2018 IL App (4th) 170245-U

NO. 4-17-0245

FILED
May 16, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
JEFFERY L. MARCRUM	)	No. 15CF551
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Harris and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed defendant's second-stage postconviction petition for relief for failure to make a substantial showing of a violation of defendant's constitutional rights.

¶ 2 In April 2015, Jeffrey L. Marcrum, defendant, was charged by information with residential burglary. 720 ILCS 5/19-3 (West 2014). In November 2015, defendant pled guilty and was sentenced to seven years' imprisonment and three years of mandatory supervised release (MSR). Defendant filed a motion to withdraw guilty plea, which was denied, as well as a direct appeal, which defendant voluntarily withdrew. *People v. Marcrum*, No. 4-16-0599 (Mar. 30, 2018) (dismissed on defendant's motion).

¶ 3 In June 2016, defendant filed his postconviction petition for relief. Defendant alleged he received ineffective assistance of trial counsel in that counsel failed to (1) maintain sufficient contact with defendant, (2) secure a better plea agreement, (3) properly inform

defendant about his sentencing credit, and (4) obtain forensic testing on items found at the crime scene. Defendant also argued his sentence was cruel and unusual. In January 2017, defendant motioned for limited appearance of counsel, alleging ineffective assistance of postconviction counsel and requesting new counsel, or, alternatively, to proceed *pro se*. The court granted defendant a *Krankel* hearing. *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). On March 20, 2017, defendant refused and withdrew his claims of ineffective assistance of postconviction counsel. On March 24, 2017, the circuit court dismissed defendant's postconviction petition for failing to allege facts sufficient to constitute ineffective assistance of trial counsel. Defendant appeals, arguing (1) he should have had a *Krankel* hearing, (2) he should have been allowed to proceed *pro se*, (3) postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), and (4) the circuit court erred in dismissing his postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In April 2015, defendant was charged by information with residential burglary (720 ILCS 5/19-3 (West 2014)), a Class 1 felony and nonprobational offense (730 ILCS 5/5-5-3(c)(2)(G) (West 2014)). The charge was based on a physical description by one victim who chased down the robber as well as physical evidence, including a jacket which contained a prevention and treatment services (PATS) treatment plan, a tax form, hospital documents, a prescription card, all bearing defendant's name, and various handwritten notes containing defendant's personal information, such as his social security number and routing numbers for his bank account. Cigarette butts and a hat were also recovered from the crime scene. Defendant requested forensic testing to identify any deoxyribonucleic acid (DNA) on the cigarette butts and

hat, the State denied the request, and defendant retained the option of having the items tested at an independent laboratory at his own cost.

¶ 6 In November 2015, defendant pled guilty and was sentenced as stated. Defendant filed a *pro se* motion to withdraw his guilty plea, alleging (1) the items should have been tested for DNA, (2) trial counsel misinformed defendant about the issuance of sentence credit, (3) counsel did not maintain sufficient contact with defendant, and (4) counsel should have negotiated for a better plea. New counsel was appointed to represent defendant. On May 3, 2016, new counsel adopted the motion to withdraw guilty plea. On July 28, 2016, the trial court held an evidentiary hearing and denied the motion to withdraw guilty plea. Defendant appealed the ruling, but on March 30, 2018, defendant withdrew his direct appeal.

¶ 7 On June 3, 2016, defendant filed his *pro se* postconviction petition for relief accompanied by a motion for appointed counsel. On November 15, 2016, new counsel was appointed and filed an amended postconviction petition. On December 13, 2016, the State filed a motion to dismiss. On January 11, 2017, defendant, not acting through counsel, submitted a packet of written materials for filing, the fifth time defendant filed *pro se* while being represented by counsel. On January 17, 2017, the State filed a motion to strike defendant's hybrid filings. On January 23, 2017, the trial court allowed the State's motion to strike defendant's hybrid filings.

