2017 IL App (4th) 150160-U

NO. 4-15-0160

FILED
February 2, 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.	)	Adams County
PHILLIP S. DIAZ, JR.,	)	No. 10CF310
Defendant-Appellant.	)	
	)	Honorable
	)	Scott H. Walden,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The summary dismissal of the postconviction petition is affirmed because the petition is frivolous and patently without merit.

¶ 2 Defendant, Phillip S. Diaz, Jr., appeals from the summary dismissal of his *pro se* petition for postconviction relief. We affirm the summary dismissal because we conclude, in our *de novo* review, that the petition is frivolous and patently without merit.

¶ 3 I. BACKGROUND

¶ 4 A. The Charge

¶ 5 On May 24, 2010, the State filed an information, which charged defendant with first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)). The information alleged that, on May

23, 2010, he "shot Ian Barksdale with a pistol, thereby causing [his] death."

¶ 6 On July 13, 2010, a grand jury returned an indictment, which likewise charged defendant with first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) in that he "shot Ian Barksdale with a pistol."

¶ 7 B. The Negotiated Guilty Plea

¶ 8 In a hearing on May 2, 2011, counsel informed the trial court that defendant wished to enter a negotiated plea of guilty. The proposed agreement was that, in return for defendant's plea of guilty to the charge of first degree murder, he would receive three benefits. First, the phrase "with a pistol" would be deleted from the indictment so that defendant would not be subject to the 25-year enhancement in section 5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010)). Second, his prison sentence would be no more than 45 years. Third, the State would nol-pros "a pending charge [arising from] an incident that occurred in the Adams County Jail while [defendant] was incarcerated there."

¶ 9 In its admonitions in the guilty plea hearing, the trial court told defendant:

> "Under this negotiation, the sentence would be somewhere between 20 and 45 years. In other words, it could be no less than 20, but it could be no more than 45 years in terms of time in the department of corrections. Again, whatever that sentence might be, it would be followed by three years of mandatory supervised release.
>
> Is that your understanding of this negotiation?
>
> THE DEFENDANT: Yes, sir.

THE COURT: Has anyone threatened you in any way or promised you anything, other than the negotiations in this case, to get you to give up all of the rights that I have explained to you and to plead guilty?

THE DEFENDANT: No, sir."

¶ 10 After confirming with defendant that, in light of the admonitions, he really wished to plead guilty to the first degree murder of Ian Barksdale, the trial court requested that the prosecutor provide a factual basis for the proposed guilty plea.

¶ 11 The prosecutor provided essentially the following factual basis. In the early morning hours of May 23, 2010, the Quincy police arrested defendant outside the Casino Starlite Terrace for violating a Quincy ordinance against fighting. Defendant got into an altercation with Ian Barksdale, who was employed as a security guard at the Casino Starlite Terrace. The police took defendant to the Quincy police station and soon afterward released him when his brother, Benny Smothers, paid the bond.

¶ 12 At approximately 4 a.m., after defendant was released from the police department, he drove to the Frederick Ball housing complex, at Lind and 9th Streets. While he was at the housing complex, a surveillance video camera recorded him reaching into the trunk of a Chevrolet Camaro, which belonged to DaVontae Smothers. Later, DaVontae Smothers told the police that defendant had removed from the trunk a nine-millimeter pistol, which belonged to him, DaVontae Smothers.

¶ 13 The surveillance video showed defendant talking on a cell phone after he reached into the trunk of the car. According to witnesses, he was talking on the phone with Ian Barksdale's brother, trying to persuade him to come to Lind and 9th Streets to settle the dispute

that had erupted outside the Casino Starlite Terrace. (It is unclear, from the factual basis, how the dispute involved Ian Barksdale's brother—or if indeed it did involve him.)

