2018 IL App (2d) 160193-U
No. 2-16-0193
Order filed May 8, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN M. CICHON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 10-CF-3036 Honorable Robert A. Miller, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly summarily dismissed defendant's postconviction petition: defendant did not state a sufficient claim of ineffective assistance of counsel and his proportionate-penalties claim did not present a ripe controversy.

¶ 2 Defendant, John M. Cichon, appeals a judgment summarily dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). We affirm.

¶ 3 On January 20, 2011, defendant was charged with two counts of aggravated child pornography (720 ILCS 5/11-20.3(a)(6) (West 2010)), two counts of child pornography (*id.*

§ 11-20.1(a)(6)), and two counts of disseminating child pornography (*id.* § 11-20.1(a)(2)). On March 22, 2011, the parties presented an agreement under which defendant would plead guilty to one count of aggravated child pornography, the State would recommend a sentence of 24 months' probation, and the remaining charges would be dismissed. The trial court explained to defendant that the conviction would be a Class 2 felony with a sentencing range of three to seven years' imprisonment, and it admonished him of his rights. Defendant stated that he understood.

¶ 4 The State presented the following factual basis for the plea. A Wheaton police detective would testify that, in November and December 2010, he was investigating online trading in child pornography. The police learned that an individual at a given address had traded several images of child pornography. The police went to the address, where defendant resided with one other person. Defendant directed the police to a computer that only he used. Several images of child pornography were located on the computer, including the one that was the basis for the guilty plea. Defendant admitted to the police that he had viewed the image on his computer. The trial court accepted defendant's plea and sentenced him accordingly.

¶ 5 On March 26, 2012, the State filed an amended petition to revoke defendant's probation, alleging that he had committed retail theft and had unauthorized contact with a minor.

¶ 6 On April 11, 2012, the parties informed the trial court that they were discussing a possible plea agreement. After conducting a conference off the record, the court indicated that it would reluctantly agree to the parties' proposal, stating as follows:

> "This defendant is on probation for possessing an image that depicts a child to be under 13 years of age in an act of sexual penetration, being in the sex organ of another person, in the mouth of a child. And I am told now that while he is on probation, he is

having contact with a 14-year-old child whom he doesn't know. And his level of motivation is in question. Mine is not.

I gotta tell you. I don't know why we are not talking about 7 years in the Illinois Department of Corrections. However, if the parties want to do this, I will go along with this, but I want you to understand *** I said it off the record and I'll say it on the record. I have absolutely no interest in negotiating with you as to how this is going to go. You are going to toe the line every step of the way.

I let it go when there was a retail theft allegation. You had contact with a 14-year-old girl on the internet. No, sir. If there's so much as a hiccup over here, I don't care what they say, you are going to the penitentiary. We are talking about whether it should be 6 or 7 years. That's all I want to talk about."

¶ 7 On August 13, 2012, the parties returned to formally enter the plea agreement. They stipulated that defendant had committed retail theft and had used a computer and social networking without approval. They recommended a sentence of four years' imprisonment followed by two years of mandatory supervised release (MSR). The trial court admonished defendant, telling him in part that he faced a minimum penalty of continued probation; that he could be sentenced to prison for three to seven years; and that a prison term would be followed by two years of MSR. Defendant said that he understood and wanted to accept the agreement. The court then sentenced him to the agreed four-year prison term, with credit for 229 days served, and two years of MSR.

¶ 8 On November 27, 2012, the trial court held a hearing. The court told the parties that the judgment resentencing defendant had erroneously imposed two years of MSR. Under section 5-8-1(d)(4) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-1(d)(4) (West 2012)), the

prison sentence for a conviction of aggravated child pornography must be followed by a term of MSR that "shall range from a minimum of 3 years to a maximum of the natural life of the defendant." Thus, the judge and the parties agreed to modify the judgment of August 13, 2012. The court resentenced defendant to four years' imprisonment to be followed by an indeterminate MSR term of no less than three years and as much as life. The sentencing order reflects that defendant was entitled to receive credit for time served in custody totaling approximately 11 months. Defendant did not appeal.