¶ 8 On January 20, 2017, defendant filed a *pro se* motion for limited appearance of counsel, including reference to the issue of ineffective assistance of counsel appointed to represent him in his postconviction petition and requesting new counsel or, in the alternative, to proceed *pro se*. He alleged postconviction counsel was ineffective in failing to secure DNA testing on the items found at the scene of the burglary. The matter was scheduled for a *Krankel*

hearing on April 7, 2017. On March 20, 2017, defendant filed a *pro se* voluntary motion to withdraw his motion for limited appearance of counsel and specifically withdrew "any claims of ineffective assistance of counsel" and "move[d] to cancel the 'Krankel hearing.' " This motion was accompanied by an affidavit stating "I do not want to be present for nor proceed in the Krankel hearing and move to dismiss motion for limited appearance of counsel for counsel Propps has fulfilled my request." Defendant's request was allowed, his motion withdrawn, and the circuit court vacated the *Krankel* hearing setting. On March 24, 2017, the circuit court dismissed defendant's postconviction petition for failure to allege facts sufficient to give rise to claim of ineffective assistance of counsel. On March 27, 2017, postconviction counsel filed a Rule 651(c) certificate.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 Defendant raises four issues on appeal, claiming (1) the circuit court erred in failing to hold a *Krankel* hearing, (2) the circuit court erred in refusing to respond to defendant's *pro se* motion to withdraw counsel, (3) postconviction counsel failed to comply with Rule 651(c), and (4) the circuit court erred in dismissing defendant's postconviction petition for relief.

¶ 12 We note the record on appeal is incomplete. The record contains neither transcripts from defendant's arraignment, plea, or sentencing hearing, nor a presentence investigation report. The appellant has the burden to provide a complete record in order to assess any claims of error. See Ill. S. Ct. Rs. 321 (eff. Feb. 1, 1994), 323 (eff. Dec. 13, 2005). Absent a complete record, we presume the order entered by the trial court conformed to the law and had a sufficient factual basis. *Chicago City Bank & Trust Co. v. Wilson*, 86 Ill. App. 3d 452, 454, 407 N.E.2d 964, 966-67 (1980). The absence of a complete record will not bar review. *Id.* Any

doubts arising from the incompleteness of the record will be resolved against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392, 459 N.E.2d 958, 959 (1984).

¶ 13 A. The *Krankel* Hearing

¶ 14 Defendant contends the circuit court erred in dismissing his postconviction petition without holding a *Krankel* hearing. He does not deny he moved to have the *Krankel* hearing vacated, instead he alleges the circuit court erred in granting his motion when the circuit court previously allowed the State's motion to strike defendant's hybrid filings.

¶ 15 We rely on *People v. Stevenson*, 2011 IL App (1st) 093413, 960 N.E.2d 739, when addressing the issue of hybrid filings. There, Stevenson filed a series of pro se motions while represented by counsel, including a claim of ineffective assistance of counsel. *Id.* ¶¶ 10, 15, 18. The court noted, "*[w]ith the exception of posttrial motions alleging ineffective assistance of trial counsel*, defendants represented by counsel generally have no authority to file *pro se* motions, and the court should not consider such motions." (Emphasis added.) *Id.* ¶ 30.

¶ 16 Here, defendant complained of ineffective assistance of postconviction counsel in a *pro se* motion, alleging, *inter alia*, postconviction counsel did not (1) meet defendant's request to have the cigarette butts and hat found at the crime scene tested for DNA or (2) file a "professional" amended postconviction petition. The circuit court granted defendant a *Krankel* hearing based on these claims, which defendant withdrew in another *pro se* motion. Because the issue of ineffective assistance of counsel is the one exception to the rule against hybrid fillings, the circuit court did not err in honoring defendant's withdrawal and vacating the hearing.

¶ 17 B. Motion to Proceed *Pro Se*

¶ 18 Defendant again relies on his *pro se* motions alleging ineffective assistance of counsel and seeking alternative counsel or the opportunity to proceed *pro se* to claim the circuit court erred in refusing to hear or grant defendant's motions.

¶ 19 The circuit court granted defendant the opportunity to be heard on these issues when it scheduled a *Krankel* hearing. Defendant then withdrew his request. Per *Stevenson*, 2011 IL App (1st) 093413, ¶ 30, the only time it is proper for the court to entertain hybrid filings is when a claim of ineffective assistance of counsel is made.

¶ 20 Defendant relies on *People v. Jocko*, 239 Ill. 2d 87, 940 N.E.2d 59 (2010), to support the proposition a claim of ineffective assistance of counsel requires a special hearing. This reliance is misguided. In *Jocko*, the court stated a *Krankel* hearing is not required when, upon assessing the factual basis of the claim, the court finds it to be meritless. *Id.* at 91. *Jocko* is not at issue here since the court gave defendant the opportunity to have a *Krankel* hearing, which defendant declined.

¶ 21 The record is clear defendant withdrew any claims of ineffective assistance of counsel as well as his request to proceed *pro se* and the circuit court properly relied on defendant's motions.

