2017 IL App (5th) 140244-U

NO. 5-14-0244

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Clinton County.
	)	
v.	)	No. 10-CF-96
	)	
JASON R. PRUITT,	)	Honorable
	)	Dennis E. Middendorff,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: Trial judge's summary dismissal, at the first stage of proceedings, of the defendant's petition for postconviction relief is affirmed because trial judge correctly determined that petition is frivolous and patently without merit where it is positively rebutted by the record on appeal; alternatively, the summary dismissal may be affirmed where the petition does not allege a claim that is cognizable under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2014)), and where the claim of error is waived.

¶ 2 The defendant, Jason R. Pruitt, appeals the order of the circuit court of Clinton County that summarily dismissed, at the first stage of proceedings, his petition for postconviction relief. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. On August 16, 2010, the defendant was charged, by information, with one count of aggravated criminal sexual abuse, a Class 2 felony. The information alleged that the defendant, who was 35 years old at the time of the offense, committed an act of sexual penetration by placing his penis in the vagina of the 13-year-old victim, on or about August 10, 2010. On February 15, 2011, a supplemental information was filed, charging the defendant with three additional counts, all related to the August 10, 2010, incident with the same 13-year-old victim: one count of aggravated criminal sexual assault, one count of criminal sexual assault, and one count of unlawful possession of drug paraphernalia. Because of the nature of the issue raised by the defendant in this appeal, we next lay out the defendant's presence at the various proceedings in this case. The record sheet contained within the record on appeal demonstrates that between the filing of the initial information on August 16, 2010, and the plea of guilty but mentally ill by the defendant on September 15, 2011, there were 14 proceedings held for matters related to this case, many of which related to the defendant's fitness to stand trial.[1] The record on appeal (which, we note, includes the supplemental record on appeal and the sealed record on appeal) contains transcripts for each of these 14 proceedings. Each proceeding was presided over by the Honorable Dennis E.

[1]At the proceeding on August 23, 2011, the parties stipulated that, pursuant to an evaluation of the defendant by Dr. Daniel J. Cuneo, the defendant was then fit to stand trial. The court accepted the stipulation.

Middendorff. It is clear from the record that the defendant appeared in open court before Judge Middendorff on 13 of these 14 occasions. It is not completely clear from the record if the defendant was present at the proceeding on July 27, 2011, although it appears that he was not. Judge Middendorff stated, on the record, "Defendant not present," but it is not clear if he was referring to the defendant personally, or only to the defendant's counsel, who the record does clearly show was not present. Of the remaining 13 occasions on which the defendant was clearly present in court, on 2 of those occasions he was not accompanied by counsel: first, at his August 16, 2010, first appearance, at the conclusion of which counsel was appointed for the defendant for the first time; and second, at the November 4, 2010, proceeding, at which counsel was clearly not present (possibly due to a scheduling error), and the defendant clearly was present. There was no mention of pleas, plea agreements, or plea negotiations at either of these two proceedings. It is also clear from the record on appeal that the defendant did not, at any point, appear before any judge other than Judge Middendorff, nor is any other judge listed on the record sheets related to motion traffic or other non-appearance matters related to this case.

¶ 5 At the September 15, 2011, proceeding at which the defendant, with counsel present, entered a plea of guilty but mentally ill to the charge of aggravated criminal sexual assault, the State recited the terms of the plea agreement, which were, *inter alia*, that the defendant would plead guilty but mentally ill to the Class X felony charge of aggravated criminal sexual assault, would receive a sentence of 18 years in prison, and would see the rest of the charges against him dismissed as a result of the plea agreement.

Counsel for the defendant agreed that the State accurately set forth the terms of the plea agreement. Judge Middendorff thereafter thoroughly admonished the defendant before accepting his plea, ascertaining from the defendant that, *inter alia*, the defendant understood the terms of the plea agreement, did not wish to consult further with his attorney about the plea agreement, did not have any questions about the plea agreement, understood the charge and potential penalties, understood the rights he was waiving by entering a plea, had not been threatened in any way to enter the plea, had not been pressured in any way to enter the plea, and had not been promised anything in exchange for the plea. The State provided a factual basis for the plea agreement, asserting that the victim and other witnesses would testify that the defendant provided the victim and other underage girls, without their knowledge, drinks spiked with alcohol and other illicit substances, and forcibly sexually assaulted the victim. Judge Middendorff found factual support for the plea of guilty but mentally ill, and thereafter admonished the defendant of his appellate rights. The defendant did not avail himself of his right to move to withdraw his guilty plea, and did not pursue a direct appeal.

