2018 IL App (1st) 160961-U

SIXTH DIVISION
Order filed: January 12, 2018

No. 1-16-0961



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County |
| | ) | |
| v. | ) | No. 09 CR 14887 |
| | ) | |
| GERARD THOMPSON, | ) | Honorable |
| | ) | Gregory R. Ginex, |
| Defendant-Appellant. | ) | Judge, Presiding. |

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court's first-stage dismissal of the defendant's postconviction petition is affirmed because he did not present an arguable claim that his guilty plea was involuntary due to ineffective assistance of plea counsel.

¶ 2 The defendant, Gerard Thompson, appeals the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)). He contends that the trial court erred in dismissing his petition because he presented an arguable

claim that his guilty plea was involuntary due to ineffective assistance of plea counsel. For the reasons that follow, we affirm.

¶ 3 The defendant was charged by indictment with, *inter alia*, three counts of attempted first-degree murder of a peace officer (720 ILCS 5/8-4(a) (West 2008); 720 ILCS 5/9-1(b)(1) (West 2008)) in relation to a July 19, 2009, shooting.

¶ 4 On February 19, 2013, the defendant entered into a negotiated plea of guilty to three counts of attempted first-degree murder of a peace officer in exchange for the State recommending concurrent terms of 22 years' imprisonment.[1] Defense counsel acknowledged the negotiated agreement, and told the court that the defendant "had an opportunity to think about the offer." Counsel informed the court that "[t]he sheriff's department was gracious enough to allow [the defendant] time with his father in regards to the matter."

¶ 5 At the plea hearing, the court advised the defendant that the charges were all Class X offenses with a sentencing range of 20 to 80 years' imprisonment at 85%, and that his sentence would be followed by a three-year period of mandatory supervised release. The defendant indicated that he understood these sentencing provisions. The court admonished the defendant that, by waiving his right to a jury trial, he was giving up his right to a trial where: the jury would be composed of members from the community, he would have the right to remain silent, the State would be required to prove its case beyond a reasonable doubt, his attorney would be able cross-examine the State's witnesses, and he would be able call his own witnesses. The defendant acknowledged that he understood his rights, and that he signed the jury waiver "freely and

[1] The defendant entered his plea before Judge Kipperman and his postconviction petition was dismissed by Judge Ginex.

voluntarily." The court asked the defendant if the "only thing that was promised [to him] was the agreement between the attorneys in this case * * *," to which the defendant replied, "Yes."

¶ 6 The record shows that the parties stipulated to the following facts. On July 19, 2009, police were called to the area of Fourth Avenue and Ohio Street on reports of a man with a gun. The man was described as wearing a shirt with brown and white stripes on it. Officer Pope was the first to arrive on the scene, followed by Officers Diaz and Allgood. The officers encountered a complaining witness, who pointed out the defendant hiding behind some parked cars. The officers, wearing their full uniforms, walked toward the defendant. He emerged from behind the parked cars, made two steps toward the officers, and then fled toward the intersection of Fourth Avenue and Ohio Street. The officers gave chase, and when they arrived at the intersection, the defendant was a half of a block down Ohio Street, toward the next intersection. Diaz saw the defendant turn to face the officers, pull out a handgun, and fire three rounds toward the officers. The officers took cover, and the defendant proceeded to flee. The officers resumed their pursuit, and observed the defendant run into a house near Third Avenue, where he held himself hostage by threatening to commit suicide. The defendant's father arrived on the scene and was able to convince the defendant to surrender. Officers arrested the defendant, and recovered the handgun, the shell casings, and the defendant's shirt.

¶ 7 After the parties stipulated to the facts, the court twice asked the defendant how he wished to plead, to which he responded, "Guilty." The court accepted that the defendant's guilty plea was knowing and voluntary, and that there was a factual basis for the plea. The court entered a conviction on the elected offenses, and sentenced the defendant to three concurrent

terms of 22 years' imprisonment. The defendant did not file a motion to withdraw his guilty plea, nor did he file a timely notice of appeal.

¶ 8 On November 19, 2015, the defendant, through counsel, filed a petition for postconviction relief and attached the unsigned affidavits of his father and mother. On January 15, 2016, the defendant filed an amended petition, this time with signed and notarized affidavits, alleging that he was coerced into pleading guilty because his plea counsel was ineffective in the following ways: (1) counsel rarely visited him during the three-and-a-half years he was incarcerated prior to his trial date; (2) during these rare visits, counsel did not discuss the facts of the case with the defendant, but only the potential sentences associated with each offense; (3) counsel only asked if the defendant had a defense to the charges during a visit in the "cramped lock-up" behind the courtroom on the day of the trial, and, upon hearing the defense, only referenced the prison time the charges carried, including telling the defendant that the judge "is talking 43 years"; and (4) counsel arranged a meeting between the defendant and his father on the day of the trial where the defendant's father relayed that counsel told him that the defendant would receive "about 43 years," but would be home in "13 years if he pled guilty."