¶ 22 C. Failure to Comply with Rule 651(c)

¶ 23 Defendant alleges postconviction counsel failed to fulfill her duties under Rule 651(c) by submitting a deficient amended postconviction petition.

¶ 24 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)) provides a remedy to criminal defendants alleging a substantial violation of their constitutional rights occurred at trial. *People v. Bribson*, 164 Ill. 2d 236, 242, 647 N.E.2d 935, 937 (1995). If

the defendant is indigent, counsel may be appointed at the second stage. 725 ILCS 5/122-4 (West 2014).

¶ 25 A postconviction petitioner is entitled to reasonable representation by counsel. *People v. Perkins*, 367 Ill. App. 3d 895, 899, 856 N.E.2d 1178, 1181 (2006). Rule 651(c) imposes specific obligations on counsel to ensure reasonable assistance, specifically counsel must consult with the petitioner and make amendments, as necessary, to petitioner's postconviction petition "for an adequate representation of petitioner's contentions." Ill. S. Ct. R. 651(c). We review counsel's compliance with Rule 651(c) *de novo*. *People v. Claudin*, 369 Ill. App. 3d 532, 533, 861 N.E.2d 227, 229 (2006).

¶ 26 In June 2016, defendant filed his *pro se* postconviction petition and moved for appointment of counsel. In November 2016, postconviction counsel filed an amended postconviction petition, alleging numerous violations of ineffective assistance of trial counsel. She also identified those issues she chose not to raise in the amended petition for lack of merit. She included reasoning for the omitted issues and attached all supporting documents provided by defendant. On March 27, 2017, postconviction counsel filed a Rule 651(c) certificate. This certificate only creates a presumption postconviction counsel complied with the rule, and it is "defendant's burden to overcome this presumption by demonstrating his attorney's failure to substantially comply with *** Rule 651(c)." *People v. Profit*, 2012 IL App (1st) 101307, ¶19, 974 N.E.2d 813.

¶ 27 The record in this case is incomplete, and we are bound by the information before us. Defendant argues defense counsel failed to (1) amend his postconviction petition to conform with the law; (2) provide factual support for his claims, particularly the claim of ineffective assistance of counsel; and (3) failed to sufficiently argue the State's motion to dismiss.

¶ 28 We disagree with defendant's contention postconviction counsel filed a deficient amended postconviction petition. Upon review of the amended petition, postconviction counsel provided the circuit court with a thoughtful analysis of the potential claims, both the claims she raised and the claims she deemed lacked merit. Postconviction counsel is not required to raise every argument made by defendant but rather provide reasonable representation. Defendant's allegations are void of facts to support the existence of a Rule 651(c) violation, and the record does not indicate postconviction counsel's representation was either inadequate or unreasonable.

¶ 29 D. Dismissal of Postconviction Petition

¶ 30 On appeal, defendant asserts the circuit court's denial of his postconviction petition was improper because his allegations of ineffective assistance of trial counsel had merit. Specifically, defendant argues he was improperly advised by counsel concerning his entitlement to good-time credits and whether he would have to serve his MSR in the custody of the Department of Corrections (DOC). Defendant also argues the circuit court should have allowed him to proceed *pro se,* but this argument has been rejected. Defendant, on appeal, does not address the other issues he raised in his postconviction petition. The circuit court dismissed defendant's petition and this issue in particular for lack of evidence in the record to support a claim of ineffective assistance of counsel.

¶ 31 1. *Standard of Review*

¶ 32 The Act (725 ILCS 5/122-1 to 122-7 (West 2014)) provides a remedy to criminal defendants alleging a substantial violation of their constitutional rights occurred at trial. *Bribson,* 164 Ill. 2d at 242. The postconviction proceeding is a collateral attack on prior judgments and is limited to constitutional issues which were not raised and could not have been raised on direct appeal. *People v. King,* 192 Ill. 2d 189, 192, 735 N.E.2d 569, 572-73 (2000). Issues raised on

direct appeal are barred by the doctrine of *res judicata*. *People v. Williams*, 209 Ill. 2d 227, 233, 807 N.E.2d 448, 452 (2004). Issues that could have been raised on direct appeal, but were not, are forfeited. *People v. Ligon*, 239 Ill. 2d 94, 103, 940 N.E.2d 1067, 1073 (2010). Although claims of ineffective assistance of counsel are properly raised on direct appeal, when the allegation of ineffective assistance is outside the record, it may be raised in a postconviction petition for relief. *People v. Whitehead*, 169 Ill. 2d 355, 372, 662 N.E.2d 1304, 1312 (1996).

