2019 IL App (1st) 161197-U

No. 1-16-1197

SIXTH DIVISION
MARCH 1, 2019

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.	)	Nos. 08 CR 6005
	)	08 CR 6006
	)	
ANJENAI BOLDEN,	)	Honorable
	)	Alfredo Maldonado,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The summary dismissal of defendant's postconviction petition is affirmed where his claim of trial counsel's ineffective assistance in failing to convey a plea offer is rebutted by the record.

¶ 2 Defendant Anjenai Bolden appeals the circuit court's summary dismissal of his *pro se* petition brought under the Postconviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2014)). On appeal, defendant contends his petition presents an arguable claim of the ineffective

assistance of his trial counsel based on counsel's alleged failure to advise him that he was required to serve mandatory consecutive sentences for his sex offense convictions. Defendant asserts that counsel's omission caused him to reject a plea offer involving two cases that would have resulted in a shorter prison term, and he contends that claim is not rebutted by the record. We affirm the judgment of the circuit court of Cook County.

¶ 3 In 2008, defendant was charged in case No. 08 CR 6005 with three counts each of criminal sexual assault (720 ILCS 5/12-13(A)(1) (West 2008)), aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2008)) and criminal sexual abuse (720 ILCS 5/12-15(A)(1) (West 2008)); now 720 ILCS 5/11-1.50). Those charges involved offenses against J.R., a minor and a family member of defendant, which occurred on or about February 11, 2008.

¶ 4 Also in 2008, defendant was charged in case No. 08 CR 6006 with four counts of aggravated criminal sexual assault (720 ILCS 5/12-14 (West 2008); now 720 ILCS 5/11-1.30), among other charges. All of those charges involved offenses against S.O., a minor, which occurred on or about February 27, 2008.

¶ 5 Following a bench trial in January 2012, defendant was convicted in case No. 08 CR 6006 of two counts of aggravated criminal sexual assault. On September 27, 2012, defendant was sentenced in case No. 08 CR 6006 to concurrent terms of 16 years and 8 years in prison.[1] After the trial court imposed that sentence, the prosecutor noted that defendant had two other pending cases and said the State would proceed on case No. 08 CR 6004 as the elected case.

¶ 6 On December 12, 2012, defense counsel informed the court "there has been an offer" that he needed to discuss with defendant. On December 17, 2012, defense counsel told the court:

[1] Defendant's 16-year term included a 10-year sentence enhancement for the use of a dangerous weapon other than a firearm.

"The defendant has two matters before the court. The State made an offer on one of them, and it was kind of a package deal for both. But my client has rejected the offer so we have to try these."

¶ 7 The State indicated it would proceed on case No. 08 CR 6005 as the elected case.

¶ 8 In January 2013, the State filed a motion in case No. 08 CR 6005 to admit proof of defendant's other crimes or conduct. That motion alleged that in case No. 08 CR 6004, defendant was charged with the 2007 criminal sexual assault of a 23-year-old victim. The trial court granted the State's motion to admit in defendant's trial in case No. 08 CR 6005, evidence of defendant's acts underlying the charges in case No. 08 CR 6004. The court set a trial date for case No. 08 CR 6005.

¶ 9 On February 20, 2013, after the parties discussed a new trial date for case No. 08 CR 6005, the following exchange occurred:

"ASSISTANT STATE'S ATTORNEY: Based on the posture of the case, we tendered an offer to the defendant on a prior court date. That offer is now revoked.

THE COURT: All right. Is this a *Curry* situation that I need to admonish him?

DEFENSE COUNSEL: No, he knows the offer.

DEFENDANT: What was it?

