2019 IL App (1st) 170021-U

No. 1-17-0021

Order filed August 7, 2019

Third 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. 08 CR 12655
	)	
C. DEMETRIUS HICKS, Sr., a/k/a CARL HICKS,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed. Summary dismissal of defendant's *pro se* postconviction petition was not error. Defendant failed to establish his claim of ineffective assistance of appellate counsel for failure to challenge his sentence on direct appeal.

¶ 2 Defendant C. Demetrius Hicks, a/k/a Carl Hicks, appeals 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)). He says the trial court erroneously dismissed his petition, wherein he claimed that appellate counsel was ineffective for failing to challenge his 26-year sentence for robbery as

excessive on direct appeal. Though we agree the sentence was substantial, we affirm the trial court's judgment.[1]

¶ 3 Following a jury trial, defendant was convicted of robbery and sentenced, based on his criminal history, as a Class X offender to 26 years' imprisonment. We affirmed on direct appeal. See *People v. Hicks*, 2015 IL App (1st) 120035. Because we summarized the evidence on direct appeal, we recite only those facts necessary to our disposition.

¶ 4 Defendant was charged with armed robbery. At trial, the evidence established that defendant robbed a candy store and, after struggling with the cashier, took money from the register. The State's witnesses testified that defendant used a gun during the robbery. Defendant testified that he took money from the register but denied using a gun or using force against the cashier. The jury found defendant guilty of robbery.

¶ 5 Prior to sentencing, defendant wrote the trial court a letter, addressing it to "His Majesty." Defendant stated that he was a former drug addict and thus had no one to write letters to the court in mitigation on his behalf. He wrote that he was "a product of" his abusive childhood but expressed remorse for the robbery and detailed various academic accomplishments he achieved during incarceration. At the same time, defendant claimed the charges against him were "trumped up." Finally, defendant wrote that he planned to get a degree in social work and substance abuse counseling.

¶ 6 At defendant's sentencing hearing, the State argued in aggravation that defendant had "numerous" previous felonies, including convictions for theft from the person, robbery, home invasion, and residential burglary. Further, the State noted that defendant had been out of prison

[1] Defendant's petition and notice of appeal list his name as "C. Demetrius Hicks," but the record on appeal and defendant's direct appeal list his name as "Carl Hicks."

for only a few months before committing the robbery in question. The State also pointed out that defendant testified at trial that he was a drug addict and "would do anything" to get drugs.

¶ 7 In mitigation, defense counsel referenced the letter defendant wrote to the court and argued that defendant was a drug addict, which alienated him "from everybody in the world who cared for him." Counsel further pointed out that defendant demonstrated rehabilitative potential by obtaining his General Education Diploma (GED) while incarcerated and receiving a scholarship for a community college. Counsel emphasized defendant's remorse and argued against the maximum sentence.

¶ 8 In allocution, defendant reiterated much of what he included in his letter to the court. He again expressed remorse for his "past acts of stupidity" and stated his abusive childhood caused him to become a drug addict.

¶ 9 The court sentenced defendant, as a Class X offender, to 26 years' imprisonment. In imposing sentence, the court stated it considered the statutory factors in aggravation and mitigation, the presentence investigation (PSI) report, defendant's criminal and childhood histories, and "the eloquent argument of [defense counsel] and of [defendant]." The court also noted defendant's reference to his GED scores and that it considered defendant's letter. With respect to the letter, the court stated defendant's use of "Dear His Majesty" made it sound like he was "conning" the court. The court later stated, "One of the factors to be considered is the defendant's potential for rehabilitation. I'm not sure that I really see that beyond a con job."

¶ 10 Defense counsel filed a motion to reconsider the sentence. The court denied the motion, noting it did not impose the maximum sentence, "recognizing a possible potential for rehabilitation."

¶ 11 On direct appeal, defendant: (1) challenged the sufficiency of the evidence to sustain his conviction; (2) argued that the trial court erred in *sua sponte* instructing the jury as to the offense of robbery; and (3) alleged ineffective assistance of trial counsel based on counsel's failure to tender a definition of "force" in response to a jury question. We affirmed. *Hicks,* 2015 IL App (1st) 120035.

¶ 12 On April 12, 2016, defendant filed a *pro se* postconviction petition under the Act. In his petition, defendant alleged, *inter alia*, that appellate counsel was ineffective for failing to challenge his 26-year sentence on direct appeal as "extreme" and "unwarranted by the crime."

¶ 13 On the same date, defendant also filed a *pro se* "motion for recusal of trial judge," requesting a different judge for the postconviction proceedings than the one he had for trial, because trial counsel told defendant that that judge did not like him. Specifically, counsel said "I don't mean that he doesn't like you, as a person, but when you dismissed your last attorney you caused his docket to be jammed—no judge likes for their docket to be backed up. That's what I meant by my statement." Defendant asserted that the court sentenced him to "3 ½ [times] maximum robbery sentences" due to the court's "personal opinion" of him.