¶ 6 On February 10, 2014, the defendant filed a petition for postconviction relief (petition) pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2014)). Therein, he alleged, *inter alia*, that he:

> "was brought before the [c]ourt and offered a plea agreement, on the record, detailing that in exchange for pleading guilty to [c]riminal [s]exual [a]buse, he would receive a term of incarceration of seven (7) years. Defendant informed the [c]ourt that he had retained [c]ounsel and wished to consult with that counsel.

> When Defendant wouldn't accept the agreement without consulting with his retained counsel, the offer was withdrawn. Defendant was severely prejudiced by the absence of his attorney, the loss of the original agreement offer, and the misconduct of the [c]ourt and attorney for the [State] where they entered into negotiations with Defendant outside the presence of his counsel."

Citing a case from the United States Supreme Court, the defendant noted that he was "entitled to adequate representation of counsel during plea negotiations." He did not allege the date upon which the alleged offer of seven years was made to him "on the record." Judge Middendorff summarily dismissed the petition, finding it to be "patently frivolous and without merit." This appeal, which we have determined is properly before us, followed.

¶ 7 ANALYSIS

¶ 8 On appeal, the defendant contends the trial judge erred by summarily dismissing the petition, because, according to the defendant, he "stated the gist of a claim that his sixth amendment right to counsel was violated where the State initiated plea negotiations with him personally before the court[,] but personally withdrew its offer when [the defendant] insisted on first speaking with retained counsel, who was absent from that hearing." We review *de novo* the summary dismissal of a petition for postconviction relief. See, *e.g.*, *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). To survive summary dismissal, a petition filed pursuant to the Act "need only present the gist of a constitutional claim." *People v. Diehl*, 335 Ill. App. 3d 693, 700 (2002). At this first stage of proceedings, the trial judge "must determine whether the petition alleges a

constitutional infirmity which, if proven, would necessitate relief under the Act." *Id*. This is a pleading question, and all well-pleaded facts are to be taken by the court as true, unless they are "positively rebutted by the record." *Id*. To determine if the facts are positively rebutted by the record, the trial judge may examine, *inter alia*, the trial record and the court file of the proceeding in which the defendant was convicted. *Id*. As the *Hodges* court noted, a petition may also be summarily dismissed if it is based upon "a fanciful factual allegation" (234 Ill. 2d at 16), which the court noted includes allegations "which are fantastic or delusional." *Id*. at 17.

¶ 9 In the present case, the defendant's February 10, 2014, allegation that he "was brought before the [c]ourt and offered a plea agreement, on the record, detailing that in exchange for pleading guilty to [c]riminal [s]exual [a]buse, he would receive a term of incarceration of seven (7) years," is positively rebutted by the record. As noted above, there were 14 proceedings held for matters related to this case, many of which related to the defendant's fitness to stand trial. Each proceeding was presided over by Judge Middendorff, and it is clear from the record on appeal that the defendant did not, at any point, appear before any judge other than Judge Middendorff, nor is any other judge listed on the record sheets related to motion traffic or other non-appearance matters related to this case. We have thoroughly reviewed the transcripts of all 14 of the proceedings and they show, affirmatively, that the defendant was not ever brought before the court and offered a plea agreement, on the record, detailing that in exchange for pleading guilty to criminal sexual abuse, he would be sentenced to seven years' imprisonment. In fact, the September 15, 2011, proceeding at which the defendant, with

counsel present, entered a plea of guilty but mentally ill to the charge of aggravated criminal sexual assault in exchange for a sentence of 18 years, is the only proceeding at which Judge Middendorff entertained a proposal with regard to a guilty plea.

¶ 10 The defendant's appellate counsel concedes as much, but makes the rather curious argument that "although the initial plea negotiation did not occur on the record, [the defendant's] allegation, when liberally construed, taken as true, and read in light of the trial court record as a whole, is sufficient to invoke relief under the [Act]." However, the defendant has cited no case—and we are aware of no case—that stands for the proposition that liberal construction of a *pro se* petition means that a court should contort the factual allegations of the petition to the extent that a factual allegation that something took place on the record should actually be read to allege that something did not take place on the record. As explained above, even when the defendant's allegation is taken as true and read in light of the trial court record as a whole, it is positively rebutted by the record.