DEFENSE COUNSEL: Eight years for the other -- for one [case No. 08 CR 6004] and then they dropped the one against [defendant's family member] [case No. 08 CR 6005] and then it

> was eight years consecutive to what you have [defendant's already imposed sentence in case No. 08 CR 6006].
>
> DEFENDANT: For both cases? Eight years for both cases?
>
> DEFENSE COUNSEL: Right, right.
>
> DEFENDANT: I'm not taking that. I didn't understand the offer.
>
> THE COURT: All right. So the record will reflect based on what I heard the offer was eight years for the two remaining cases --
>
> ASSISTANT STATE'S ATTORNEY: That's correct. We were going to drop one case, eight years on one of the two remaining cases, drop one on consecutive.
>
> THE COURT: Mr. Bolton, you do not wish to accept that offer?
>
> DEFENDANT: Of course not."

¶ 10 Following a bench trial in June 2013, defendant was convicted in case No. 08 CR 6005 of one count of criminal sexual assault and one count of aggravated criminal sexual abuse.

¶ 11 In October 2013, the trial court held a hearing in case No. 08 CR 6005 on defendant's written claims of trial counsel's ineffectiveness pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). The court asked defendant about his contention that his counsel requested additional payment if defendant elected a jury trial in case No. 08 CR 6005 as opposed to a bench trial. Defendant told the court: "From my understanding we really didn't think that we would probably go to trial on this case and that we thought we would probably only go to trial on the one case."

¶ 12 The court asked defendant why he thought he would not go to trial on case No. 08 CR 6005 (referring to the case by the last name of the minor victim). Defendant responded: "Because

of the offer that the State had made." Defendant said the State had offered him "six years at 50 percent on the [last name of victim beginning with G] case" and had offered to drop case No. 08 CR 6005.

¶ 13 The court asked defense counsel to address defendant's contention about his fees and questioned defendant and counsel about defendant's *Krankel* remaining claims. The court denied defendant's claims without appointing new counsel.

¶ 14 The trial court sentenced defendant in case No. 08 CR 6005 to consecutive terms of five years for criminal sexual assault and four years for aggravated criminal sexual abuse. The court also ordered those terms to be served consecutive to defendant's 16-year term in case No. 08 CR 6006. Immediately following defendant's sentencing in No. 08 CR 6005, the State *nol-prossed* case No. 08 CR 6004.

¶ 15 Subsequently, on direct appeal in case No. 08 CR 6006, this court affirmed defendant's conviction on one count of aggravated criminal sexual assault but vacated defendant's conviction and 8-year sentence on the second count of the same offense. This court stated that because only a single act of penetration was proven at trial, only one of defendant's convictions for aggravated criminal sexual assault could stand under the one-act, one-crime rule. *People v. Bolden*, 2015 IL App (1st) 123367-U, ¶¶ 45-46. However, the length of defendant's total sentence in case No. 08 CR 6006 was not affected because the 8-year term imposed for the vacated count was concurrent with the 16-year sentence on the affirmed count.

¶ 16 Similarly, on direct appeal in case No. 08 CR 6005, defendant's conviction for aggravated criminal sexual abuse was vacated under the one-act, one-crime rule, along with its four-year consecutive sentence, pursuant to the parties' agreed motion for summary disposition.

People v. Bolden, No. 1-14-1443 (2015) (dispositional order). Defendant's conviction and five-year sentence for criminal sexual assault in case No. 08 CR 6005 were affirmed.

¶ 17 On December 15, 2015, defendant filed a *pro se* postconviction petition regarding cases Nos. 08 CR 6005 and 08 CR 6006. That petition is the subject of this appeal. In that filing, defendant asserted that he was denied effective assistance of trial counsel during plea negotiations because counsel did not advise him that he was subject to mandatory consecutive sentences in the two cases which are the subject of the postconviction petition. He claimed that he therefore could not knowingly and intelligently consider a plea offer from the State. Defendant asserted that the record establishes that "the State made an offer that would have disposed of both of the cases at bar, *i.e.*, case Nos. 08 CR 6005 and 08 CR 6006." He argued that had counsel advised him that his sentences had to be served consecutively, he "likely would have accepted the State's offer of 12 years and disposed of" those cases but instead is serving 21 years in prison for those two cases.

