2019 IL App (1st) 153318-U

No. 1-15-3318

Order filed on September 10, 2019.

Second Division

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 6858
	)	
JAMES DOLIS,	)	The Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Coghlan concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant has not shown he would have been required to serve his term of mandatory supervised release in prison or that a decision to reject a plea agreement on that basis would have been rational, defendant did not establish the prejudice requirement to bring a successive postconviction petition.

¶ 2 Defendant James Dolis appeals the circuit court's order denying him leave to file a successive petition under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2014)). In defendant's successive petition, he alleged that his counsel at his plea

proceeding failed to inform him that, during the period of mandatory supervised release (MSR) following his sentence, he was subject to certain conditions that effectively could result in a longer prison term. On appeal, defendant asserts he has met the cause and prejudice requirements for a successive petition because he could not have raised this claim in his initial postconviction petition and he would not have pled guilty had he known he might have to serve his MSR term in prison. We affirm.

¶ 3 Defendant has had numerous proceedings in the trial court and in this court, and a review of several of those cases is necessary to frame the issue on appeal. In 2000, defendant was convicted in case No. 99 CR 5180 of home invasion and aggravated battery and was sentenced to concurrent terms of 30 years and 5 years, respectively. On appeal, this court affirmed. *People v. Dolis*, No. 1-00-0759 (2002) (unpublished order under Illinois Supreme Court Rule 23).

¶ 4 In 1999, while the original case was pending in the trial court, defendant was charged in three cases, Nos. 99 CR 9658, 99 CR 9659, and 99 CR 9660 (the 1999 cases), with offenses relating to Ellen Stefanitis, a witness in case No. 99 CR 5180. In each of the 1999 cases, defendant was charged with single counts of communicating with a witness and violating an order of protection. In No. 99 CR 9659, he was also charged with intimidation. In 2003, defendant pled guilty in the 1999 cases to all six counts of communicating with a witness and violating an order of protection. The court sentenced defendant to three five-year prison terms for communicating with a witness and three three-year prison terms for violating the protection order, to be served concurrently with each other but consecutively to his 30-year term in case No. 99 CR 5180. Along with that sentence, the trial court entered an order of protection that, *inter alia*, prohibited defendant from contacting Stefanitis and other individuals.

¶ 5 In April 2009, defendant was charged in this case with four counts of violating the order of protection entered in 2003. This appeal involves defendant's 2010 negotiated guilty plea to one of those counts.

¶ 6 On May 17, 2010, defendant pled guilty to one Class 4 felony count of violating an order of protection (720 ILCS 5/12-30(a)(1), (d) (West 2008)) by having contact with Stefanitis. Pursuant to statute, the offense was a Class 4 felony because defendant had been convicted of violating an order of protection in one of the 1999 cases (No. 99 CR 9658). The remaining three counts were nol-prossed.

¶ 7 The following exchange occurred at the plea proceeding:

"THE COURT: You'll be pleading guilty only to Count 1, and my understanding is it's one year Illinois Department of Corrections. Is that right?

ASSISTANT STATE'S ATTORNEY: Correct, Judge.

THE COURT: And that is consecutive to the following case numbers: 99 CR 5180, and then 99 CR 9658, 59 and 60. Credit -- the time you've served on this, awaiting disposition, sir, is 375 days. So your fine and costs are satisfied by the time you've served.

Do you understand what your sentence is going to be, sir?

DEFENDANT: Yes, Judge.

THE COURT: Okay."

¶ 8 Defendant told the court he pled guilty. The State summarized defendant's criminal background, including his convictions in the 1999 cases.

¶ 9 The court then addressed defendant:

> "Mr. Dolis, you understand by pleading guilty to a Class IV felony, normally when someone pleads guilty to a Class IV felony, the sentence is one to three years in the penitentiary *** and one year of mandatory supervised release. Because you have equal or greater class felony convictions within the last ten years, that penitentiary time could be extended from one to six years. Do you understand that, sir?
>
> DEFENDANT: Yes, sir."