¶ 33 A criminal defendant has a constitutional right to effective assistance of counsel. U.S. Const., amend. VI. Claims alleging ineffective assistance of counsel when entering a guilty plea are governed by *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). In *Hill*, the court adopted the two-pronged test announced in *Strickland v. Washington*, 466 U.S. 668 (1984), when determining whether counsel was ineffective. A defendant must establish both (1) his attorney's performance was deficient and (2) he suffered prejudice as a result. *Hill*, 474 U.S. at 57. The second prong requires a showing of a reasonable probability, but for counsel's errors, defendant would not have pled guilty and would have insisted on going to trial. *People v. Young*, 355 Ill. App. 3d 317, 322, 822 N.E.2d 920, 924 (2005). A defendant's bare allegation to this effect is insufficient. *People v. Valdez*, 2016 IL 119860, ¶ 29, 67 N.E.3d 233. Rather, the defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Id.* (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)). This court reviews *de novo* whether counsel's actions give rise to an ineffective assistance claim. *People v. Coleman*, 2015 IL App (4th) 131045, ¶ 66, 25 N.E.3d 82.

¶ 34 2. *Sentence Credits and MSR*

¶ 35 Defendant alleges (1) he received misinformation regarding his sentence credit and (2) counsel told him he would be able to serve his MSR outside DOC custody. He maintains

he relied on this information when deciding to plead guilty. Defendant was convicted of a Class 1 felony subject to Class X sentencing due to his prior record of convictions. Therefore, defendant was subject to term of 6 to 30 years' imprisonment. The State's original offer was for a sentence of 8 years', but defense counsel counteroffered. His actual sentence of 7 years' is one year greater than the minimum. He has been convicted nine other times.

¶ 36 The awarding of good-time credit is a collateral matter not affecting the sentence imposed, for which no admonishments are required. "[w]hether a defendant will actually receive any good-conduct credit does not flow definitely, immediately, and automatically from the imposition of a sentence." *People v. Frison,* 365 Ill. App. 3d 932, 935, 851 N.E.2d 890, 893 (2006). In *Frison*, the court found Frison's claim his attorney had failed to inform him his sentence was subject to special provisions did not state the gist of a constitutional claim necessary for postconviction relief. *Id.* at 936. Many factors affect the calculation of credit and where MSR will be served, all of which are dependent upon defendant's conduct while serving his sentence, and thus are outside the control of the court.

¶ 37 Due process requires guilty pleas be voluntary and knowing. *People v. Young*, 355 Ill. App. 3d 317, 322, 822 N.E.2d 920, 924 (2005). The fact defendant alleges he received erroneous advice, even taken as true, does not necessarily destroy the voluntary nature of the plea. *People v. Pugh*, 157 Ill. 2d 1, 14, 623 N.E.2d 255, 261 (1993). A guilty plea, if made in reliance upon counsel's erroneous advice, is involuntary if defendant did not receive effective assistance of counsel. *Id.* To show defendant received ineffective assistance of counsel, he must demonstrate, but for this advice, he would have insisted on going to trial. *Young*, 355 Ill. App. 3d at 322. A guilty plea is void if induced by an unfulfilled promise, but a guilty plea made in

reliance upon advice of counsel is voluntary. *People v. Corby*, 139 Ill. App. 3d 214, 218-19, 487 N.E.2d 374, 377 (1985).

¶ 38 The representation of counsel complained of did not concern the length of sentence to be received by defendant. Rather, defendant alleges he was misinformed about the actual amount of time he would serve. Because the awarding of good-time credit and administration of the specific requirements of MSR, other than the length of MSR, is to be determined by DOC and rests on the behavior of defendant, defense counsel's statements only amount to a prediction, not a promise.

¶ 39 The record establishes it was in defendant's best interest to take the State's offer of a seven-year sentence. The evidence is against defendant, he has a history of convictions subjecting him to higher sentences, and counsel counteroffered for a better sentence and succeeded in securing the same. Nothing in the record before us convinces this court defendant should have rejected this offer and proceeded to trial. Absent such a showing, we affirm the circuit court's dismissal of defendant's postconviction petition for failure to establish a claim of ineffective assistance of counsel.

¶ 40 III. CONCLUSION

¶ 41 We affirm the circuit court's judgment. As part of our judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 42 Affirmed.