

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FILED

October 30, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 150683-U

No. 4-15-0683

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
MICHAEL D. GUISE,)	No. 10CF1164
Defendant-Appellant.)	
)	Honorable
)	Thomas E. Griffith Jr.,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Turner and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding the trial court did not error in summarily dismissing defendant’s *pro se* postconviction petition.

¶ 2 Defendant, Michael D. Guise, appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)), arguing the trial court erroneously concluded his petition failed to set forth an arguable claim of ineffective assistance for trial counsel’s failure to perfect an appeal from his guilty plea. We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Information

¶ 5 In August 2010, the State charged 15-year-old defendant by information with four

counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2008)) and two counts of armed robbery (720 ILCS 5/18-2(a) (West 2008)). Each count of first degree murder included a sentencing enhancement for the personal discharge of a firearm (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008)).

¶ 6 B. Plea Hearing

¶ 7 In November 2011, the trial court held a plea hearing. During the hearing, the State charged defendant by information with an additional count of first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)), which removed the firearm sentencing enhancement. The parties indicated they reached a fully negotiated plea agreement. As part of that agreement, defendant would plead guilty to the additional count and give a statement under oath in exchange for the State dismissing all other charges and recommending a 35-year prison sentence.

¶ 8 By examination of the State, defendant testified, on August 4, 2010, he was interviewed by Detective David Pruitt about the July 30, 2010, armed robbery and murder of Ishmael Adams. Defendant provided information without any promises of leniency. Defendant indicated, in the late evening hours of July 29, 2010, and the early morning hours of July 30, 2010, Bryain Young asked him to rob Adams of crack cocaine. Ryan Walker drove defendant, Young, and Jonathan Maclin in a vehicle to Adams's residence. While in the vehicle, Young provided defendant with a nine-millimeter handgun, and Walker provided him with a black T-shirt and red bandana. Young instructed defendant and Maclin to call after the robbery occurred, and he and Walker would pick them up. After the robbery and shooting of Adams, defendant and Maclin were picked up by Walker and Young. Defendant returned the black T-shirt, red bandana, and handgun to Young, and then Young gave the handgun to Walker.

¶ 9 Following defendant's sworn statement, the trial court admonished defendant as to the offense charged in the additional information and the possible penalties. Defendant indicated he understood. The court also admonished defendant as to the rights he was giving up if he pleaded guilty. Defendant indicated he understood. Defendant expressed his desire to plead guilty and signed a jury waiver. The court questioned defendant whether anyone forced him to plead guilty. Defendant indicated no one had. The court questioned defendant whether he was entering his plea at his own free will. Defendant indicated he was. The court questioned defendant if anyone promised him anything in exchange for pleading guilty. Defendant indicated no one had.

¶ 10 The State provided the following factual basis, to which defendant did not object. Keshawn McGee would testify, during the early morning hours of July 30, 2010, he was seated in a parked vehicle with Adams when Maclin and defendant, whose face was partially covered with a red bandana, approached the vehicle and demanded money at gunpoint. Defendant then discharged his firearm, killing Adams. Maclin would testify and corroborate McGee's testimony. Detective Pruitt would testify he interviewed defendant after he was given *Miranda* rights (see *Miranda v. Arizona*, 384 U.S. 436 (1966)) and while in the presence of a juvenile officer. During that interview, defendant admitted approaching Adams with the intent to rob him. Defendant also admitted he possessed a nine-millimeter handgun and, during the robbery, he became frightened and believed the handgun went off. The State would further show Adams died as a result of gunshot wounds discharged from a nine-millimeter handgun.

¶ 11 The trial court found the factual basis to be sufficient to support the plea and the plea to be knowingly and voluntarily made. The court accepted the plea, granted the State's

motion to dismiss the remaining charges, and sentenced defendant to 35 years' imprisonment. After rendering its sentence, the court admonished defendant as to his appellate rights and his need to file a motion to withdraw his guilty plea to preserve his right to appeal.

¶ 12 C. Motion To Withdraw Guilty Plea and Vacate Judgment

¶ 13 In December 2011, defendant, through counsel, filed a timely motion to withdraw his guilty plea and vacate judgment. In the motion, defendant's counsel noted she received a telephone message from an alleged relative of defendant indicating defendant wished to withdraw his guilty plea. Counsel also noted the message did not provide any grounds from which the request would be made, and she had been unsuccessful in her attempts to contact the relative. Counsel indicated she had been unable to speak with defendant prior to the filing of the motion and was filing the motion to preserve defendant's rights. Counsel requested the opportunity to communicate with defendant to determine whether the request to file a motion to withdraw a guilty plea was made at his behest and, if so, the basis for doing so.