¶ 14 On April 25, 2016, defendant mailed a *pro se* motion to amend his postconviction petition. In his attached amended petition, as relevant here, defendant augmented his claim of ineffective assistance of appellate counsel for failing to challenge his sentence. Defendant claimed the trial court sentenced him to a "lengthy" term, and called him a " 'con' artist while maintaining a willful blindness" to defendant's rehabilitative potential and the fact that his accusers were "parasitic poisoners and genocidal terrorists engaging in the utter destruction to a segment of society's citizenry and communities." Defendant claimed his sentence should have

been based on the "specific crime he was convicted of" rather than "penalizing [him] for past convictions for which he'd already been penalized for."

¶ 15 On June 24, 2016, the trial court summarily dismissed defendant's petition as frivolous and patently without merit and denied his motion for substitution of judge. This appeal follows.

¶ 16 On appeal, defendant claims the trial court erred in summarily dismissing his postconviction petition, as he made an arguable claim of ineffective assistance of appellate counsel based on counsel's failure to challenge his 26-year sentence as excessive on direct appeal. He also seeks the opportunity on remand to seek recusal of the trial judge who presided over his trial and summarily dismissed his petition.

¶ 17 The Act permits criminal defendants to challenge their convictions or sentences on grounds of constitutional violations. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). During first-stage postconviction proceedings, the trial court must independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition may be summarily dismissed as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009); *People v. Tate*, 2012 IL 112214, ¶ 9.

¶ 18 In the first stage of proceedings, a petition need only present the gist of a constitutional claim. *People v. Allen*, 2015 IL 113135, ¶ 24. Presenting a "gist" of a constitutional claim is a low threshold, and only limited detail is necessary for the petition to proceed beyond the first stage of postconviction review, as opposed to setting forth a claim in its entirety. *Hodges*, 234 Ill. 2d at 9; *People v. Williams*, 364 Ill. App. 3d 1017, 1022 (2006). The defendant 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. We review the summary dismissal of a petition *de novo. Id.*

¶ 19 The constitutional right to effective assistance of counsel applies to counsel on a direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Claims of ineffective assistance of appellate counsel are governed by the same test used in assessing claims of ineffective assistance of trial counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 20 In the context of first-stage postconviction proceedings, a defendant must show it is arguable that (1) appellate counsel's failure to raise an issue on direct appeal was objectively unreasonable, and (2) defendant was prejudiced by counsel's deficient performance—*i.e.*, there is a reasonable probability that the appeal would have been successful. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). Defendant must satisfy both prongs of *Strickland*. *Lacy*, 407 Ill. App. 3d at 457. If we may dispose of defendant's claim on the basis that he suffered no prejudice, we need not address whether counsel's performance was objectively unreasonable. *People v. Salas*, 2011 IL App (1st) 091880, ¶ 91.

¶ 21 Appellate counsel need not brief every conceivable issue on appeal and may refrain from developing non-meritorious issues without violating *Strickland. People v. Guerrero*, 2018 IL App (2d) 160920, ¶ 43. Therefore, unless the underlying issue is meritorious, the defendant suffers no prejudice from counsel's failure to raise it on appeal. *People v. Childress*, 191 Ill. 2d 168, 175 (2000). In order to assess the merit of the underlying sentencing issue (here, that his 26-year sentence was excessive), we must determine whether it would have been successful if raised on direct appeal. *Id.*

¶ 22 We afford great deference to a trial court's sentence and will not reverse it absent an abuse of discretion. *People v. Butler*, 2013 IL App (1st) 120923, ¶ 30. Because the trial court, having observed the proceedings, is in the best position to weigh the relevant sentencing factors (*People v. Arze*, 2016 IL App (1st) 131959, ¶ 121), we do not substitute our judgment for that of the trial court simply because we would have balanced the appropriate sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 213 (2010).

¶ 23 Defendant was convicted of robbery, a Class 2 offense, generally punishable by three to seven years' imprisonment. See 720 ILCS 5/18-1(c) (West 2008); 730 ILCS 5/5-4.5-35(a) (West 2010). But due to his criminal history, defendant was required to be sentenced between 6 and 30 years as a Class X offender. See 730 ILCS 5/5-4.5-95(b) (West 2010) (mandating Class X sentencing for individuals based on enumerated requirements relating to their criminal history); 730 ILCS 5/5-4.5-25(a) (West 2010) (sentencing range for Class X offenses). Defendant's 26-year sentence falls within the Class X statutory range of 6 to 30 years, and we thus presume it is proper, unless it is manifestly disproportionate to the nature of the offense. See *People v. Burton*, 2015 IL App (1st) 131600, ¶ 36.