¶ 9 On November 30, 2015, approximately three years after the corrected sentencing order was entered, defendant filed a *pro se* petition under the Act. The petition stated, in full:

> "[(1)] I believe my 14th ammendment [*sic*] for the guarantees of due process and equal protection has been violated. This is due to insufficient councel [*sic*] where public defender did not advise me that I had the potential for a life sentence in prison if I plead guilty. This would have weighed heavily on whether I would have taken a plea bargin [*sic*] and plead [*sic*] guilty to the accused violation of probation. [(2)] The public defender did not advise me of laws regarding police or investigators not able to obtain a statement on my violation of probation or potential crime when on drugs or prescription medication with similar effects as alcohol.
>
> [(3)] I also believe that an [*sic*] article I, section 11 of the Illinois Constitution has been violated in that all sentences be proportional to the nature of the offense and with the goal of restoring the offender to useful citizenship. I do believe my sentence was handed down without the goal to restore myself to useful citizenship when kept in prison for up to life. When given that sentence with the potential for life in prison the sentence is

not proportional to the nature of the offense when any violence, physical contact to the victim have not been factored into such a harsh sentence."

¶ 10 The trial court issued a written order, summarily dismissing the petition, reasoning as follows. At the hearing on November 27, 2012, the court informed defendant that the parties' agreement called for a four-year prison term to be followed by an MSR term of not less than three years and potentially life. Defendant stated that he understood and wanted to plead guilty. Thus, even had his attorney had advised him that a guilty plea would mean the potential of MSR for life, it "would not likely have changed the result of the plea entry." Indeed, defendant's petition had alleged only that counsel's advice "would have weighed heavily on" defendant's decision on whether to accept the agreement. Furthermore, defendant's petition had alleged no facts to support the claim that counsel's deficient advice about police questioning had prejudiced him. Finally, defendant's claim that section 5-8-1(d)(4) of the Unified Code of Corrections violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) had been rejected in *People v. Rinehart*, 2012 IL 111719.

¶ 11 Defendant timely appealed.

¶ 12 On appeal, defendant contends that the trial court erred in summarily dismissing his claims that (1) he received ineffective assistance of counsel and (2) his MSR term violates the proportionate penalties clause. For the following reasons, we affirm the trial court's ruling.

¶ 13 The trial court may summarily dismiss a petition under the Act if the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2016). To survive summary dismissal, the petition need state only the gist of a meritorious claim of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 245 (2001). The petition need not make legal arguments or cite legal

authority. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Our review is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 14 We begin with defendant's claim that his trial attorney was ineffective for failing to inform him that, if he pleaded guilty, a violation of his MSR terms could result in life imprisonment. Although this claim could be interpreted as referring only to the initial guilty plea, and not to defendant's admission to the petition to revoke his probation—which, strictly speaking, was not a guilty plea—the trial court interpreted the claim as based on counsel's advice in the latter proceeding. As we must construe the *pro se* petition liberally and the State also accepts the trial court's construction of the first claim, we address the claim as one that counsel was ineffective in his handling of the probation-revocation petition. This construction also makes sense given that the initial plea agreement, which called for a term of probation, did not subject defendant to the eventual imposition of MSR.

¶ 15 To prevail on a claim of ineffective assistance of counsel, a defendant must establish that (1) counsel's performance was objectively unreasonable and (2) the defendant was prejudiced by counsel's substandard performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Valdez*, 2016 IL 119860, ¶ 29.

¶ 16 Here, defendant's *pro se* petition did not explain the "potential" life sentence to which it alluded. Defendant now explains as follows. His MSR term is indeterminate and could last his whole life. See *Rinehart*, 2012 IL 111719, ¶ 30. To be released on MSR, he must have a satisfactory release plan that specifies an intended residence that meets several conditions (see 730 ILCS 5/3-3-7(a)(7.6) (West 2010)).[1] If defendant completes his prison sentence but his

[1] Also, under the Sex Offender Registration Act (730 ILCS 150/1 *et seq*. (West 2016)), the residence must be located more than 500 feet from a school, park, or playground (*id*.

release plan does not meet these conditions, he will be kept in prison. This continued custody would be based on the legal fiction that he was released on MSR and, by violating a condition, was immediately returned to custody. This is commonly known as being "violated at the door." *Cordrey v. Prisoner Review Board*, 2014 117155, ¶ 9; *People v. McDonald*, 2018 IL App (3d) 150507, ¶ 32.

