2017 IL App (4th) 150315-U

NO. 4-15-0315

FILED
May 17, 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.	)	Champaign County
KEVIN A. JORDAN,	)	No. 11CF1169
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justice Pope concurred in the judgment.
Justice Holder White dissented.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in dismissing defendant's postconviction petition at the first stage.

¶ 2 In September 2012, a jury found defendant, Kevin A. Jordan, guilty of residential burglary. In October 2012, the trial court sentenced him to 28 years in prison. In March 2015, defendant filed a *pro se* petition for postconviction relief, which the court dismissed as frivolous and patently without merit.

¶ 3 On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In July 2011, the State charged defendant by information with one count of residential burglary, a Class 1 felony (720 ILCS 5/19-3 (West 2010)), alleging he entered the

dwelling place of Lea M. with the intent to commit therein a theft. Given defendant's criminal history, he was subject to a sentencing range of 6 to 30 years in prison as Class X offender. 730 ILCS 5/5-4.5-95(b) (West 2010).

¶ 6 In February 2012, attorney James Dedman entered his appearance on defendant's behalf. In September 2012, a jury found defendant guilty. In October 2012, the trial court denied defendant's posttrial motion.

¶ 7 At the sentencing hearing, the State presented evidence connecting defendant to three other burglaries in Champaign County as well as a forgery case. The State recommended a 22-year sentence. The trial court noted defendant was 25 years old and had been able to obtain employment in the past. As aggravating factors, the court pointed toward defendant's criminal history and the need to deter others. The court stated defendant stole to support his heroin addiction and had been given "numerous opportunities" to deal with his problem. The court sentenced defendant to 28 years in prison.

¶ 8 Defendant appealed, arguing (1) his 28-year sentence was excessive and (2) the circuit clerk improperly assessed various fines and fees. This court affirmed defendant's conviction and sentence but vacated the improperly imposed assessments and remanded with directions for the trial court to impose any mandatory fines. *People v. Jordan*, 2014 IL App (4th) 121003-U, ¶ 51.

¶ 9 In March 2015, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)) and attached two affidavits. Defendant alleged (1) his 28-year sentence was excessive and (2) counsel was ineffective because he made promises that went unfulfilled and refused to file defendant's requested motions. Along with the affidavits, defendant's petition included a July 2011 offer

from the State to the public defender, whereby defendant would plead guilty to residential burglary in exchange for a sentence of 15 years in prison.

¶ 10 In an affidavit signed by Alison Jordan-Frost, defendant's mother, she stated she spoke with Dedman about her son's case and Dedman claimed he could get "a lesser sentence than the proposed 25 years." As the trial approached, Jordan-Frost stated Dedman told her and defendant that if he was found guilty, his sentence "would be significantly less than the State's offer or an open plea with a cap of 25 years."

¶ 11 In his affidavit, defendant stated Dedman told him he could get him a plea deal less than the 25 years the State was offering. After failing to do so, Dedman told defendant he would get less than the 25-year plea deal if he went to trial. As he received a 28-year sentence, defendant stated Dedman was ineffective.

¶ 12 In its written order, the trial court found, in part, as follows:

> "The Defendant was offered a plea to Residential Burglary on July 27, 2011, for fifteen years in the Illinois Department of Corrections. He turned down that offer and hired private counsel. According to the Defendant's affidavit he was offered a plea for open sentencing with the State capping their recommendation at twenty-five years. Again, according [to] Defendant, his attorney suggested they could do better than the State's last offer. Logic would dictate that a plea of guilty with a cap set at twenty-five years meant that his range was six to twenty-five years. The Defendant's counsel suggested a finding of guilty by the jury would still result in a potential sentence of twenty-five years or

> less. The end result was that the Defendant went to trial wherein all of his constitutional rights were protected. The State's recommendation after trial was twenty-two years. Therefore, both the State and defense counsel were of the same opinion."

The court dismissed the petition, finding it frivolous and patently without merit. This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Defendant argues the trial court erred in dismissing his postconviction petition at the first stage, arguing he established the gist of a constitutional claim that counsel was ineffective for advising him not to take a favorable plea. We disagree.

¶ 15 The 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 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).

¶ 16 "The purpose of a post-conviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, nor could have been, adjudicated previously upon direct appeal." *People v. Peeples*, 205 Ill. 2d 480, 510, 793 N.E.2d 641, 660 (2002). In light of this, our supreme court has held "issues that could have been raised on direct appeal but were not are forfeited." *People v. Petrenko*, 237 Ill. 2d 490, 499, 931 N.E.2d 1198, 1204 (2010).

¶ 17 The 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 2014). Our supreme court has held "a *pro se* petition seeking postconviction relief under the 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 17, 912 N.E.2d at 1212.

¶ 18 Our supreme court has also noted a postconviction petition "need present only a limited amount of detail and is not required to include legal argument or citation to legal authority." *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). Moreover, "[t]he allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim." *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754.

¶ 19 "In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] 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 2014). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725

ILCS 5/122-2 (West 2014). 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. Moreover, we may affirm the dismissal of a postconviction petition on any basis supported by the record. *People v. Wright*, 2013 IL App (4th) 110822, ¶ 32, 987 N.E.2d 1051.