¶ 14 D. Status Hearings

¶ 15 At a February 7, 2012, status hearing, defendant's counsel informed the trial court defendant had written her and indicated he wanted to pursue his motion to withdraw his guilty plea. Counsel requested defendant be present at the next status hearing to allow her to discuss the matter with him.

¶ 16 At a March 13, 2012, status hearing, defendant was present with his counsel.

During that hearing, the following discussion occurred:

“[DEFENSE COUNSEL]: *** As far as the motion to
[w]ithdraw the [g]uilty [p]lea, I'm not sure that [defendant] really

understands all of the things that have to go into this. I would have to amend it at the very least because there are no grounds set forth. At the time that I filed the motion it was because a family member told me that he wanted to so I would have to do that, but I think he may have questions that he would like to address the [c]ourt with.

[TRIAL COURT]: He has a lawyer, [counsel], and—

[DEFENSE COUNSEL]: And I understand. I'm not sure whether he feels comfortable with the answers that I have given him or not, and, obviously, we all want him to understand what the process is here. He wants an appeal, essentially, is what he wants. And I've told him that in order to do that we have to go forward with this motion. So, I guess, the best I can say at this point is I'll file an amended motion, if that's what he wants to do, and we'll set it for hearing in the future."

¶ 17 At a March 28, 2012, status hearing, defendant's counsel requested a continuance, as she had been unable to be in contact with defendant. Counsel also requested transcripts from the plea hearing for the opportunity to review them.

¶ 18 At a June 28, 2012, status hearing, defendant's counsel notified the trial court defendant advised her in writing he no longer desired to pursue his motion to withdraw his guilty plea. Counsel moved to withdraw defendant's motion, which the court granted. No appeal was taken.

¶ 19 D. *Pro Se* Postconviction Petition

¶ 20 In May 2015, defendant filed a *pro se* postconviction petition, alleging, amongst other claims, he received ineffective assistance of counsel. In part, defendant alleged as follows:

“PUBLIC DEFENDER FILED A MOTION TO WITHDRAW GUILTY PLEA AND VACATE JUDGMENT, I WENT BACK TO COURT FOR THE HEARING, PUBLIC DEFENDER KEPT ASKING DO I WANT TO DO IT, SCARING ME CAUSE THERE WAS NOTING SHE COULD DO TO WIN THE CASE, SO BY HER TELLING PETITIONER THAT, I DIDN’T WITHDRAW MY GUILTY PLEA.

5. PETITIONER STATES THAT THE JUDGE DENIED THE MOITON TO WITHDRAW THE GUILTY PLEA, AND SAID PETITIONER COULD APPEAL. PETITIONER TOLD HIS PUBLIC DEFENDER THAT HE WANTED TO APPEAL THE COURT’S DENIAL OF HIS MOTION. BUT THE PUBLIC DEFENDER WAS INCOMPETENT AND INEFFECTIVE BECAUSE SHE DID NOT PERFECT PETITIONER’S RIGHT TO APPEAL FROM THE COURT’S ORDER, AND DID NOT FILE A MOTION TO RECONSIDER SENTENCE OR VACATE THE JUDGMENT OR A NOTICE OF APPEAL AND REQUEST FOR APPOINTMENT OF COUNSEL, AND PETITIONER TOLD HIS ATTORNEY HE WANTED TO APPEAL. PETITIONER THEREAFTER, THINKING THAT HE COULD

APPEAL SUBSEQUENTLY FOUND OUT THAT THE PUBLIC DEFENDER DIDN'T PROPERLY PERFECT HIS RIGHTS TO APPEAL.”

¶ 21 Defendant attached a personal affidavit to his postconviction petition. In it, he averred, in part, as follows:

“MY GRANDMOTHER CONTACTED *** MY LAWYER TO WITHDRAW MY GUILTY PLEA AN[D] SHE FILED THAT MOTION. A YEAR LATER I WENT BACK TO COURT FOR THE HEARING AND *** MY ATTORNEY *** KEPT ASKING DO I WANT TO DO IT CAUSE THERE IS NOTHING SHE CAN DO TO WIN, SO BY HER TELLING ME THAT I DIDN'T WITHDRAW MY GUILTY PLEA.”

At the end of his affidavit, defendant made a declaration under penalty of perjury, swearing the information contained in his petition was true and correct to the best of his knowledge.

Defendant also attached to his petition an additional document he characterized as an affidavit, which simply averred the facts presented in his petition were true and correct to the best of his knowledge.