¶ 11 We note that the defendant has not alleged—either in his *pro se* petition or on appeal—that because the petition alleged misconduct on the part of Judge Middendorff, Judge Middendorff should not have ruled on the petition. Such an allegation would be without merit. "[T]he Illinois statutory provisions relating to substitutions of judges and changes of venue do not apply in post-conviction proceedings." *People v. Thompkins*, 181 Ill. 2d 1, 22 (1998). Only in rare circumstances has the Supreme Court of Illinois held that a trial judge should recuse himself or herself from ruling on a petition for postconviction relief because of bias or prejudice. *Id*. Of relevance to the present case, a trial judge should do so if the judge "has knowledge outside the record concerning the

truth or falsity of allegations made and where [the] judge may be called as a material witness." *Id.* (citing *People v. Wilson*, 37 Ill. 2d 617, 621 (1967)). The *Thompkins* court cautioned that "only under the most extreme cases is disqualification on the basis of bias or prejudice constitutionally required." *Id*.

¶ 12 As explained above, in the present case, a simple reading of the record demonstrates that the defendant's factual allegations are positively rebutted by the record, something that requires no knowledge outside the record. Nor is there any reason to believe that Judge Middendorff would need to be called as a material witness in any proceeding regarding the petition, for even if the defendant had alleged that the record on appeal may be incomplete for some reason (which he has not, either in his *pro se* petition or on appeal), such a proceeding would involve as a material witness the clerk of the circuit court, Rod Kloeckner, who certified the record on appeal.

¶ 13 Although we conclude that the petition is frivolous and patently without merit, we do not conclude that the defendant's fabrication of a court proceeding that did not happen is necessarily an intentionally deceitful act worthy of sanctions. We are mindful of the fact that the defendant ultimately entered a plea of guilty but mentally ill, that questions regarding his fitness were raised at multiple proceedings prior to the entry of his plea, and that the defendant personally indicated to Judge Middendorff on more than one occasion during the August 16, 2010, proceeding that because he was not on his medication, he did not understand what was going on in the proceeding. Moreover, at the October 26, 2010, proceeding, the defendant personally told Judge Middendorff that although he "[m]ostly" understood what was going on in the proceeding, his "medications aren't quite right yet

and I still hear voices and see things." Accordingly, the defendant's February 10, 2014, fanciful factual allegations are not necessarily inspired by malice or an attempt to abuse the legal process.

¶ 14 As an alternative basis for affirming the trial court's ruling, we note that even if we were to twist the defendant's factual allegations to the extent that they were not positively rebutted by the record, we would still conclude that the State is correct in its assertion that the petition, liberally construed, does not allege a constitutional infirmity which, if proven, would necessitate relief under the Act. With regard to the prejudice or harm the defendant alleges he has suffered, the petition states that the defendant "was severely prejudiced by the absence of his attorney, the loss of the original agreement offer, and the misconduct of the [c]ourt and attorney for the [State] where they entered into negotiations with Defendant outside the presence of his counsel." Liberally construed, the petition appears to allege that the defendant had a right to the alleged plea offer of seven years, and lost that right as a result of the actions taken by Judge Middendorff and the State in the absence of the defendant's counsel. However, as the State points out, courts have held that for constitutional purposes, there is no "right" to be offered a plea, and no "right" that a judge accept a plea. See, *e.g.*, *Missouri v. Frye*, 566 U.S. __, __, 132 S. Ct. 1399, 1410 (2012). Moreover, until a court accepts a guilty plea agreement, there is no detriment to a defendant, and thus no due process violation. *United States v. Norris*, 486 F.3d 1045, 1048 (8th Cir. 2007) (citing *Mabry v. Johnson*, 467 U.S. 504, 507 (1984), for the proposition that "A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a

court, does not deprive an accused of liberty or any other constitutionally protected interest"). Accordingly, we agree with the State that even if we were to find that the defendant had adequately alleged the gist of some type of improper contact when the defendant's counsel was not present, the defendant has not alleged even the gist of any legally recognizable constitutional harm, prejudice, or detriment that resulted from that purported contact.

¶ 15 As a second alternative basis for affirming the trial court's ruling, we also agree with the State that the defendant has waived consideration of his claim. Even a liberal construction of the petition does not change the fact that although the defendant contends therein that he was "prejudiced" because he lost out on an alleged earlier plea offer, the petition does not allege that his subsequent plea of guilty but mentally ill was not knowing and voluntary, or was otherwise invalid. As the State aptly notes, the Supreme Court of Illinois has held that "[i]t is well established that a voluntary guilty plea waives all nonjurisdictional error or irregularities, including constitutional ones." *People v. Townsell*, 209 Ill. 2d 543, 545 (2004).

¶ 16 CONCLUSION

¶ 17 For the foregoing reasons, we affirm the ruling of the trial judge.

¶ 18 Affirmed.