¶ 20 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Cathey*, 2012 IL 111746, ¶ 23, 965 N.E.2d 1109. "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." *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212. "Because a defendant must satisfy both prongs of the *Strickland* test to prevail, the failure to establish either precludes a finding of ineffective assistance of counsel." *People v. Cherry*, 2016 IL 118728, ¶ 24, 63 N.E.3d 871.

¶ 21 In the case *sub judice*, defendant alleged counsel was ineffective when he advised him to reject the State's favorable plea offer and then received a 28-year sentence. We find defendant's postconviction petition failed to raise the gist of an arguably meritorious claim of ineffective assistance of counsel related to counsel's advice to reject a plea offer.

¶ 22 "A defense attorney's honest assessment of a defendant's case cannot be the basis for a finding of ineffectiveness." *People v. La Pointe*, 2015 IL App (2d) 130451, ¶ 87, 40 N.E.3d 72. Here, defendant failed to allege counsel made a mistake of law in advising him to go to trial. Moreover, defendant's claim that counsel advised him he could get a sentence below 25 years appears to be a correct assessment, given the State's sentence recommendation of only 22 years after the trial. Also, the trial court's 28-year sentence was a strong indicator it would not

have gone along with a 25-year cap, considering the need to deter others and defendant's "close to nil" rehabilitative potential. Based on the foregoing, we find the court did not err in summarily dismissing defendant's postconviction petition.

¶ 23 III. CONCLUSION

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

¶ 25 Affirmed.

¶ 26 JUSTICE LISA HOLDER WHITE, dissenting.

¶ 27 Because the majority departs from the standards by which we are to examine the validity of a first-stage postconviction petition, I respectfully dissent.

¶ 28 During the first stage of proceedings, we examine whether the defendant's petition sets forth the *gist* of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 271, 757 N.E.2d 442, 460 (2001). During this stage, the trial court may dismiss claims that are frivolous or patently without merit where the claims are completely contradicted by the record. *Brown*, 236 Ill. 2d at 185, 923 N.E.2d at 754.

¶ 29 Here, defendant alleges ineffective assistance of counsel. A postconviction 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." *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212.

¶ 30 The error in the majority analysis is demonstrated by the case upon which it relies for the proposition that "[a] defense attorney's honest assessment of a defendant's case cannot be the basis for a finding of ineffectiveness." *La Pointe*, 2015 IL App (2d) 130451, ¶ 87, 40 N.E.3d

72. In *La Pointe*, the affidavit attached to the defendant's postconviction petition alleged his attorney gave him private assurances that the facts of his case could not support a "brutal or heinous" finding. *La Pointe*, 2015 IL App (2d) 130451, ¶ 39, 40 N.E.3d 72. The defendant claimed his counsel's representation caused him to enter an open plea, which ultimately led to him receiving a life sentence after the trial court subsequently made a "brutal or heinous" finding. *La Pointe*, 2015 IL App (2d) 130451, ¶ 20, 40 N.E.3d 72.

¶ 31 The postconviction petition in *La Pointe* survived first- and second-stage proceedings. *La Pointe*, 2015 IL App (2d) 130451, ¶ 48, 40 N.E.3d 72. Following a third-stage evidentiary hearing, the trial court denied the defendant's petition. *La Pointe*, 2015 IL App (2d) 130451, ¶ 66, 40 N.E.3d 72. In denying the defendant's petition, the court relied heavily on the testimony of the defendant's former counsel. *La Pointe*, 2015 IL App (2d) 130451, ¶ 65, 40 N.E.3d 72. Specifically, the court found credible the attorney's testimony that in speaking with his client, he couched his representations in terms of his opinion and what he believed. *La Pointe*, 2015 IL App (2d) 130451, ¶ 65, 40 N.E.3d 72.

¶ 32 With respect to the first prong of *Strickland*, defendant here asserts defense counsel promised him a better sentence than the 25-year cap offered by the State. While further proceedings might shed light onto the nature of defense counsel's statements, at this stage, we only have the two affidavits indicating defense counsel "told" defendant and his mother that defense counsel would procure a lesser sentence. The affidavits do not couch counsel's statements as legal assessments or opinions, but as promises. Thus, as to the first prong, it is *arguable* that defense counsel unreasonably promised defendant a lesser sentence, which is sufficient to state the gist of a claim.

¶ 33 With respect to the second prong, it is *arguable* defendant was prejudiced. True,

defendant received a 28-year sentence from the trial court despite the State requesting a 22-year sentence. However, according to defendant, defense counsel's promise related to the ultimate sentence defendant would receive, not to the State's sentencing recommendation. Notably, the trial court's sentence followed a trial where defendant had little defense. At this stage, although we can speculate as to what the court might have done, we do not know what the outcome would have been if defendant had taken responsibility for his actions and accepted the State's cap of 25 years rather than proceeding to trial. Thus, it is *arguable* that defendant was prejudiced by defense counsel's statements.

¶ 34 Further proceedings would likely address the speculation as to whether (1) trial counsel offered an assessment or (2) the trial court would have sentenced defendant to less than 25 years. However, because we are only at the first stage of proceedings, I conclude defendant has met his burden of asserting the gist of a constitutional claim.