¶ 24 Defendant acknowledges that his sentence is within the statutory limits prescribed by law. But he claims the trial court ignored his rehabilitative potential, namely his earning a GED, expressing remorse, and receiving substance abuse treatment.

¶ 25 The record reveals the court considered the relevant statutory factors in sentencing defendant. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55 (noting that we presume sentencing court considered all relevant factors in aggravation and mitigation unless record affirmatively reveals otherwise). Contrary to defendant's assertion, the court did consider his

rehabilitative potential and explicitly stated so on the record, noting that it declined to impose the maximum sentence due to such potential.

¶ 26 And the record rebuts defendant's contention that the court disregarded the mitigating evidence that defendant was a drug addict receiving treatment. Defendant spoke in allocution about his drug addiction and wrote to the court about it in a presentencing letter. Despite defendant's claim, the trial court was not required to give defendant's addiction the weight he urges. See *People v. Montgomery*, 192 Ill. 2d 642, 674 (2000) ("[T]estimony about a defendant's history of alcohol and drug abuse is not necessarily mitigating. Although a defendant might urge this evidence in mitigation, as an explanation for his misconduct, the sentencer is not required to share the defendant's assessment of the information"). Nor, in any event, does the presence of mitigating factors mandate a minimum sentence or preclude a maximum sentence. *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010).

¶ 27 The court also explicitly stated that it considered defendant's PSI and criminal history, and arguments in aggravation and mitigation. See *People v. Babiarz*, 271 Ill. App. 3d 153, 164 (1995) ("Where the sentencing court examines a presentence report, it is presumed that the court considered the defendant's potential for rehabilitation."); see also *People v. Hernandez*, 319 Ill. App. 3d 520, 529 (2001) (in determining appropriate sentence, trial court considers such factors as "a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment."). Defendant's PSI indicated that he was previously sentenced to four years for robbery, ten years for residential burglary, and fourteen years for home invasion.

¶ 28 Critically, the court also expressly noted that defendant had committed the robbery in question within a short time after his release from a 14-year sentence for home invasion. It was not unreasonable or arbitrary for the trial court to place a lesser weight on defendant's rehabilitative potential when defendant committed this crime so shortly after completing his sentence for the previous one.

¶ 29 Twenty-six years is no doubt a significant sentence. But the question is not whether we would have imposed the same sentence. We ask whether the trial court abused its discretion, and on this record, we find that it did not. Thus, had appellate counsel challenged defendant's sentence as excessive, we find no reasonable probability that this court would have found his sentence excessive. *People v. Burke*, 164 Ill. App. 3d 889, 902 (1987) (where trial court properly considered relevant sentencing factors, it is not function of a reviewing court to rebalance factors on appeal). As defendant suffered no arguable prejudice from counsel's failure to challenge his sentence on direct appeal, the trial court did not err in dismissing defendant's postconviction petition as frivolous and patently without merit.

¶ 30 As for defendant's claim that the trial court erroneously ruled on his motion for substitution of judge rather than transfer it to a different judge for ruling, defendant did not have the absolute right to a substitution of judge in his postconviction proceeding. *People v. Harvey*, 379 Ill. App. 3d 518, 522 (2008). The judge who presided over the trial should preside over the postconviction proceeding "unless it is shown that the judge is substantially prejudiced," through allegations of " 'animosity, ill will, or distrust' " or " 'prejudice, predilections or arbitrariness.' " *Id.* at 523 (quoting *People v. Reyes*, 369 Ill. App. 3d 1, 25 (2006)). Absent a showing of that

prejudice, "trial judges are in the best position to determine whether they can be impartial." *Harvey*, 379 Ill. App. 3d at 522.

¶ 31 Defendant's reliance on the trial court's comment regarding his *pro se* letter (which referred to the trial judge as "His Majesty") as a "con job," is a far cry from a showing of substantial prejudice which would require a different judge to rule on his motion in his postconviction proceedings. Nor do we find that his attorney's statement that the judge did not "like for his docket to be jammed" constituted such prejudice. Thus, the court did not err when it ruled on the motion for substitution of judge.

¶ 32 We would further note, merely as an aside, that our review of the principal issue on appeal—the effectiveness of defendant's appellate counsel on direct appeal—was a *de novo* review, meaning we decided it without any deference to the trial court's reasoning. Thus, while defendant obviously feels that the trial judge was biased against him, our independent review of the effectiveness issue leads us to the same outcome that the trial judge reached.

¶ 33 We affirm the judgment of the circuit court of Cook County.

¶ 34 Affirmed.