¶ 14 Around 4:20 a.m., defendant, Benny Smothers, DeBrail Smothers, DaVontae Smothers, and Keon Chapman invited two women, Michshaya Williams and Shana Douglas, to accompany them to Benny Smothers's house, at Lind and 24th Streets. On the way there, the group decided to stop at the Hardee's restaurant located at 30th and Broadway Streets.

¶ 15 It happened that, at this same time, Ian Barksdale and two of his friends or relatives arrived at the Hardee's restaurant, on foot, to get something to eat—just as defendant and his companions were rolling up, in two vehicles, into the drive-through lane. Apparently, this encounter (or reencounter) was random. Ian Barksdale walked up to the drive-through door of the restaurant, passing by the black sport utility vehicle (SUV) in which defendant was riding.

¶ 16 Defendant got out of the SUV and confronted Barksdale. The two squared off as if to resume their fight. Defendant then pulled out the nine-millimeter pistol. Barksdale raised his hands and began to back away. Defendant fired at Barksdale two or three times. Barksdale turned around and fell to the ground, facedown. Defendant then approached Barksdale as he lay on the ground, facedown, and fired three more shots into him.

¶ 17 At approximately 9:50 a.m. on May 23, 2010, Barksdale died of the gunshot wounds.

¶ 18 An autopsy revealed five gunshot wounds. To quote the factual basis:

> "Ian Barksdale suffered one bullet wound to the front of his right thigh, which exited the rear of his thigh. He was shot once in the right foot. There were also three entrance wounds to the back of Ian Barksdale's right thigh, all traveling

upwards toward the torso area, consistent with the victim being on the ground, face down, while being shot from above and behind.

Those wounds include the fatal wound, which entered the mid-right thigh and traveled upward into the pelvis in the victim, lacerating his iliac artery. Ian Barksdale died as a result of hemorrhagic shock or loss of blood, relating to the severing of that artery."

¶ 19 Defense counsel agreed that, if the case went to trial, the State could present evidence substantially supporting that factual basis.

¶ 20 After confirming with defendant that he was "pleading guilty because [he was] in fact guilty," the trial court found a factual basis, entered judgment on the plea, and "conditionally concur[red] in the negotiations."

¶ 21 Then the trial court asked defendant again:

"[Defendant], has anyone threatened you in any way or promised you anything, other than these negotiations, to get you to give up all of those rights I explained to you and to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: The court finds that [defendant] has knowingly and voluntarily waived each of the rights explained to him."

¶ 22 C. The Sentence

¶ 23 On August 26, 2011, the trial court sentenced defendant to imprisonment for 45 years.

¶ 24 D. The *Pro Se* Motion To Reduce the Sentence and To Withdraw the Guilty Plea

¶ 25 On September 14, 2011, defendant filed a *pro se* motion to reduce his sentence and to withdraw his guilty plea. In support of his request to withdraw his guilty plea, he alleged that his trial counsel had rendered ineffective assistance by the following acts or omissions: (1) failing to file a motion for a change of venue, (2) failing to communicate with him fully and to consider all the evidence defendant had given him, (3) not allowing defendant to go to trial and seek a second degree murder instruction, and (4) informing defendant that his only options were a guilty plea with a sentencing cap of 45 years or a trial with the possibility of life imprisonment.

¶ 26 The trial court appointed postplea counsel and, on April 3, 2012, held a hearing on the motion to withdraw the guilty plea. After hearing testimony, the court denied the motion.

¶ 27 E. The Direct Appeal

¶ 28 Defendant took a direct appeal, but we remanded the case for compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006).

¶ 29 On October 11, 2012, upon remand, postplea counsel argued that, for the reasons previously stated, the trial court should allow defendant to withdraw his guilty plea. Again, the court denied the motion.

