2019 IL App (1st) 161406-U

No. 1-16-1406

Order filed September 27, 2019

Fifth 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. 12 CR 16761
	)	
DORONTE JONES,	)	Honorable
	)	Alfredo Maldonado,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: The summary dismissal of defendant's *pro se* postconviction petition is affirmed, where the ineffective assistance claim that defendant raises on appeal was not raised before the circuit court.

¶ 2 Defendant Doronte Jones appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). On appeal, defendant argues that the circuit court erred in summarily dismissing his *pro se* postconviction petition, where he stated an arguable ineffective assistance claim against counsel

on direct appeal, who allegedly misled him into dismissing his direct appeal by telling him there were no viable issues. Defendant alleges that he had a meritorious claim that could have been raised on direct appeal, in that he allegedly submitted to the circuit court a handwritten letter alleging ineffective assistance, which entitled him to a remand for a hearing. We affirm the dismissal of defendant's *pro se* postconviction petition.[1]

¶ 3 Defendant was charged by information with two counts of attempt first degree murder (720 ILCS 5/8-4(a) (West 2012); 720 ILCS 5/9-1(a)(1) (West 2012)), one count of aggravated battery (720 ILCS 5/12-3.05(e)(1) (West 2010)), and one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)), arising from an incident in Chicago on August 5, 2012.

¶ 4 We set forth a brief overview of the facts adduced at trial. Monika Bailey testified that she was in a relationship with defendant until 2010, and that defendant was the father of her two children. She had been in a relationship with Diontae McKinley since the summer of 2012. On August 3, 2012, she allowed her children to speak with defendant on the phone. From then until August 5, 2012, defendant repeatedly called Ms. Bailey and sent her text messages, telling Ms. Bailey she "broke [his] heart," and accusing Ms. Bailey of making her children tell defendant that she was dating another man.

¶ 5 Mr. McKinley testified that, on the afternoon of August 5, 2012, after dropping Ms. Bailey off at the train and borrowing her phone, he "confront[ed]" defendant at a gas station and had an altercation with him. Later, Mr. McKinley received text messages on Ms. Bailey's phone

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

threatening him, and Mr. McKinley identified himself to the sender. Mr. McKinley then received text messages referring to the altercation at the gas station and stating, "On my way down there."

¶ 6 At about 10 p.m., Mr. McKinley drove to pick up Ms. Bailey. While on the Dan Ryan Expressway, defendant shot a firearm at Mr. McKinley twice while hanging out of a vehicle's rear window. Mr. McKinley felt pain in his left thigh, and eventually exited the Dan Ryan, pulled over, and called the police.

¶ 7 The police arrived, and Mr. McKinley found that the vehicle's left front tire was flat, and that there were bullet holes in the vehicle's quarter front panel and front left door. Mr. McKinley also found "[t]wo slugs from bullet shots" inside his vehicle, and had a "graze wound" from a gunshot on his left upper thigh. The next day, Mr. McKinley went to the police station and identified defendant in a lineup.

¶ 8 The State presented a number of witnesses corroborating Mr. McKinley's testimony regarding the damage to his vehicle and the injury in his leg. Charles Bradley, an Illinois state police trooper, added that the two discharged bullets found inside the vehicle were inventoried. Gina Giglio, an Illinois state police forensic scientist, also testified that the two bullets recovered from the vehicle were .45 caliber and were fired from the same firearm.

¶ 9 Illinois state police officer Stano Domma testified that on August 6, 2012, defendant was arrested in his presence. At the police station, Officer Domma and special agent Eilleen Payonk Mirandized defendant and asked him about the events of August 5, 2012. Defendant initially told them that he went "to hang out with some friends" on a street corner from 6 p.m. to 2:30 a.m. Officer Domma and Agent Payonk reviewed text messages on Ms. Bailey's phone, Mirandized defendant again, and confronted him with the text messages. Defendant responded, "You got

me," and said he would tell them "everything." Defendant then told them that he borrowed "a .45 calibur" firearm and "a blue Malibu" from a friend, and saw Mr. McKinley drive past him. He followed Mr. McKinley, pulled up next to him, fired two shots at him, and tried to fire more, but his firearm "jammed."

