2018 IL App (3d) 160526-U

Order filed September 11, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, |
| Plaintiff-Appellee, | ) | |
| v. | ) | Appeal No. 3-16-0526 Circuit No. 15-CF-2742 |
| DANIEL J. STELLMAN, | ) | Honorable Daniel L. Kennedy, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

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**ORDER**

¶ 1 *Held*: The defendant's *pro se* postconviction petition stated the gist of a constitutional claim of ineffective assistance of counsel where the defendant alleged that his plea counsel failed to advise him that his prior conviction for fleeing and eluding rendered him ineligible for impact incarceration.

¶ 2 The defendant, Daniel J. Stellman, appeals the summary dismissal of his *pro se* postconviction petition. The defendant argues that his petition stated the gist of a constitutional claim of ineffective assistance of plea counsel where the petition alleged that plea counsel failed to advise the defendant that his prior conviction for fleeing and eluding made him ineligible for

impact incarceration. The petition alleged that if the defendant had known of his ineligibility, he would have accepted a different plea agreement.

¶ 3 FACTS

¶ 4 The defendant was charged with two counts of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(1), (2), (d)(2)(C) (West 2014)). The defendant entered a fully negotiated guilty plea agreement in which the defendant pled guilty to one count of aggravated DUI in exchange for a sentence of five years' imprisonment with a recommendation from the court that he be placed in the impact incarceration program, commonly known as boot camp. The State also agreed to dismiss the other count of aggravated DUI and three charges for traffic offenses, which were charged in a separate case.

¶ 5 The court asked the defendant if he understood that it was "solely within the discretion of the Department of Corrections [(DOC)]" whether he was placed in the impact incarceration program. The court also asked if the defendant understood that he would be subject to five years' imprisonment if he did not complete the impact incarceration program. The defendant said yes in response to both questions. The defendant signed a form consenting to impact incarceration in which he indicated that he understood that the court had recommended him for the impact incarceration program, but his commitment to the program was "entirely dependent upon the decision of the [DOC]."

¶ 6 The defendant did not appeal.

¶ 7 Approximately three months later, the defendant filed a *pro se* postconviction petition. The petition alleged that prior to the entry of the guilty plea, the State offered the defendant a plea deal of three years' imprisonment in exchange for the defendant's guilty plea. Before the

defendant had decided whether to accept the three-year plea deal, the State offered a new plea deal of five years' imprisonment or impact incarceration. The petition alleged:

> "[Defense counsel] advised the [defendant] to accept the [plea offer of] boot camp or 5 [years' imprisonment] over the 3 years in prison because the [defendant] would be out in only six months if he successfully completed boot camp. The [defendant] accepted the plea deal under the impression he was elligible [*sic*] for and would receive boot camp. However, the [DOC] found the [defendant] inelligible [*sic*] to participate in its boot camp because the [defendant] had a prior for fleeing and eluding ***."

The petition further alleged: "Had the [defendant] not been duped into thinking he was elligible [*sic*] for boot camp, he would have accepted the original offer of three years in prison ***." The petition alleged that the defendant's plea counsel was ineffective for advising him to take the plea deal recommending impact incarceration based on plea counsel's erroneous belief that the defendant was eligible for boot camp.

¶ 8 The defendant attached a signed, notarized affidavit to the *pro se* petition. In the affidavit, the defendant stated:

> "[M]y attorney in this matter did not advi[s]e me I was inelligible [*sic*] for the boot camp I plea [*sic*] guilty to and that had he so advised me I would have not accepted the plea deal and would have accepted the State's prior plea offer of three years in prison without boot camp."

¶ 9 The court summarily dismissed the defendant's *pro se* postconviction petition, finding that it was frivolous and patently without merit.

¶ 10 ANALYSIS

¶ 11 The defendant argues that the court erred in summarily dismissing his *pro se* postconviction petition because it stated the gist of a claim of ineffective assistance of counsel. We review the trial court's summary dismissal of the defendant's *pro se* postconviction petition *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 12 At the first stage of postconviction proceedings, "[t]he allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim." *Id.* "This standard presents a 'low threshold' [citation], requiring only that the petitioner plead sufficient facts to assert an arguably constitutional claim [citation]." *Id.* (quoting *People v. Jones*, 211 Ill. 2d 140, 144 (2004)) "A petitioner need present only a limited amount of detail and is not required to include legal argument or citation to legal authority." *Id.* The trial court must summarily dismiss a postconviction petition at the first stage of proceedings if the petition is frivolous or patently without merit. *Id.* A petition is frivolous or patently without merit if it "has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). "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." *Id.*

¶ 13 We find that the trial court erred in summarily dismissing the defendant's *pro se* postconviction petition because the petition met the low threshold of stating the gist of a constitutional claim of ineffective assistance of counsel. "A postconviction petition alleging ineffective assistance of counsel may not be dismissed at the first stage of the proceedings if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *Brown*, 236 Ill. 2d at 185.

¶ 14 Here, the defendant's allegation that his plea counsel failed to inform him that he was ineligible for impact incarceration based on his prior conviction for fleeing and eluding

established that his counsel's performance arguably fell a below an objective standard of reasonableness. We find our opinion in *People v. Clark*, 386 Ill. App. 3d 673 (2008), to be instructive on this point.