¶ 10 The court admonished defendant of the consequences of his guilty plea. A factual basis for the plea was read into the record, namely that defendant was served in court with the 2003 order of protection and violated that order of protection by mailing letters to Stefanitis from prison between April and December 2008. The court found a factual basis existed for defendant's plea and entered judgment on the plea. The court stated the agreed sentence was one year in prison, to be served consecutive to his sentences in case No. 99 CR 5180 and the 1999 cases. The court also awarded defendant "[c]redit for the 375 days you served."

¶ 11 In 2011, defendant filed a petition for relief pursuant to section 2-1401(f) of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401(f) (West 2010)). In that petition, defendant asserted his plea was involuntary and his conviction void because the 2003 order of protection was invalid. The circuit court denied defendant's petition.

¶ 12 Defendant appealed, again arguing his conviction should be set aside because the underlying 2003 protection order was void. This court affirmed, stating that it already determined the protection order was valid in *People v. Dolis*, 2013 IL App (1st) 101027-U, and that *res judicata* barred a reconsideration of that issue. *People v. Dolis*, 2013 IL App (1st) 120774-U, ¶¶ 2-3.

¶ 13 On February 27, 2013, defendant filed a *pro se* postconviction petition, asserting his plea agreement was violated because he did not receive 375 days of sentencing credit and that his plea counsel was ineffective for telling him he would receive that credit. Counsel was appointed to represent defendant. On December 19, 2013, the circuit court dismissed defendant's petition at the second stage of postconviction review. Defendant appealed the dismissal of that petition. In 2017, this court found defendant was denied the benefit of his plea bargain because he pled guilty in exchange for one year of prison and 375 days of sentencing credit but later discovered he was not eligible for sentencing credit. This court stated one possible remedy was to modify defendant's sentence to approximate the terms of the plea agreement. This court remanded to the case to the trial court for further postconviction proceedings. *People v. Dolis*, 2017 IL App (1st) 142014-U, ¶ 5 (March 29, 2017).

¶ 14 In May 2015, while defendant's appeal from the dismissal of his postconviction petition was pending, he filed the petition that is the subject of this appeal. That filing is a combined successive postconviction petition under the Act and a petition under section 2-1401 of the Code. In that filing, defendant alleged, as relevant here, that in addition to his earlier claim that he did not receive the proper amount of sentencing credit, his plea counsel did not inform him that he "would be required to serve an MSR term or that conditions of electronic home confinement and GPS [global positioning system] would be imposed on him" as a result of his conviction for violating an order of protection. Defendant asserted he did not learn of those requirements until January 2015, when he received a written copy of the conditions of his MSR, and thus had cause for not raising the issue sooner.

¶ 15 Defendant alleged those conditions of his MSR were "NOT agreed upon." He argued he was prejudiced by counsel's failure to inform him of the MSR term because, when his three-year MSR period is combined with the 375 days of presentence custody credit the State denied him, his prison term is extended by a total of approximately four years. Defendant asserted he would not have pled guilty in 2010 had he been informed of conditions "that would keep him in prison 4 more years." Defendant also claimed his conviction was void as it was procured by fraud when he was not given the credit toward his sentence for time served.

¶ 16 Attached to defendant's petition is a "Parole or Mandatory Supervised Release Agreement" (MSR agreement). That document, dated January 14, 2015, states defendant's name and inmate number. The MSR agreement lists general "Rules of Conduct" and indicates several conditions that would apply to defendant during his MSR period. Those conditions include "Electronic Monitoring FOR DURATION" and "GPS for DURATION." Other conditions of defendant's MSR included domestic violence counseling, cultural diversity training, anger management counseling, and that defendant have no contact with an individual named in the agreement.

¶ 17 Also attached to the petition is defendant's affidavit in which he asserted he would not have pled guilty and would have proceeded to a trial had his attorney "not assured me my outdate would NOT change, that I would receive time served." Defendant averred he "did NOT agree to do an additional 4 years in prison" and was not told of any MSR term "much less of any electronic home monitoring[,] home confinement or GPS conditions" and he would not have pled guilty had he been told of those conditions.

¶ 18 On September 17, 2015, the circuit court denied defendant leave to file his successive petition. Defendant now appeals.