¶ 9 On March 11, 2016, the trial court summarily dismissed the petition, stating that, essentially, the petition alleged a "catalog of failures of [trial counsel] to provide the defendant with adequate [representation]," which is evaluated under the standard set forth in *Strickland v. Washington*, 466 US 668 (1984). The court explained that, under *Strickland*, the defendant is required to show both "cause" and "prejudice." After reviewing the defendant's allegations, the court concluded that the evidence did not reveal any prejudice to the defendant because he did

not show that the outcome would have been any different but for counsel's ineffective assistance. In doing so, the court stated:

> "In this case, the defendant from what I see, was apprised generally by Judge Kipperman who took the plea as well as [trial counsel] who had gone back and forth that he was going to be proceeding to a certain disposition and plea.
>
> We look at this in light of Counsel's competent reputation. Whether or not there was a decision between the defendant and the attorney as to something else, there is nothing here except for the bare allegations of the defendant. And it is not this Cou[r]t's perview [*sic*] or duty to proceed and say that the defendant would succeed if he hasn't proven both prongs.
>
> I looked at the ineffective assistance of counsel again, and I looked thoroughly.
>
> The defendant specifically alleges that will [*sic*] he was coerced, although the post-conviction says that the attorney never asked what the defendant wanted. The defendant never said anything in the petition. He says the attorney failed to act. It doesn't say anything about interviewing witnesses, it talks about the parents not being apprised. That's not a basis for the post-conviction.
>
> Now, I can categorize this as a—basically a litany of supposedly or a catalog or failures of [trial counsel] to provide the defendant with adequate *reputations*. But I don't find that there are specific allegations here supported by evidence, to show a prejudice.
>
> So therefore, based on my review of the case and based on the case law, at this time I must deny the post-conviction."

¶ 10 The defendant now appeals, arguing that the trial court erred in summarily dismissing his petition at the first stage of postconviction proceedings because the petition stated an arguable claim that his plea was involuntary as a result of ineffective assistance of plea counsel. The defendant alleges that his counsel's erroneous advice and poor representation coerced him into pleading guilty.

¶ 11 Under the Act, a defendant may attack a conviction by asserting that it resulted from a substantial denial of his constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2014); *People v. Tate*, 2012 IL 112214, ¶ 8. A postconviction action is a collateral attack on the judgment rather than a direct appeal from the conviction. *Tate*, 2012 IL 112214, ¶ 8. Where, as here, a postconviction petition does not implicate the death penalty, a trial court adjudicates the petition in three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, where this petition currently lies, the trial court independently reviews the petition, takes all allegations as true, and determines whether the petition is "frivolous or patently without merit." *Id.*

¶ 12 The trial court may summarily dismiss a petition "as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact," meaning that it is "based on an indisputably meritless legal theory or a fanciful factual allegation," such as a legal theory that is "completely contradicted by the record." *Hodges*, 234 Ill. 2d at 16. In this stage, the allegations of fact are considered true, "so long as those allegations are not affirmatively rebutted by the record." *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 47. We must construe postconviction petitions "liberally" and "allow borderline petitions to proceed." *Thomas*, 2014 IL App (2d) 121001, ¶ 5. Our review of the trial court's dismissal of a postconviction petition is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 13 At the first stage of postconviction proceedings, a petition that alleges 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." *Tate*, 2012 IL 112214, ¶¶ 19-20; *Hodges*, 234 Ill. 2d at 17. Because a defendant must prove both elements, we may review the prejudice prong first. *People v. Gray*, 2012 IL App (4th) 110455, ¶ 25.

¶ 14 The defendant here was convicted pursuant to a negotiated guilty plea. With respect to a guilty plea, a counsel's conduct is considered deficient if he or she "failed to ensure that the defendant entered the plea voluntarily and intelligently." *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). To prove prejudice, "a defendant must show that there is a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " *Id.* (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). A "bare allegation" that a defendant would have demanded trial and pled not guilty if his or her trial counsel had not been deficient is not sufficient to establish prejudice. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). Instead, a defendant's "claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *Id.* at 335-36.

