirements indicate the defendant cannot have a prior escape conviction. Defendant met all eight requirements and thus was eligible for impact incarceration. The prosecutor's statement at defendant's plea hearing that "the law says he could get boot camp" was correct.

¶ 16 Section 5-8-1.1(b) of the Unified Code (730 ILCS 5/5-8-1.1(b) (West 2012)) does further state DOC "may also consider, among other matters, whether the committed person has any outstanding detainers or warrants, whether the committed person has a history of escaping or absconding, whether participation in the impact incarceration program may pose a risk to the safety or security of any person and whether space is available." The aforementioned factors are things DOC considers in determining placement but are not bars to a defendant's placement in the program. Contrary to defendant's argument, he was not disqualified from impact incarceration based on his escape conviction. DOC may have exercised its discretion and decided not to place him in the program based on his escape conviction, but that is different from his conviction rendering him ineligible for the program.

¶ 17 This is not a case of a defense counsel providing inaccurate information to a defendant. Defendant is claiming defense counsel failed to tell him something. As we have explained, the information defendant claims he should have been told is not what the statute provides. To the extent defendant suggests counsel should have predicted DOC would not place him in boot camp due to his prior escape conviction, we note defendant fails to cite any authority in support of that contention, and we are unaware of any authority requiring defense counsel to predict how DOC will handle a given fact in making a discretionary decision and then predict DOC's decision accurately. Defendant's suggestion is an indisputably meritless legal theory.

¶ 18 Since defendant's argument lacks an arguable basis in law, we find defendant's

petition fails to state the gist of a constitutional claim of ineffective assistance of counsel.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated, we affirm the Vermilion County circuit court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 21 Affirmed.