¶ 10 Assistant state's attorney Jennifer Rutkowski testified that, while Agent Payonk was present, she Mirandized and interviewed defendant. Defendant confessed to the shooting once again, but said he did not want to sign a statement.

¶ 11 The jury found defendant guilty of aggravated discharge of a firearm and aggravated battery with a firearm, but was split on the attempt first degree murder counts. The trial court declared a mistrial as to the attempt first degree murder counts.

¶ 12 On March 29, 2013, the trial court merged defendant's conviction for aggravated discharge of a firearm into his conviction for aggravated battery with a firearm, and sentenced defendant to 13 years' imprisonment for aggravated battery with a firearm.

¶ 13 Then, pursuant to a plea agreement, defendant pled guilty to one count of attempt first degree murder, and received a sentence of 13 years' imprisonment, to run concurrently with his sentence for aggravated battery. During the plea proceedings, the parties entered a stipulation that if the case went to trial, Mr. McKinley would testify that on August 5, 2012, "defendant pointed a dangerous weapon at him while he was driving down the Dan Ryan Expressway." Defendant confirmed to the court that he did not have any questions regarding the plea agreement. He also confirmed that nobody threatened him or promised him anything to plead guilty, and that he was pleading guilty of his own free will. The State nol-prossed the remaining attempt first degree murder count.

¶ 14 The trial court explained to defendant that within 30 days, he could file a written motion for leave to withdraw his guilty plea. The court further stated that if defendant could not afford an attorney to assist him in bringing the motion, an attorney would be provided. Additionally, the court explained that if it granted the motion, the State could reinstate the nol-prossed attempt first degree murder charge. Defendant confirmed that he understood his right to appeal, and stated that he did not have any questions.

¶ 15 The record before us contains a *pro se* handwritten letter signed by defendant and dated April 14, 2013. This letter is not file-stamped, and states, "The reason I am filing this appeal is because of [ineffective] assistance of counsel, and lack of evidence. The [e]vidence does not support such conviction."

¶ 16 On May 20, 2013, defendant filed a notice of appeal and certificate of service. On July 16, 2014, this court entered an order granting defendant's motion to dismiss his appeal.[2]

¶ 17 On March 6, 2015, the circuit court received defendant's *pro se* motion to reconsider his guilty plea. The motion alleged that defendant received ineffective assistance of counsel, who "mis[led]" him, and that the evidence at trial was insufficient to establish his intent. On October 16, 2015, the circuit court denied defendant's *pro se* motion, stating it was filed "beyond the 30 days by a year."

¶ 18 On January 27, 2016, defendant filed a *pro se* postconviction petition alleging, *inter alia*, that counsel on direct appeal was ineffective for "mislead[ing]" him "to withdraw his appeal," and that he was "denied his right to a direct appeal." He alleged that counsel on direct appeal misled him "to believe that he had no issues or claims to be raised," and that "counsel failed to

[2] Defendant's motion to dismiss his direct appeal is not contained in the record.

prepare a brief" alleging the other claims raised in his petition. Defendant also claimed that he only spoke with counsel on direct appeal through mail. According to defendant, he "signed an affidavit provided by [counsel on direct appeal] to withdraw his appeal," but lacked "the knowledge and [appreciation] of its consequences." Further, defendant claimed that the trial court wrongfully accepted his guilty plea without establishing the factual basis for the charge, since the parties only stipulated that he pointed a firearm at Mr. McKinley. The petition did not allege that the April 14, 2013, letter constituted a post-plea motion, or that he was entitled to relief based on the letter.

¶ 19 In support of his petition, defendant attached an affidavit alleging that his petition raised "meritorious" claims that "should have been raised on [his] direct appeal." The affidavit additionally alleged that defendant "was [misled] by [counsel on direct appeal] to sign an affidavit mailed to me, to withdraw my appeal." According to the affidavit, defendant "simply did not understand any of the consequences of signing such a document." Defendant did not attach the motion to dismiss his direct appeal, the alleged affidavit that he signed withdrawing his direct appeal, or any documentation of the communications he allegedly had by mail with counsel on direct appeal.