¶ 17 Defendant contends that, because his MSR term might last his entire life, he faces the potential—although not the certainty—of serving life in prison, based on being "violated at the door" on whatever date(s) he becomes eligible for release. He reasons that his trial counsel should have informed him of the possibility that his bargained-for sentence of four years' imprisonment "could transform into a prison sentence of natural life." Defendant argues that, although the conditions of MSR and its possible revocation might be considered collateral consequences of a guilty plea, his counsel was still obligated to inform him of them. See *Padilla v. Kentucky*, 559 U.S. 356, 367-70 (2010) (deficient advice about immigration consequences of guilty plea can support claim of ineffective assistance); *People v. Hughes*, 2012 IL 112187, ¶¶ 50-51, 60 (deficient advice about possible commitment as sexually violent person can support claim of ineffective assistance).

¶ 18 Here, however, we need not decide whether the claim satisfied *Strickland*'s performance prong, because it did not satisfy *Strickland*'s prejudice prong. To do so, the claim had to raise the gist of a meritorious argument that it is reasonably probable that, absent counsel's omission, defendant would not have admitted to the probation-revocation petition but would have insisted on going to trial. The claim did not do so.

---

§ 150/(8)(a)).

¶ 19 To establish prejudice, defendant needed to make more than a "conclusory allegation that [he] would not have pleaded guilty and would have demanded a trial." *People v. Valdez*, 2016 IL 119860, ¶ 29. He had to plead facts to show that the decision to reject the plea bargain would have been rational under the circumstances. *Id.* ¶ 29. For several reasons, the claim failed this test.

¶ 20 First, defendant relied solely on the allegation that complete advice from counsel on the potential for a "life sentence" would have "weighed heavily on whether [he] would have taken a plea bargin [*sic*] and plead [*sic*] guilty' to the revocation petition." This is the type of conclusion that *Valdez* holds is insufficient. Moreover, if the bare allegation that proper advice *would have* made the defendant plead not guilty is insufficient, then, *a fortiori*, the bare allegation that proper advice "would have weighed heavily" on his decision is also insufficient. On this basis alone, the claim fails the prejudice prong.

¶ 21 Second, although the absence of a viable defense to a charge is not *per se* fatal to a contention that the defendant would have gone to trial (see *Lee v. United States*, 582 U.S. ___, ___, 137 S. Ct. 1958, 1966 (2017); *People v. Hoare*, 2018 IL App (2d) 160727, ¶ 45), resolving the question of whether counsel's deficient representation induced defendant to plead guilty still "depends in large part on predicting whether the defendant likely would have been successful at trial" (*People v. Hall*, 217 Ill. 2d 324, 336 (2005)). Here, neither the petition nor the record remotely suggests a plausible defense that could have been raised against the probation-revocation petition. And, unlike in *Lee* and *Hoare*, where the defendants produced evidence that they would have fought almost hopeless battles to avoid the certainty of deportation, here defendant pleaded no facts from which to infer that he would have contested the petition solely to avoid a *possible de facto* life prison sentence. Indeed, there is evidence of record to the

contrary. At the initial hearing on the probation-revocation petition, the trial court stated that, without the plea agreement, it would have sentenced defendant to six or seven years' imprisonment. Contesting the petition to revoke probation would not have shortened the MSR term, but it probably would have resulted in a longer sentence—and defendant knew it, having been so told by the court.

¶ 22 We note that we recently rejected a claim of ineffective assistance of counsel under similar circumstances. In *People v. Tucek*, 2019 IL App (2d) 160788, ¶ 5, the defendant agreed to plead guilty to criminal sexual assault and the State agreed to recommend a sentence of eight years' imprisonment, to be followed by an MSR term between three years and life. The trial court accepted the plea and sentenced the defendant accordingly. *Id*. ¶ 9. The defendant later filed a *pro se* postconviction petition, alleging that he did not realize his prison term could be extended indefinitely if he was unable to obtain approved housing. According to the defendant, his understanding was that his MSR term would be served outside of prison. The defendant maintained that, if his trial counsel had informed him that he could be required to serve his MSR term in prison, then he would not have pleaded guilty and would have instead proceeded to trial. *Id*. ¶ 10. The trial court summarily dismissed the petition and the defendant appealed. *Id*. ¶ 11.

