2017 IL App (4th) 150001-U

NOS. 4-15-0001, 4-15-0762, 4-15-0949 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 15, 2017
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
EDWARD L. TAYLOR,
Defendant-Appellant.

) Appeal from
) Circuit Court of
) Champaign County
) No. 12CF98
)
) Honorable
) Thomas J. Difanis,
) Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's summary dismissal of defendant's *pro se* postconviction petition is affirmed over defendant's contention he had set forth an arguable claim of ineffective assistance of trial counsel for counsel's failure to consult with defendant while he was in jail awaiting trial.

¶ 2 Defendant, Edward L. Taylor, appeals the trial court's summary dismissal of his postconviction petition, in which he alleged his trial counsel failed to visit him in jail. Defendant claims he stated the gist of a meritorious claim sufficient to proceed to second-stage proceedings under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)).

¶ 3 I. BACKGROUND

¶ 4 In January 2012, defendant was charged with one count of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)). Defendant was released on bond in July 2012. Following an August 2012 jury trial, defendant was convicted *in absentia*. In September 2012, the trial court

sentenced him to 30 years in prison, also in defendant's absence. Defendant filed a direct appeal, (1) claiming the court erred in proceeding to trial and sentencing *in absentia*, and (2) challenging one of the jury instructions. This court affirmed, finding, *inter alia*, the record strongly suggested defendant willfully avoided his trial and sentencing. *People v. Taylor*, 2014 IL App (4th) 120900-U, ¶¶ 30, 42.

¶ 5 In March 2014, defendant filed a *pro se* petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). The trial court dismissed defendant's petition on the State's motion. Defendant appealed the court's order dismissing his petition (No. 4-14-0456), and soon after, appealed the court's order denying his *pro se* motion for fingerprint testing of the weapon used in the crime (No. 4-14-0994). We consolidated the appeals and vacated the court's order dismissing defendant's section 2-1401 petition because defendant was not afforded the opportunity to respond to the State's motion to dismiss. *People v. Taylor*, Nos. 4-14-0456, 4-14-0994 cons. (Apr. 18, 2016) (unpublished summary order under Supreme Court Rule 23(c)(2)).

¶ 6 In December 2014, defendant filed another *pro se* motion for fingerprint testing, which the trial court denied. Defendant appealed, and this court docketed the appeal as No. 4-15-0001. In June 2015, defendant filed a *pro se* section 2-1401 petition, which the court dismissed. Defendant appealed, and this court docketed the appeal as No. 4-15-0762.

¶ 7 In September 2015, defendant filed a *pro se* postconviction petition, alleging numerous constitutional violations, including the claim of ineffective assistance of counsel raised in this appeal. Within 15 days, the trial court summarily dismissed defendant's petition as frivolous and patently without merit. In a written order, the court disposed of several of defendant's specific allegations, but the court did not address defendant's claim of counsel's

failure to consult with him personally while he was in jail. Defendant appealed the trial court's summary dismissal order. This court docketed the appeal as No. 4-15-0949.

¶ 8 We have consolidated the appeals for our review.

¶ 9 II. ANALYSIS

¶ 10 Initially, we note the only claim raised by defendant in his brief relates to appeal No. 4-15-0949. He raises no issues relating to appeal Nos. 4-15-0001 and 4-15-0762, and therefore has abandoned any potential claim arising therefrom. See *People v. Dabbs*, 239 Ill. 2d 277, 294 (2010) (no mention of a claim in a brief constitutes an abandonment of the claim).

¶ 11 Defendant argues he presented a sufficient basis to survive a first-stage summary dismissal. Defendant insists he alleged the gist of a constitutional claim and satisfied the liberal first-stage pleading requirements. See *People v. Hodges*, 234 Ill. 2d 1, 9 (2009) (at the first stage, a defendant need only present a limited amount of detail).

¶ 12 The Act (725 ILCS 5/122-1 *et seq*. (West 2014)) allows review of a defendant's claim where there was a "substantial denial of his *** rights" under either, or both, the Illinois Constitution or the United States Constitution in the proceedings that resulted in his conviction. 725 ILCS 5/122-1(a)(1) (West 2014). At the first stage of the Act, the trial court must determine whether the defendant's petition is "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition is considered "frivolous" or "patently without merit" when it has "no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16. A petition will have "no arguable basis either in law or in fact" when it "is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Where the record contradicts a defendant's legal theory, his theory is meritless. *Hodges*, 234 Ill. 2d at 16. "Fanciful factual

allegations include those which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 17. If the trial court determines the petition is frivolous or patently without merit, the court will summarily dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2014).

¶ 13 The trial court should not dismiss a petition at the first stage of the Act if it "alleges sufficient facts to state the gist of a constitutional claim." *People v. Allen*, 2015 IL 113135, ¶ 24. All well-pled facts in the petition and any supporting affidavits are taken as true. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002). We review a first-stage dismissal *de novo*. *Allen*, 2015 IL 113135, ¶ 19.

¶ 14 A claim of ineffective assistance of counsel is reviewed pursuant to the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hodges*, 234 Ill. 2d at 17. To prevail, the defendant must show that his counsel's performance was deficient and the deficiency prejudiced him. *Hodges*, 234 Ill. 2d at 17. At the first stage of 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." *Hodges*, 234 Ill. 2d at 17.

¶ 15 Defendant claims his trial counsel was ineffective for not visiting him in person while he was in jail and only communicating with him for a total of six minutes during two telephone calls. Defendant claims this "implies a lack of preparation in consultation with [defendant] to coordinate the type of evidence and witnesses that might have been called at trial, but were not."

¶ 16 We agree with defendant that a valid claim of ineffective assistance of counsel may exist where counsel failed to communicate with a defendant. *People v. Hobson*, 386 Ill. App. 3d 221, 239 (2008) (citing *People v. Smith*, 268 Ill. App. 3d 574, 578-79 (1994)). The sixth

amendment requires defense counsel to keep a defendant informed of developments in the case and consult with him or her on all major decisions. *Smith*, 268 Ill. App. 3d at 579. However, defendant cannot explain how consultation with his trial counsel would have helped his defense or altered the outcome of his case. See *People v. Penrod*, 316 Ill. App. 3d 713, 723 (2000) (despite trial counsel's admission that he never called or visited the defendant in jail, representation was deemed effective where the defendant did not show how further communication with counsel would have altered the outcome of trial).

¶ 17 Defendant's burden is particularly great since he was tried and sentenced *in absentia*. Counsel's failure to consult with defendant in person, whether defendant was in jail or not, would not have changed the outcome of the trial since the evidence against defendant was overwhelming (defendant admitted to committing the robbery but denied using a weapon). Indeed, pursuant to *Strickland*, defendant is required to show there was a reasonable probability, but for counsel's error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Defendant cannot do so.

¶ 18 Further, the fact counsel failed to meet defendant in jail is not itself dispositive of counsel's failure to consult with defendant when defendant admitted counsel spoke with him via telephone *and* he was released on a recognizance bond, spending only a few months in jail. He was released in July 2012, approximately six weeks prior to his trial. The fact counsel did not meet with defendant in jail does not mean counsel did not consult with him prior to trial. Taking the well-pled facts as true, defendant's allegation does not state the gist of a constitutional claim. For these reasons, we affirm the trial court's order summarily dismissing defendant's petition as frivolous or patently without merit.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated, we affirm the trial court's judgment.

¶ 21 No. 4-15-0001, Affirmed.

¶ 22 No. 4-15-0762, Affirmed.

¶ 23 No. 4-15-0949, Affirmed.