¶ 18 In support of his claims, defendant attached to his petition transcripts of the pretrial proceedings in case No. 08 CR 6005 which were heard on December 12 and December 17, 2012. He asserts that those transcripts establish that the State made an offer described as a "package deal for both" cases and that he rejected the offer. Defendant also attached to his petition, his own affidavit attesting that he was never told that he would have to serve mandatory consecutive sentences. On March 11, 2016, the circuit court dismissed defendant's *pro se* petition as frivolous and patently without merit.

¶ 19 On appeal, defendant contends that his postconviction petition presents an arguable claim of his trial counsel's ineffectiveness in plea negotiations. He argues that his counsel did not tell

him that he would have to serve mandatory consecutive sentences if convicted in cases Nos. 08 CR 6005 and 08 CR 6006. He maintains that as a result of his counsel's failure to advise him regarding his potential sentence, he rejected a 12-year plea offer made by the State and is now serving a prison term of 21 years in those cases. Defendant asserts that his claim is not positively rebutted by the record.

¶ 20 The State initially responds that defendant forfeited this claim by not raising it in his direct appeal in case Nos. 08 CR 6005 or 08 CR 6006. Moreover, the State maintains the court transcripts referenced by defendant rebut his claim that he rejected a favorable plea deal in those cases.

¶ 21 First, to address the State's forfeiture argument, the crux of defendant's claim is that trial counsel did not explain the manner in which his sentences would be served. The State offered him a plea deal that he did not accept because he did not have a full understanding of the offer. Claims regarding plea negotiations are often based on conversations between a defendant and counsel that occur outside the record on appeal or are based on allegations that defense counsel failed to convey something to the defendant; thus, the principles of forfeiture do not apply. *People v. Mujica*, 2016 IL App (2d) 140435, ¶ 13; *People v. Barkes*, 399 Ill. App. 3d 980, 986 (2010).

¶ 22 The Act provides a criminal defendant with a remedy for a substantial violation of constitutional rights at trial or at sentencing. *People v. Allen*, 2015 IL 113135, ¶ 20. At this first stage of postconviction proceedings, the defendant need only set forth an arguable constitutional claim. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). If the petition meets the requirement of an arguable claim, it advances to the second stage of postconviction review, where the circuit court

considers its legal sufficiency. *People v. Domagala*, 2013 IL 113688, ¶ 35. The circuit court's order summarily dismissing a postconviction petition is reviewed *de novo*. *People v. Cathey*, 2012 IL 111746, ¶ 17.

¶ 23 The circuit court may dismiss a postconviction petition at the first stage of proceedings if the allegations therein, taken as true, render the petition frivolous or patently without merit, meaning that it lacks an arguable basis in either fact or law. 725 ILCS 5/122-2.1(a)(2) (West 2014); *Hodges,* 234 Ill. 2d at 12. A petition lacks an arguable basis either in law or in fact if it is based on an indisputably meritless legal theory or based on fanciful or delusional factual allegations. *Hodges*, 234 Ill. 2d at 16. An "example of an indisputably meritless legal theory is one which is completely contradicted by the record." *Id*. at 16-17. At this initial stage of postconviction proceedings, facts alleged in a petition are considered true unless they are positively rebutted by the trial record. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998).

¶ 24 A defendant's sixth amendment right to the effective assistance of counsel applies to the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012*); People v. Hale*, 2013 IL 113140, ¶ 15. Whether to accept or reject a plea offer is a decision that can only be made by the defendant. *Barkes*, 399 Ill. App. 3d at 991. Thus, a criminal defendant has the constitutional right to be reasonably informed of the direct consequences of accepting or rejecting a plea offer. *Hale*, 2013 IL 113140, ¶ 16. Defense counsel fails to adequately explain the potential risk between standing trial and accepting a plea offer if counsel does not inform the defendant that multiple convictions in his case would carry mandatory consecutive sentences. *People v. Curry*, 178 Ill. 2d 509, 529 (1997). Relevant to the instant case, is the fact that the trial court is required to impose consecutive sentences where a defendant is convicted of multiple offenses including one

of several enumerated sex offenses. 730 ILCS 5/5-8-4(a)(ii) (West 2008) (now 730 ILCS 5/5-8-4(d)(2) (West 2014)).