¶ 15 As an initial matter, we note that the defendant did not argue in his petition that he is actually innocent of the offenses to which he pled guilty, nor did he articulate any plausible defense to the charges that he could have raised at trial. Rather, his petition makes only an oblique reference to the fact that, on the day of the trial, his counsel asked what his defense was and the defendant told him. However, in his petition, the defendant does not elaborate as to what that defense would have been. Now, for the first time on appeal, the defendant suggests that he

would have argued that he did not have the intent to kill the three officers, despite firing three rounds in their direction while fleeing. The State argues, and we agree, that, because the defendant did not raise this argument in either his petition or an amended petition, he has forfeited this argument. See *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006) (explaining that the defendant had forfeited his argument by not raising the issue in either his *pro se* petition or an amended petition).

¶ 16 Because the defendant's postconviction petition included neither a claim of actual innocence, nor a plausible defense, we find that the trial court did not err in summarily dismissing this claim as the defendant did not show that he was arguably prejudiced by counsel's performance. Stated differently, the defendant did not show a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. As a matter of fact, the defendant does not even raise a bare allegation that he would have demanded trial and pled not guilty if counsel had not been deficient. Instead, the defendant's petition contains only allegations that his counsel ignored the defense that he offered and used his father to manipulate him into pleading guilty. Notably, in his petition, the defendant does not explain what the defense was that he offered to counsel. As such, the defendant's allegations are insufficient to state an arguable claim that he was prejudiced by counsel's representation or coerced into pleading guilty. Accordingly, the trial court did not err in summarily dismissing the defendant's claim of ineffective assistance of counsel.

¶ 17 In reaching this conclusion, we are not persuaded by the defendant's reliance on *Hall* in support of his argument that he was prejudiced by counsel's performance and that the trial court's admonishments were insufficient to cure counsel's ineffectiveness. In *Hall*, 217 Ill. 2d at

335, the defendant's counsel erroneously told him that lack of knowledge was not a defense to aggravated kidnapping, which the court found to be objectively unreasonable representation. The State argued that, under *Strickland*, the defendant could not show that he was prejudiced by the erroneous advice because the trial court admonished him as to the nature of the charged offense. *Id.* at 336-37. Our supreme court held that the defendant was prejudiced by counsel's performance because the trial court's admonishments did not specifically address counsel's erroneous advice, and thus were insufficient to overcome the ineffective assistance. *Id.* at 339-41.

¶ 18 Here, as mentioned and unlike in *Hall*, the defendant does not allege, nor does the record show, that he had a valid defense that he would have pursued at trial, which he abnegated due to counsel's erroneous advice. As such, we need not inquire whether the trial court's admonishments were enough to overcome any prejudice created by counsel's advice.

¶ 19 The defendant nevertheless argues that the trial court erred in dismissing his claim because, in doing so, it relied on his counsel's reputation, a matter outside of the record. In support of this argument, the defendant relies on the court's oral pronouncements. In denying the defendant's petition, the transcript shows that the court said the following:

> "We look at this in light of Counsel's competent *reputation*. Whether or not there was a decision between the defendant and the attorney as to something else, there is nothing here except for the bare allegations of the defendant. And it is not this *Cou[r]t's perview* [*sic*] or duty to proceed and say that the defendant would succeed if he hasn't proven both prongs [of *Strickland*].
>
> * * *

> Now, I can categorize this as a—basically a litany of supposedly or a catalog or failures of [trial counsel] to provide the defendant with adequate *reputations*. But I don't find that there are specific allegations here supported by evidence, to show a prejudice." (Emphasis added.)

¶ 20 We note that, after reviewing the entire transcript, the allegedly erroneous statement by the trial court appears to be nothing more than an error in transcription. In support of this conclusion, we observe that, shortly after the court allegedly references trial counsel's "reputation," the court makes another reference to counsel's failure to provide the defendant with "adequate reputations." The court in all likelihood meant to say "adequate representation."

¶ 21 In any event, even if this was not, as we suspect, a transcription error, merely mentioning matters outside the record is not sufficient to establish error where the record shows that the court made its decision based upon facts in evidence. See *People v. Hamilton*, 361 Ill. App. 3d 836, 849-50 (2005) ("While the judge's remark that [counsel] had been competent in other proceedings before the court may not have been proper, and considering our own determination that [counsel] did not render ineffective assistance, we find that the inclusion of this outside knowledge did not affect the judge's ruling and was therefore not prejudicial."). This is especially so where, as here, the court also stated that it did not "find that there are specific allegations here supported by evidence, to show a prejudice. And if, in fact, [counsel] had complied with anything, that there would be a different outcome." As such, the court's decision was based on the facts that the defendant alleged in the petition, and the court's single statement referencing outside material, if that is indeed what transpired, is not enough to show any error.

¶ 22 For these reasons, we affirm the first-stage dismissal of the defendant's postconviction petition.

¶ 23 Affirmed.