¶ 30 Defendant again appealed. He made three arguments. First, he argued that postplea counsel had rendered ineffective assistance by failing to amend defendant's *pro se* motion to withdraw his guilty plea so as to allege that the trial court had erred, in the sentencing hearing, by taking into consideration that defendant already had received leniency in

the plea agreement. *People v. Diaz*, 2013 IL App (4th) 120969-U, ¶ 3. Second, defendant argued he was entitled to two additional days of presentence credit. *Id.* ¶ 4. Third, he argued he was entitled to a credit against the "State Police Ops" fee of $5, which was really a fine. ¶ 5. We disagreed with the first argument but agreed with the second and third arguments. *Id.* ¶¶ 3-5. Therefore, we affirmed the trial court's judgment as modified so as to allow defendant an additional two days of presentence credit as well as the credit against the fine, and we remanded the case with directions to amend the mittimus accordingly. *Id.* ¶ 6.

¶ 31 F. The Postconviction Petition

¶ 32 On October 27, 2015, defendant filed a *pro se* petition for postconviction relief. He made nine claims in his petition.

¶ 33 First, he claimed that "[t]rial counsel's failure to call or interview eyewitnesses whose testimony would corroborate [defendant's] self[-]defense claim, was constitutionally ineffective." Defendant attached to his petition the affidavits of Charles Debriel Smothers, Devonta Smothers, Keon Chatman, and Benny Smothers.

¶ 34 Second, defendant claimed that "[t]rial counsel's failure to investigate, file any motions, or prepare a defense, constituted ineffective assistance."

¶ 35 Third, he claimed that "[t]rial counsel's failure to present mitigating evidence, including testimony from defendant's family members as character witness[es], during [the] sentencing hearing was ineffective."

¶ 36 Fourth, he claimed that "[t]rial counsel and appellate counsel [were] ineffective for not filing the proper certificate for [defendant's] notice of motion to reduce sentence."

¶ 37 Fifth, he claimed that "[t]he cumulative prejudices of all the above counsel's deficiencies, errors, and/or omissions [of] claims contributed to [defendant's] conviction."

¶ 38 Sixth, he claimed that "[his] sentence was maximized due to remarks by [the] prosecution that had [a] prejudicial effect on [the] judge."

¶ 39 Seventh, he claimed that "his plea was the results [*sic*] of unconstitutional coercion." With regard to that claim, he alleged as follows:

> "Trial counsel had induced [defendant] to plead guilty by erroneously advising him that a deal had been worked out with the judge and prosecutor, for no more than 25 years, with the cap of 20 to 45 years. Using cap plea to specifically appease [the] victim's family. However, [defendant] contends that [but] for counsel's erroneous advice, he would not have pled guilty, but would have gone to trial even though counsel may have lacked the knowledge required to defend the offense. When [defendant] raised particular questions about trial strategy such as, 'What has counsel's pre-trial investigation been like?' 'Who did he (or his aides) interview?' 'When?' 'What subjects did he cover with them?' 'What info did he get from them?' 'Does he have notes from those interviews?' 'What witnesses did he think would hurt us most at trial?' "Help us most?' 'Why?' When discussing these things with trial counsel, he always advised [defendant] that no matter what was [done], he'll get killed in trial [citation] and always focused on 'taking the plea.' Trial counsel also used Mother, Fianceé, and other family members to help induce [defendant] to take the plea because he, the judge, and the prosecutor had it worked out, if [defendant] would agree to it

[citation]. Trial counsel also stated that a straight plea [or] lesser included offense was not an option of [defendant].

Recommending [defendant] to plead guilty to [the] offense which counsel had not [done] a thorough investigation, as well as l[y]ing to induce a guilty plea, basically forcing [defendant] to agree to the plea agreement due to trial counsel's horrible representation. Constituting ineffective assistance."

¶ 40 Eighth, he claimed that the addition of three years of mandatory supervised release to his sentence was a violation of the plea agreement.

¶ 41 Ninth, he claimed he "was convicted and sentenced on the basis of facts different than those facts on which the charges were based."

¶ 42 On January 23, 2015, the trial court summarily dismissed the postconviction petition as frivolous and patently without merit.

¶ 43 This appeal followed.