¶ 20 On April 1, 2016, the circuit court summarily dismissed defendant's *pro se* postconviction petition. The court found, in relevant part, that defendant did not raise any meritorious issues that should have been raised on direct appeal, and that defendant did not "allege any way in which [counsel on direct appeal] misled him." The court additionally noted that "[t]he record reflects that petitioner knowingly and voluntarily withdrew his appeal." As to defendant's challenge to his guilty plea, the court stated that defendant could only attack the

voluntary and knowing nature of his plea, and that he had waived any errors or irregularities of the plea that were not jurisdictional.

¶ 21 On appeal, defendant asserts that the circuit court erred in summarily dismissing his *pro se* postconviction petition, where he stated an arguable ineffective assistance claim against counsel on direct appeal, who misled him into dismissing his direct appeal by telling him there were no viable issues. Defendant alleges that counsel could have raised a viable claim on direct appeal based on the handwritten letter dated April 14, 2013, in which he stated he was "filing this appeal *** because of [ineffective] assistance of counsel, and lack of evidence." According to defendant, this letter was "a rudimentary but timely request to file a post-trial motion" alleging ineffective assistance, which entitled him to a remand for a hearing.

¶ 22 Under the Act, persons under criminal sentence "can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); 725 ILCS 5/122-1 *et seq.* (West 2016). 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." *People v. Brown*, 236 Ill. 2d 175, 184 (2010). This standard presents a "low threshold," as the petitioner "need present only a limited amount of detail, and is not required to include legal argument or citation to legal authority." (Internal quotation marks omitted.) *Id.* A *pro se* petitioner need only "allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act." *Hodges*, 234 Ill. 2d at 9.

¶ 23 A circuit court may summarily dismiss a petition through a written order where it finds the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). A

pro se petition is "frivolous or is patently without merit" only where it "has no arguable basis either in law or in fact." (Internal quotation marks omitted.) *Hodges*, 234 Ill. 2d at 16. A petition lacks an arguable basis in law or fact where it "is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* "An example of an indisputably meritless legal theory is one that is completely contradicted by the record," and "[f]anciful factual allegations include those that are fantastic or delusional." (Internal quotation marks omitted.) *People v. White*, 2014 IL App (1st) 130007, ¶ 18. "The summary dismissal of a postconviction petition is reviewed *de novo*." *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 24 Under section 122-3 of the Act, "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2016). In an appeal from postconviction proceedings, "the concept of fundamental fairness" does not "permit an appellate court to review errors never considered by the trial court in the course of its ruling." (Internal quotation marks omitted.) *People v. Cole*, 2012 IL App (1st) 102499, ¶ 15. Thus, where a defendant on postconviction appeal fails to include an issue in his or her petition, we are "not free, as [the Supreme Court] is under its supervisory authority, to excuse" the "waiver" of that issue. *Jones*, 213 Ill. 2d 498, 508 (2004). The Supreme Court has "only provided for successive petitions as the sole exception to the waiver language of section 122-3 ***." *Jones*, 213 Ill. 2d at 505-06.

¶ 25 To prevail on an ineffective assistance claim, a defendant must establish that (1) "counsel's performance was objectively unreasonable under prevailing professional norms," and (2) "there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Cathey*, 2012 IL 111746, ¶ 23 (quoting

Strickland v. Washington, 466 U.S. 668, 694 (1984)). When alleging an ineffective assistance claim at the first stage of postconviction proceedings, merely alleging one was denied the right to effective assistance of counsel, with nothing more, is insufficient to "satisfy even the low threshold of presenting 'a modest amount of detail.' " *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 74 (quoting *Jones*, 213 Ill. 2d at 504).

¶ 26 The State asserts that defendant forfeited the issue on postconviction appeal by failing to allege it in his postconviction petition. In that petition, defendant alleged that counsel on direct appeal misled him into believing there were no issues of merit to raise on direct appeal, when counsel should have raised the other issues alleged in defendant's postconviction petition. In his reply brief, defendant asserts that we must liberally construe this allegation to include the ineffective assistance claim before us. Yet, as the State notes, defendant never alleged in his petition that he was entitled to a remand for a hearing based on the April 14, 2013, letter.