¶ 23 In affirming the trial court's summary dismissal, we acknowledged that the defendant had raised more than a mere allegation that he would not have pleaded guilty had he known that he could end up serving some or all of his MSR term in prison. *Id*. ¶ 19. We noted, however, that the defendant was charged with a Class X felony that exposed him to a sentencing range of 6 to 60 years' imprisonment. Thus, it was likely that a conviction on the more serious charge would have led to a sentence longer than the eight-year sentence that the defendant received by pleading guilty to the less serious charge. Furthermore, the State had planned to introduce several

of the victim's out-of-court statements at trial, and the defendant's petition failed to establish a plausible defense beyond merely attacking the victim's credibility. *Id.* ¶ 20. We concluded in pertinent part:

> "In sum, [the] defendant did not allege facts to establish the gist of a meritorious argument that, had he known of the possibility—not certainty, or even clear probability—of serving his MSR term in prison, he would have forgone pleading guilty and chosen a trial that would have exposed him to the risk of a far greater prison term, with no more assurance of serving his MSR term outside prison walls." *Id.* ¶ 21.

¶ 24 For the reasons discussed above, and following our opinion in *Tucek*, we affirm the trial court's ruling that the *pro se* petition's claim of ineffective assistance of counsel was frivolous and patently without merit.

¶ 25 We now turn to defendant's claim that his indeterminate MSR term violates the proportionate-penalties clause, because his potential life sentence is disproportionate to the seriousness of his offense. The trial court rejected this claim upon finding that it had already been rejected in *People v. Rinehart*, 2012 IL 111719, stating that our supreme court had "considered the language of 730 ILCS 5-8-1(d)(4) and affirmed it's [*sic*] legality as written." This reasoning was erroneous.

¶ 26 In *Rinehart*, the trial court sentenced the defendant to 28 years' imprisonment, but not to a specific MSR term, concluding that the Illinois Department of Corrections (IDOC) had discretion to impose an MSR term between three years and life. *Id.* ¶ 8. The defendant appealed, arguing that the trial court erred by not sentencing him to an MSR term within the statutory range. The appellate court agreed with the defendant, vacated the MSR term, and remanded with directions to set an MSR term within the statutory range. The appellate court reasoned that an

indeterminate MSR term was inconsistent with the determinate sentence structure contained in the Unified Code of Corrections. *Id*. ¶ 11. However, on the State's appeal, our supreme court vacated the appellate court's order on the issue of MSR, holding that the legislature had "adopted a structure of indeterminate or 'extended' MSR terms for sex offenses precisely because it viewed sex offenses differently, due to the risk of recidivism." *Id*. ¶ 29. Hence, the defendant's MSR term was "an indeterminate three years to natural life." *Id*. ¶ 30.

¶ 27 Contrary to the trial court's reasoning in this case, *Rinehart* did not address the constitutionality of section 5-8-1(d)(4) of the Unified Code of Corrections. Rather, as seen above, the issue in *Rinehart* was whether the statute required the trial court to set a determinate MSR term within the statutory range. *Rinehart*, 2012 IL 111719, ¶ 23. Answering this question was strictly an exercise of statutory interpretation and determining legislative intent. See *Rinehart*, 2012 IL 111719, ¶¶ 23-30.

¶ 28 However, notwithstanding the trial court's erroneous reliance on *Rinehart*, the State contends that defendant's claim was unripe, because it was based on a "*potential* sentence rather than an *actual* sentence" (emphases in original) and thus sought an advisory opinion on the validity of the MSR provision as applied to defendant. We agree. We note that, although the trial court did not rely on this ground, we may rely on it to affirm the judgment. See *People v. Cleveland*, 342 Ill. App. 3d 912, 915 (2003).

¶ 29 As defendant concedes on appeal, his petition alleged that the MSR statute as applied to his case created the *potential* for his four-year prison term to be followed by life in prison, based on the legal fiction of violation at the door. This *potential* lifetime prison sentence (or lifetime MSR term served in prison) would be contingent on defendant's repeated failure to provide a satisfactory release plan. Defendant thus argues that his "potential for life imprisonment is

disproportionate to his offense." This argument has no merit. Defendant has provided no authority to establish a violation of the proportionate penalties clause based on a *potential* period of incarceration, and we are, likewise, aware of none.

¶ 30 We further note that, in his *pro se* petition, filed on November 30, 2015, defendant did not allege that he was then eligible for MSR, or even that he had yet been denied MSR. It was also unclear from the parties' initial briefs whether defendant had indeed been "violated at the door" before he filed his *pro se* petition. On our own motion, we directed the parties to provide supplemental briefs addressing "the impact, if any, of defendant's current custodial status and the reasons for it on the constitutional claims raised in his *pro se* postconviction petition."