¶ 19 On appeal, defendant alleges he sufficiently stated a postconviction claim that his plea counsel was ineffective for failing to advise him of the consequences of his guilty plea, namely of certain conditions of his MSR and that his failure to comply with those conditions could result in a longer prison term. He claims he has met the cause and prejudice requirements for filing a successive postconviction petition.

¶ 20 The Act contemplates the filing of one postconviction petition without leave of court. *People v. Guerrero*, 2012 IL 112020, ¶ 15. Successive petitions are governed by section 122-1(f) of the Act, which limits such a filing to cases where it is necessary "to prevent a fundamental miscarriage of justice." *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). The defendant has the burden to obtain leave of court before a successive petition may be filed. *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). Our review of the circuit court's denial of leave to file a successive postconviction petition is *de novo*. *People v. Bailey*, 2017 IL 121450, ¶ 13. This court may affirm the judgment of the circuit court on any basis supported by the record. *People v. Bausch*, 2019 IL App (3d) 170001, ¶ 26.

¶ 21 A successive petition requires the defendant to meet the requirements of cause and prejudice. 725 ILCS 5/122-1(f) (West 2014). "Cause" is any objective factor that impeded the defendant's ability to raise a specific claim in the initial postconviction proceeding. *People v. Davis*, 2014 IL 115595, ¶ 14. "Prejudice" refers to an error that so infected the entire proceeding such that the resulting conviction or sentence violates due process. *Id.*; 725 ILCS 5/122-1(f) (West 2014).

¶ 22 In his successive petition, defendant contended, as he does on appeal, and the State does not contest, that he meets the cause requirement because his initial postconviction petition was filed in 2013 and he did not discover until January 2015, when he received a copy of the MSR agreement, that he would be on electronic monitoring and GPS during his entire MSR period. Defendant contended he suffered prejudice because, due to counsel's ineffectiveness, he did not "know or agree" to the three-year MSR period or its conditions. He asserted he "would NOT have pled guilty to conditions that would keep him in prison" for several more years. On appeal, he adds that counsel was ineffective for not informing him that, if he failed to comply with the MSR conditions, he might be required to serve his MSR term in prison.

¶ 23 Defendant's claim of plea counsel's allegedly deficient performance is measured under the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 694 (1984), namely that counsel performed below an objective standard of reasonableness and that, but for that error, the result of the proceeding would have been different, *i.e.*, he was prejudiced by counsel's deficient performance. *People v. Brown*, 2017 IL 121681, ¶¶ 25-26. To establish prejudice in the context of a guilty plea, the defendant must show that "a decision to reject the plea bargain would have been rational under the circumstances" of his case *Id.* ¶ 48 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)). An ineffective assistance of counsel claim can be resolved on the prejudice prong alone. *People v. Beasley*, 2017 IL App (4th) 150291, ¶ 26. For the following reasons, we find no prejudice here.

¶ 24 A term of MSR was included in defendant's sentence as a matter of law. See *Round v. Lamb*, 2017 IL 122271, ¶ 16. The MSR term for the Class 4 felony version of violating an order of protection is one year. 730 ILCS 5/5-8-1(d)(3) (West 2010). However, as mentioned by the

trial court, defendant's sentence in this case was to be served consecutive to his sentences for his previous convictions. The parties are correct that, based on the most serious offense among those for which defendant was serving consecutive terms (the Class X felony of home invasion), defendant would be required to serve a three-year MSR term after his imprisonment in this case. See *People v. Jackson*, 231 Ill. 2d 223, 227 (2008) (when a defendant is serving consecutive sentences, he must serve all consecutive prison terms and then serve the MSR term that corresponds to the most serious offense); *People v. Brown*, 2016 IL App (2d) 140458, ¶ 8; 730 ILCS 5/12-11(c) (West 2010) (home invasion is a Class X felony); 730 ILCS 5/5-8-1(d)(1) (West 2010) (three-year MSR term applies to Class X felonies other than those enumerated in the statute).

