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2018 IL App (3d) 170222-U

Order filed August 9, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

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. 3-17-0222
JASON S. ORASCO,)	Circuit No. 09-CF-1536
Defendant-Appellant.)	Honorable Amy M. Bertani-Tomczak, Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Carter and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred when it summarily dismissed defendant's postconviction petition as it presented the gist of claims that defendant received ineffective assistance of counsel.

¶ 2 Defendant, Jason S. Orasco, appeals from the summary dismissal of his *pro se* postconviction petition. Defendant argues the circuit court erred in dismissing his petition because it presented the gist of claims that defendant received ineffective assistance of trial and appellate counsel. We reverse and remand for second-stage proceedings.

¶ 7 On November 5, 2009, the State filed a motion to consume DNA evidence. Defense counsel did not object to the consumption of the DNA evidence.

¶ 8 On February 14, 2012, following nearly two years of pretrial proceedings, the court called the case for a jury trial. At the conclusion of the trial, the jury found defendant guilty of all the charged offenses. The court sentenced defendant to a total of 75 years' imprisonment.

¶ 9 On direct appeal, defendant argued that he had received ineffective assistance of trial counsel who did not seek a jury instruction on the affirmative defense of compulsion. We affirmed defendant's convictions and sentences. *People v. Orasco*, 2016 IL App (3d) 120633-B.

¶ 10 On January 23, 2017, defendant filed a *pro se* postconviction petition. Defendant's petition raised claims of ineffective assistance of trial and appellate counsel. Specifically, (1) trial counsel improperly waived defendant's right to a speedy trial on August 29, 2009,² without defendant's consent, (2) trial counsel did not object to the State's consumption of DNA evidence which denied defendant the opportunity to have the evidence retested in the future, (3) trial counsel did not contest the testifying psychiatric expert's bias that resulted from the expert's review of the police reports, and (4) appellate counsel failed to raise these issues on direct appeal.

¶ 11 The court summarily dismissed defendant's petition finding that defendant's claims were unsubstantiated, without merit, and waived because defendant could have raised them during prior proceedings in the trial or appellate courts. Defendant appeals.

¶ 12 ANALYSIS

¶ 13 Defendant argues the circuit court erred in summarily dismissing his *pro se* first-stage postconviction petition because it presented the gist of claims of ineffective assistance of trial

²The record establishes that the referenced waiver occurred on August 28, 2009, as no hearing occurred on August 29, 2009.

and appellate counsel. Specifically, counsel: (1) waived defendant's speedy trial right without defendant's knowing and informed consent, (2) did not object to the State's consumption of DNA evidence, and (3) did not contest the psychiatric expert's bias. We find that defendant's petition presented the gist of a claim that trial counsel waived defendant's speedy trial right without defendant's consent and appellate counsel failed to raise this issue on direct appeal.

¶ 14 When a defendant files a *pro se* postconviction petition, the circuit court must independently review the petition, taking the allegations as true, and determine whether “ ‘the petition is frivolous or is patently without merit.’ ” *People v. Hodges*, 234 Ill. 2d 1, 10 (2009) (quoting 725 ILCS 5/122-2.1(a)(2) (West 2006)). The court may summarily dismiss a petition that has no arguable basis either in law or in fact. *People v. Tate*, 2012 IL 112214, ¶ 9. A petition lacking an arguable basis in law or fact is one “based on an indisputably meritless legal theory or a fanciful factual allegation.” *Hodges*, 234 Ill. 2d at 16. For example, a claim that is completely contradicted by the record has no meritorious legal basis and is subject to dismissal. *Id.* At the first stage, the court acts “strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit.” *People v. Rivera*, 198 Ill. 2d 364, 373 (2001). The first-stage threshold for survival is low because most petitions are drafted by defendants with little legal knowledge or training. *Tate*, 2012 IL 112214, ¶ 9.

¶ 15 Defendant's postconviction petition alleged that he received ineffective assistance of trial and appellate counsel. To warrant second-stage proceedings, defendant's petition must show “(1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result.” *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 16 After reviewing defendant’s petition, we find that it presented an arguable claim that trial and appellate counsel were ineffective for failing to preserve defendant’s statutory right to a speedy trial and raise this issue in defendant’s direct appeal. Section 103-5 of the Code provides

“Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant ***.” 725 ILCS 5/103-5(a) (West 2008).

The remedy for a statutory speedy trial violation is dismissal of the charges. *Id.* § 103-5(d).

¶ 17 Defendant alleged in his petition that trial counsel waived his speedy trial right without consent on August 28, 2009, and this waiver prejudiced defendant. Defendant’s allegation has an arguable basis in law as the preservation of defendant’s statutory speedy trial right provides a potentially viable ground for the dismissal of the charges against defendant. *Id.*; see also *People v. Dalton*, 2017 IL App (3d) 150213, ¶¶ 28-29 (finding that trial counsel’s failure to move to dismiss a charge due to a speedy trial violation and appellate counsel’s failure to raise this issue on appeal was ineffective assistance of counsel). Maintaining this defensive option is especially important in the instant case where nearly two years elapsed between defendant’s arrest and trial date. Defendant’s allegation also has an arguable basis in fact as defense counsel filed a statutory speedy trial demand immediately after defendant’s arrest, but then waived this right less than two months later. The subsequent period between the waiver and defendant’s trial was more than one year, and therefore, potentially gave rise to a speedy trial violation.

¶ 18 While we find that defendant’s petition alleges an arguable basis in law and fact, we take no position on whether an actual speedy trial violation occurred as defendant need only present the gist of a claim at the first stage. Instead, we merely find that the present record does not

refute defendant's speedy trial contention. In other words, questions remain regarding whether trial counsel's speedy trial waiver was directed solely at the August 28, 2009, continuance or was the result of strategy discussions with defendant. Therefore, this issue is ripe for additional postconviction proceedings. See *People v. Veach*, 2017 IL 120649, ¶ 46 (ineffective assistance of counsel claims that require consideration of facts outside of the record are generally better suited to collateral proceedings).

¶ 19 Finally, we acknowledge that the circuit court found that defendant waived his ineffective assistance of counsel claims because he could have raised them during prior proceedings. Defendant's claims, however, are not subject to waiver because they are both reliant on matters outside the record (*People v. Barkes*, 399 Ill. App. 3d 980, 986 (2010)) and defendant alleged that appellate counsel provided ineffective assistance for failing to raise these potentially meritorious issue on direct appeal (*Dalton*, 2017 IL App (3d) 150213, ¶ 31). Moreover, we need not address defendant's remaining two postconviction claims, that counsel did not object to the State's consumption of DNA evidence and did not contest the psychiatric expert's bias, as his first claim (a statutory speedy trial violation) warrants further proceedings and partial dismissals are not permitted at the first stage. *Rivera*, 198 Ill. 2d at 374.

¶ 20 CONCLUSION

¶ 21 As defendant's *pro se* petition has an arguable basis in law and fact, we reverse the judgment of the circuit court of Will County and remand for second-stage postconviction proceedings.

¶ 22 Reversed and remanded with directions.