¶ 25 After carefully reviewing the record, we find that the trial court did not err in summarily dismissing defendant's postconviction petition where his allegation of ineffective assistance of counsel is rebutted by the record. Defendant alleges in his petition that the record "provides [] facts which establish that the State made an offer that would have disposed of both of the cases at bar, *i.e.*, case Nos. 08 CR 6005 and 08 CR 6006." Defendant does not specify when that offer was made. In support of his claims, defendant attached to his petition, the transcripts of the proceedings in case No. 08 CR 6005 which took place on December 12 and December 17, 2012. On the latter date, defense counsel stated defendant had "two matters before the court" and the "State made an offer on one of them" that was "kind of a package deal for both." Counsel told the court defendant had "rejected the offer so we have to try these cases."

¶ 26 The December 2012 court dates in case No. 08 CR 6005 took place after defendant had been convicted and sentenced in case No. 08 CR 6006 in September 2012. Therefore, in December 2012, defense counsel could not have been referring to any plea offer made in case No. 08 CR 6006. Any plea discussions in December 2012 could only have involved the cases that were still pending against defendant at that point, and those cases were Nos. 08 CR 6005 and 08 CR 6004 (which was ultimately *nol-prossed*). The summary dismissal of a postconviction petition is proper where the record rebuts the allegations in the petition. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001). The record affirmatively rebuts defendant's claim that, based on the December 2012 transcripts, he was offered a plea deal in cases Nos. 08 CR 6006 and 08 CR 6005.

¶ 27 Acknowledging that timeline, defendant nevertheless maintains that his postconviction petition must proceed to a second-stage review because those transcripts "do not positively show that the State did not make him a 12-year plea offer." He contends that a plea offer in case Nos. 08 CR 6006 and 08 CR 6005 "could have been made" at some time between May 2011 (when trial counsel was hired in case No. 08 CR 6006 to take over the case from a public defender) and January 2012 (when his trial began in case No. 08 CR 6006).

¶ 28 Defendant's contentions relating to his postconviction petition are limited to the claims that he made in the petition itself. See *People v. Jones*, 213 Ill. 2d 498, 505 (2004) (claims that are not raised in a postconviction petition cannot be argued for the first time on appeal). Defendant based the claim in his petition on the transcripts of the December 2012 proceedings. Those reports of proceedings contradict defendant's contention that he was presented with a plea offer for both cases Nos. 08 CR 6006 and 08 CR 6005 during the pendency of the proceedings in case No. 08 CR 6006.

¶ 29 Defendant further asserts that the arguments made in October 2013 during the trial court's *Krankel* inquiry in case No. 08 CR 6005 do not positively rebut his claims that he received a 12-year plea offer for both cases Nos. 08 CR 6006 and 08 CR 6005. Again, that was not part of the initial claim made in defendant's petition. *Id*. Moreover, the discussion at the *Krankel* hearing did not involve a plea offer in the two cases at issue. Defendant told the court that he did not think he would go to trial on "this case," meaning case No. 08 CR 6005. When the court asked why defendant thought that the case wouldn't be tried, defendant responded the State had offered him "six years at 50 percent" in a case that was not case No. 08 CR 6006

(based on the victim's name stated on the record) and had also offered to *nol-pros* case No. 08 CR 6005.

¶ 30 In conclusion, defendant's claim that he was presented with a plea offer in case No. 08 CR 6006 for both that case and case No. 08 CR 6005, as a package deal, is affirmatively rebutted by the record because the proceedings to which he refers took place *after* he had already been sentenced in case No. 08 CR 6006.

¶ 31 Accordingly, the summary dismissal of defendant's postconviction petition is affirmed.

¶ 32 Affirmed.