¶ 27 Our finding in *People v. Reed*, 2014 IL App (1st) 122610, is instructive. In *Reed*, the defendant was found guilty of first degree murder, armed robbery, and residential burglary. *Id.* ¶ 1. We affirmed the defendant's conviction for murder, but reversed the other convictions and sentences. *Id.* In his *pro se* postconviction petition, the defendant alleged in pertinent part that counsel on direct appeal was ineffective for failing to challenge the admissibility of an oral statement defendant made as hearsay. *Id.* ¶¶ 28, 59. The circuit court summarily dismissed his petition. *Id.* ¶ 32. On postconviction appeal, the defendant argued that counsel on direct appeal was "ineffective in failing to argue the prosecutors and police failed to honor [the defendant's] requests to remain silent and for counsel, and interrogated him in violation of his fifth amendment rights." *Id.* ¶ 41.

¶ 28 After an extensive analysis of this court's rulings following *Jones*, we found that the defendant in *Reed* forfeited the issue raised on postconviction appeal. *Id.* ¶ 82. We stated that although the postconviction petition and the postconviction appeal "nominally address[ed]" the same oral statement made by the defendant, the petition asserted a claim based on hearsay, while the appeal asserted a claim on constitutional grounds. *Id.* ¶¶ 59. We noted that these claims were "distinctly different," and that to construe them as the same claim "would require more than liberal construction." *Id.* ¶¶ 60-61.

¶ 29 Here, defendant's postconviction petition and postconviction appeal both "nominally address[ed]" an assertion that counsel on direct appeal misled defendant into dismissing his appeal, by telling him that he had no meritorious issues to raise on direct appeal. *Id.*¶ 59. However, defendant's petition did not allege that he would have been entitled to a remand for a hearing based on the ineffective assistance claim in his April 14, 2013, letter. He also did not allege in his petition that the circuit court should have interpreted the letter to be a post-plea motion, or that the court should have allowed him to withdraw the plea. Defendant's petition only challenged the guilty plea on the ground that the circuit court wrongfully accepted it, where the plea was supported by insufficient stipulated facts. As in *Reed*, construing the allegations in defendant's petition to be the same claim as the one before us on postconviction appeal "would require more than liberal construction." *Id.* ¶ 61; see also *People v. Mars*, 2012 IL App (2d) 110695, ¶¶ 11, 31, 33 (finding the defendant forfeited the issue on postconviction appeal, where the ineffective assistance claims asserted in the postconviction petition and on postconviction appeal respectively concerned different counsel and different underlying subject matter).

¶ 30 Defendant failed to allege the issue before us in his postconviction petition, and instead raises it for the first time on appeal. As the Supreme Court has held, we are not free to excuse this forfeiture. *Jones*, 213 Ill. 2d at 508. Accordingly, we do not consider whether counsel on direct appeal was ineffective for misleading defendant into dismissing his direct appeal, where counsel purportedly failed to raise a claim that defendant was entitled to a remand for a hearing, based on an ineffective assistance claim in the April 14, 2013, letter.

¶ 31 We also note that even had defendant not forfeited the issue, he nonetheless failed to sufficiently support his claim with evidence. Under section 122-2 of the Act, a petitioner must attach "affidavits, records, or other evidence supporting its allegations," or "state why the same are not attached." 725 ILCS 5/122-2 (West 2016). The purpose of this requirement is to "establish that a petition's allegations are capable of objective or independent corroboration." *Hodges*, 234 Ill. 2d at 10. While a *pro se* petition need not allege "a complete and detailed factual recitation," it still must "set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent." (Internal quotation marks omitted.) *Id.*

¶ 32 Here, defendant alleged in his postconviction petition that he only communicated with his counsel on direct appeal through mail, and that counsel misled him into believing he had no claims of merit to raise on direct appeal. As a result, defendant allegedly signed an affidavit to withdraw his appeal, and lacked the "knowledge and [appreciation] of its consequences." However, defendant did not attach to his petition the motion to dismiss his direct appeal, the affidavit that counsel on direct appeal allegedly made him sign, or any documents reflecting the communications with which counsel on direct appeal misled him. Additionally, defendant did

not allege why this evidence was unavailable to him. Accordingly, even had defendant not forfeited the issue now on appeal, he nonetheless failed to adequately support his petition with evidence in compliance with section 122-2 of the Act. 725 ILCS 5/122-2 (West 2016).

¶ 33 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 34 Affirmed.