¶ 22 H. Summary Dismissal

¶ 23 In July 2015, the trial court entered a written order summarily dismissing defendant's postconviction petition. The court found dismissal was proper as defendant's petition (1) was frivolous and patently without merit; and (2) failed to comply with section 122-2 of the Act (725 ILCS 5/122-2 (West 2014)). As to his claim of ineffective assistance for counsel's

failure to perfect an appeal from his guilty plea, the court noted, in part, no basis existed for defendant to appeal after he withdrew his motion to withdraw his guilty plea.

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant argues the trial court's summary dismissal of his postconviction petition was in error because his petition set forth an arguable claim of ineffective assistance for counsel's failure to perfect an appeal from his guilty plea, which was supported by two affidavits and the facts of record. The State disagrees, maintaining summary dismissal was proper because defendant's petition (1) was frivolous and patently without merit, and (2) failed to comply with section 122-2 of the Act (725 ILCS 5/122-2 (West 2014)).

¶ 27 The Act (725 ILCS 5/122-1 to 122-7 (West 2014)) provides a defendant with a collateral means to challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909. When a case does not involve the death penalty, the adjudication of a postconviction petition follows a three-stage process. *People v. Tate*, 2012 IL 112214, ¶ 9, 980 N.E.2d 1100. Here, defendant's postconviction petition was dismissed at the first stage. We review a first-stage dismissal *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010).

¶ 28 At the first stage of postconviction proceedings, the trial court must decide whether the defendant's petition is "frivolous or *** patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). If the court determines the petition is either frivolous or patently without merit, it must dismiss the petition in a written order. *Id.* A petition is frivolous or patently without merit if it fails to "present the gist of a constitutional claim." *People v. Gaultney*, 174 Ill.

2d 410, 418, 675 N.E.2d 102, 106 (1996). A petition's well-pleaded allegations must be taken as true unless they are affirmatively contradicted by the record. *Brown*, 236 Ill. 2d at 189, 923 N.E.2d at 757. Where a petition alleges ineffective assistance, it “ ‘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, 980 N.E.2d 1100 (quoting *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009)).

¶ 29 Here, defendant argues his postconviction petition set forth an arguable claim of ineffective assistance for counsel's failure to perfect an appeal from his guilty plea after being requested to do so. Defendant does not dispute the trial court properly admonished him of his appellate rights and the need to file a motion to withdraw his guilty plea if he wished to appeal. Defendant further does not dispute his counsel consulted with him about his appellate rights. In fact, counsel's comments at the March 13, 2012, status hearing show a prior discussion occurred between defendant and counsel, during which counsel informed defendant in order to appeal he would have to move forward with his motion to withdraw his guilty plea. Defendant, who was present at that hearing, had the opportunity to be reminded of this requirement by counsel's comments. After defendant was made aware of the requirements to appeal from his guilty plea, counsel asserted defendant notified her in writing he no longer wished to pursue his motion to withdraw his guilty plea. Defendant suggests counsel's assertion is contradicted by the allegation in his petition indicating he told counsel he wanted to appeal the court's denial of his motion to withdraw his guilty plea. Defendant's allegation, however, is affirmatively contradicted by the record as it is based on events that never occurred—the denial of his motion to withdraw his

guilty plea. The record shows it was defendant's decision to forego his motion to withdraw his guilty plea. Defendant's postconviction petition and its supporting material do not refute this fact. After being informed of defendant's decision, defendant's counsel moved to withdraw defendant's motion to withdraw his guilty plea, which the court granted.

¶ 30 Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) provides “[n]o appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant *** files in the trial court *** a motion to withdraw the plea of guilty and vacate the judgment.” See also *People v. Wilk*, 124 Ill. 2d 93, 105, 529 N.E.2d 218, 222 (1988) (“Rule 604(d) establishes a condition precedent for an appeal from a defendant’s plea of guilty.”) Because defendant elected to forego his motion to withdraw his guilty plea, counsel could not have provided deficient performance when she did not take further steps to perfect an appeal. See generally *People v. Lamar*, 2015 IL App (1st) 130542, ¶ 19, 44 N.E.3d 1178. Because defendant has failed to show his postconviction petition presents the gist of a constitutional claim, we find the trial court properly concluded the petition was frivolous and patently without merit and subject to summary dismissal. We need not address whether dismissal was also proper under section 122-2 of the Act (725 ILCS 5/122-2 (West 2014)).

¶ 31 III. CONCLUSION

¶ 32 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. 55 ILCS 5/4-2002(a) (West 2016).

¶ 33 Affirmed.