¶ 44 II. ANALYSIS

¶ 45 When we review the summary dismissal of a postconviction petition, our standard of review is *de novo* (*People v. Hodges*, 234 Ill. 2d 1, 9 (2009)): we look at the matter anew, without any deference to the trial court—as if we ourselves were deciding whether to summarily dismiss the petition.

¶ 46 A petition should be summarily dismissed as "frivolous or *** patently without merit" (725 ILCS 5/122-2.1(a)(2) (West 2014)) only if it "has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16. "A petition which lacks an arguable basis either in law or in

fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one which is completely contradicted by the record." *Id.*

¶ 47 In this appeal, defendant raises only the first of the nine legal theories set forth in his *pro se* petition: that trial counsel rendered "ineffective assistance [by] failing to call or interview eyewitnesses whose testimony would corroborate his claim of self[-] defense," to quote his brief. (Internal quotation marks omitted.) The record contradicts that theory. We refer, specifically, to the part of the record where defendant pleaded guilty to first degree murder, statutorily defined as including the element of "kill[ing] an individual *without lawful justification*." (Emphasis added.) 720 ILCS 5/9-1(a)(1) (West 2010). Given defendant's judicial admission that he killed Ian Barksdale "without lawful justification" (*id.*), he had no claim of self-defense. See *People v. Jeffries*, 164 Ill. 2d 104, 127 (1995); *Spircoff v. Stranski*, 301 Ill. App. 3d 10, 15 (1998). There was no such claim for trial counsel to corroborate. Faulting trial counsel for failing to interview self-defense witnesses is pointless after defendant pleaded guilty to first degree murder.

¶ 48 Instead of contradicting his guilty plea, defendant now is limited to attacking the validity of his guilty plea:

> "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received

> from counsel was not within the standards set forth in [*McMann v. Richardson*, 397 U.S. 759 (1970)]." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

The standard in *McMann*, to which *Tollett* refers, is that the advice must be "within the range of competence demanded of attorneys in criminal cases." *McMann*, 397 U.S. at 771.

¶ 49 We do not see anywhere, in defendant's brief, where he argues that the advice he received from trial counsel made his guilty plea involuntary or unintelligent. See *Tollett*, 411 U.S. at 267; Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("Points not argued are [forfeited] and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). Because defendant, of all people, would know whether he shot Ian Barksdale in self-defense, it is unclear how trial counsel's alleged failure to interview self-defense witnesses could have made defendant's guilty plea unintelligent. The petition rules out any possibility that trial counsel's alleged failure to interview these witnesses somehow coerced defendant into pleading guilty. Defendant says, in his petition, that he "would have gone to trial even though [trial] counsel may have lacked the knowledge required to defend [against] the [charged] offense."

¶ 50 It is true that, in his petition, defendant alleges that trial counsel told him of "a deal *** worked out with the judge and prosecutor, for no more than 25 years"—but "with the cap of 20 to 45 years," paradoxically. The record, however, contradicts that theory (which probably explains why appellate counsel does not argue it in the brief). See *Hodges*, 234 Ill. 2d at 16 ("An example of an indisputably meritless legal theory is one which is completely contradicted by the record."). In the guilty plea hearing, the trial court twice asked defendant if anyone had made any promises to him "other than these negotiations." Both times, defendant answered no. Therefore, the record contradicts defendant's claim of "a deal *** for no more than

25 years." See *id.*

¶ 51 Thus, in our *de novo* review, we affirm the summary dismissal of the postconviction petition. It fails to state the gist of a nonfrivolous claim that the guilty plea was involuntary or unintelligent. See 725 ILCS 5/122–2.1(a)(2) (West 2014); *Tollett*, 411 U.S. at 267; *People v. Holt*, 372 Ill. App. 3d 650, 652 (2007).

¶ 52 III. CONCLUSION

¶ 53 For the foregoing reasons, we affirm the trial court's judgment, and we assess $50 in costs against defendant.

¶ 54 Affirmed.