¶ 15 In *Clark*, the defendant filed a postconviction petition alleging that his plea counsel was ineffective for advising him that all of his outstanding arrest warrants had been quashed, and, thus, he was eligible for impact incarceration. *Id.* at 677. The petition alleged that plea counsel had actually failed to quash several of the warrants, which caused the DOC to deny the defendant participation in the impact incarceration program. *Id.* We found that the "[d]efendant's allegations that he pled guilty based on [his plea counsel's] erroneous advice and misrepresentations about whether he had outstanding warrants and was eligible for impact incarceration present[ed] the gist of an ineffective assistance claim." *Id.* at 678.

¶ 16 We rejected the State's argument that the defendant's outstanding warrants did not make him ineligible for impact incarceration. *Id.* We reasoned that the State was "attempting to contradict the facts presented in defendant's petition, which it cannot do in the first stage of a postconviction proceeding." *Id.* at 677-78. We also noted that section 5-8-1.1(b) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-1.1(b) (West 2006)) stated that " '[t]he [DOC] may consider *** whether the committed person has any outstanding detainers or warrants' in determining his eligibility for impact incarceration." *Clark*, 386 Ill. App. 3d at 678. We reasoned that the defendant had alleged that the outstanding warrants "were considered by the [DOC] and were critical to its refusal to give defendant impact incarceration." *Id.*

¶ 17 Here, the defendant alleged that he was denied participation in the impact incarceration program due to a prior conviction for fleeing and eluding, and his plea counsel failed to inform him that this prior conviction would make him ineligible. Section 5-8-1.1(b) of the Code states

that in determining an inmate's eligibility for impact incarceration, the DOC "may *** consider, among other matters, *** whether the committed person has a history of escaping or absconding." 730 ILCS 5/5-8-1.1(b) (West 2016). Arguably, the defendant's prior conviction for fleeing and eluding could be interpreted to be "a history of escaping or absconding" (*id.*), and the petition alleged that this prior conviction was the DOC's basis for denying impact incarceration. Thus, based on the reasoning set forth in *Clark*, the defendant has shown that his plea counsel's performance was arguably deficient.

¶ 18 We give no opinion as to whether the defendant's prior conviction for fleeing and eluding did in fact constitute "a history of escaping or absconding" under section 5-8-1.1(b) of the Code or whether plea counsel rendered deficient performance in allegedly failing to advise the defendant of this conviction's potential effect on his eligibility for impact incarceration. We find only that this legal theory is not *indisputably* meritless and that it is arguable, based on the facts alleged in the petition, that plea counsel's performance was deficient. See *Hodges*, 234 Ill. 2d at 16; *Brown*, 236 Ill. 2d at 185.

¶ 19 We also find that the allegations set forth in the *pro se* petition demonstrate that the defendant was arguably prejudiced by plea counsel's alleged deficiencies. "To establish prejudice, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *People v. Hale*, 2013 IL 113140, ¶ 18 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

¶ 20 Where, as here, a defendant claims that his attorney's deficient performance caused him to reject a plea offer, "the defendant must establish that there is a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer." *Id.* " 'Defendants

must also demonstrate a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law.' " (Emphasis omitted.) *Id.* ¶ 19 (quoting *Missouri v. Frye*, 566 U.S. 134, 147 (2012)).

¶ 21 In the instant case, the petition alleged that if plea counsel had advised the defendant that he was ineligible for impact incarceration based on his prior conviction for fleeing and eluding, he would have accepted a different plea offer for three years' imprisonment. The three-year plea offer involved a significantly shorter term of imprisonment than the offer of five years' imprisonment with a recommendation for impact incarceration that the defendant accepted. See *id.* ¶ 18 ("The disparity between the sentence a defendant faced and a significantly shorter plea offer can be considered supportive of a defendant's claim of prejudice."). The *pro se* petition states that counsel advised the defendant to take the plea offer of five years' imprisonment or impact incarceration over the offer of three years' imprisonment, which implies that both offers were still available to the defendant at the time of the plea. We find that these factual allegations, taken as true at this initial stage of the proceedings, were sufficient to show that the defendant was arguably prejudiced by plea counsel's alleged deficient performance.

¶ 22 We reject the State's argument that the defendant failed to establish an arguable claim of prejudice because he did not make a claim of actual innocence or articulate a plausible trial defense. We acknowledge that a defendant is required to make such a showing where the defendant argues that absent his or her counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial. *People v. Hall*, 217 Ill. 2d 324, 335-36 (2005). Here, however, the defendant is not claiming that he would have pleaded not guilty and insisted on going to trial absent counsel's errors. Rather, the defendant claims he would have accepted a

different plea offer. Thus, the requirement that the defendant make a claim of actual innocence or articulate a plausible trial defense does not apply.

¶ 23 We also reject the State's argument that we should affirm the dismissal of the *pro se* petition because the defendant failed to attach an affidavit from his plea counsel or the assistant state's attorney to support his claim that the State offered him a plea deal for three years' imprisonment. "Failure to attach independent corroborating documentation or explain its absence may *** be excused where the petition contains facts sufficient to infer that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney." *Id.* at 333. The " 'difficulty or impossibility of obtaining such an affidavit is self-apparent.' " *Id.* at 333-34 (quoting *People v. Williams*, 47 Ill. 2d 1, 4 (1970)). Thus, the defendant's failure to attach his attorney's affidavit may be excused. We find that the " 'difficulty or impossibility' " (*id.*) of obtaining an affidavit from the assistant state's attorney—the representative of the opposing party—is also self-apparent.

¶ 24 CONCLUSION

¶ 25 The judgment of the trial court is reversed, and the cause is remanded for second-stage postconviction proceedings.

¶ 26 Reversed and remanded.