¶ 25 When an inmate is eligible for MSR, he is presented with an agreement setting forth the conditions of his release from the physical custody of the Department of Corrections. 730 ILCS 5/3-3-7 (West 2014). This is the agreement that defendant received in January 2015. While serving a period of MSR, a defendant remains in the legal custody of the Department of Corrections subject to the conditions in the MSR agreement, as set by the Prisoner Review Board. 730 ILCS 5/3-14-2(a) (West 2014). A defendant who is convicted of a violation of an order of protection under section 12-30 of the Criminal Code, as defendant was here, is placed on electronic surveillance during his MSR period. 730 ILCS 5/3-3-7(a)(17) (West 2014); see also 730 ILCS 5/5-8A-7 (West 2014) (electronic surveillance can require the use of GPS). If, after written notice to the defendant and a hearing, the Prisoner Review Board determines that a defendant violated the terms of MSR, the board can continue the MSR with or without modifying its conditions, can parole the defendant to a halfway house, or revoke the MSR and

reconfine the defendant to prison for the unserved portion of the MSR as computed by the statute and the board's regulations. 730 ILCS 5/3-3-9 (West 2014). Thus, contrary to defendant's assertion, imprisonment is only one possible ramification of a violation of an MSR condition.

¶ 26 In contending that he must serve his MSR term in prison, defendant invokes a premise known as "violating at the door," which has been described as a "legal fiction" involving the continued custody of sex offenders. See *Cordrey v. Prisoner Review Board*, 2014 IL 117155, ¶ 9; see also, *e.g.*, *People v. Tucek*, 2019 IL App (2d) 160788, ¶ 15; *People v. McDonald*, 2018 IL App (3d) 150507, ¶ 28. When a sex offender is released from custody and is thus eligible to leave the penal institution at the start of his MSR period, the law imposes numerous conditions of MSR. 730 ILCS 5/3-3-7(b-1) (West 2014). For example, a convicted sex offender may not reside near parks, schools, day care centers or other locations enumerated by statute (730 ILCS 5/3-3-7(b-1)(12) (West 2014)) and immediately violates an MSR condition if housing that meets those requirements is not secured. *Cordrey*, 2014 IL 117155, ¶ 9. As a result, the sex offender remains incarcerated pending compliance with the condition. *Id*.

¶ 27 Defendant's attempt to invoke the "violating at the door" premise is specious, as it applies to sex offenders and he offers no authority that the policy applies to him. Further, there is nothing to suggest defendant would be found to violate the MSR conditions, a matter which lies in his own control, or that he would remain in prison during his MSR period. Failure to comply with MSR conditions does not mandate reincarceration, as defendant could be ordered to continue on MSR or be paroled to a halfway house. See 730 ILCS 5/3-3-9(a) (West 2014). Thus, defendant's claim that he would serve an additional three years in prison is entirely speculative.

¶ 28 Further, defendant was charged with four counts of violating an order of protection, his violations of the order of protection were documented by letters he wrote to the subject of the protective order, and his culpability would have been proven at trial. See, *e.g.*, *Brown*, 2017 IL 121681, ¶ 49 (considering the facts of the particular case and the likelihood the defendant would have been proven guilty of the offense or offenses in question). He was subject to an extended-term sentence of six years in prison (730 ILCS 5/5-4.5-45(a) (West 2010)), but would serve only one year in prison on one count under the plea agreement. As noted previously, defendant would be required to serve a three-year MSR term for the home invasion conviction, no matter the length of his sentence for violating the order of protection. See *Jackson*, 231 Ill. 2d at 227.

¶ 29 As a result of the plea, defendant avoided a discretionary sentence of six years in the face of strong evidence against him. He cannot show he would have rationally chosen to reject the plea offer based on the remote *possibility* that he would be unable to comply with the electronic monitoring condition of his MSR, which was within his control, and, if that occurred, that he *might* remain in prison until the MSR term expired. See *Tucek*, 2019 IL App (2d) 160788, ¶ 36. Accordingly, we find defendant was not prejudiced within the meaning of *Strickland* by counsel's failure to notify him of the MSR conditions. As a result, defendant cannot satisfy the prejudice component of the cause and prejudice test, and the circuit court properly denied him leave to file the successive postconviction petition.

¶ 30 For the reasons stated above, the circuit court's order denying defendant leave to file a successive petition is affirmed.

¶ 31 Affirmed.