¶ 31 Before defendant filed his supplemental brief, we granted his motion to supplement the record with two documents. The first document was a copy of an email from an official at the correctional center where defendant was incarcerated. The official stated:

> "[Defendant] has been in IDOC custody since 8/21/12. He has not left our custody due to the fact that neither him nor IDOC can find a viable parole site. He can leave anytime suitable approved housing is found."

The second document was a printout from the IDOC Offender Tracking System. The printout reflects that defendant was "violated at the door" twice before he filed his *pro se* petition—and then twice more thereafter. According to the most recent information on the IDOC website, of which we may take judicial notice (see *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 430 (2007), defendant's next "Projected Parole Date" is January 31, 2020. (last visited May 2, 2019).

¶ 32 In his supplemental brief, defendant argues that, because he has been repeatedly "violated at the door," the facts stated in his *pro se* petition satisfied the low standard for surviving a

summary dismissal. See *People v. Allen*, 2015 IL 113135, ¶ 24 ("most postconviction petitions are drafted by *pro se* defendants, and accordingly, the threshold for a petition to survive the first stage of review is low"). Defendant asserts that his sentence "arguably violates the proportionate penalties clause of the Illinois Constitution because a life prison sentence [is] highly disproportionate to his non-violent offense and the four-year sentence of imprisonment that formed the basis of his admission."

¶ 33 As we will discuss in more detail below, we are troubled by the circumstances of defendant's continued incarceration. However, it remains that defendant's proportionate penalties claim was unripe when he filed his *pro se* petition, and it has not yet ripened at the time of this writing.

¶ 34 Our constitution's proportionate penalties clause provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. "To succeed on a proportionate penalties claim, a defendant must show either that the penalty imposed is cruel, degrading, or so wholly disproportionate to the offense that it shocks the moral sense of the community; or that it differs from the penalty imposed for an offense containing the same elements." *People v. Klepper*, 234 Ill. 2d 337, 348 (2009).

¶ 35 Here, including the approximately 11 months credit for time served at the time of the corrected sentencing order, dated November 27, 2012, defendant had been in custody for just under four years when he filed his *pro se* petition, on November 30, 2015. Hence, notwithstanding his two violations at the door, defendant had not even served the entire sentence term that was the basis for his plea agreement at the time he filed his *pro se* petition.

¶ 36 Of course, at the time of this writing, defendant's period of incarceration has slightly exceeded the seven-year maximum for his Class 2 felony conviction. But even assuming *arguendo* that the time attributable to defendant's violations at the door are considered punitive, rather than procedural (see *People v. Patterson*, 2014 IL 115102, ¶ 102), we cannot say that this penalty is "cruel, degrading, or so wholly disproportionate to the offense that it shocks the moral sense of the community; or that it differs from the penalty imposed for an offense containing the same elements." *Klepper*, 234 Ill. 2d at 348. In accepting defendant's plea agreement, the trial court noted that defendant was "on probation for possessing an image that depicts a child to be under 13 years of age in an act of sexual penetration, being in the sex organ of another person, in the mouth of a child." The court was clearly alarmed that defendant had violated the terms of his probation by using the internet to contact a "14-year-old-child" whom he did not know. Given the court's hesitation to impose a sentence under the seven-year statutory maximum, it does not follow that defendant's period of incarceration—whether at the time of his petition or the time of this writing—constitutes a violation of the proportionate penalties clause.

¶ 37 Before we conclude, we observe that defendant is one of several plaintiffs in a federal lawsuit arguing that it is unconstitutional to force indigent sex offenders to serve indefinite MSR terms in custody based on their inability to obtain appropriate housing. In *Murphy v. Raoul*, No. 16 C 11471, 2019 WL 1437880, at *20 (N.D. Ill. Mar. 31, 2019), the district court granted the plaintiffs' motion for summary judgment on their equal protection claim. The court acknowledged that the statutory scheme in question applied equally to all convicted sex offenders by mandating housing that satisfies all of the associated requirements. However, as the scheme was applied to the plaintiffs, the court ruled that "the opportunity for an indigent and homeless sex offender to procure release from confinement following completion of

incarceration is virtually nonexistent." *Id*. at *17. The court concluded that the scheme was implemented in such a way that it "creates an illegal classification based on wealth, which indefinitely deprives the class members of their liberty as a result of their incapacity to pay." *Id*. at *20. Turning to the plaintiffs' procedural due process claim, the court denied the parties' cross-motions for summary judgment, finding that there was a disputed issue of material fact as to "whether there is a formal process in place for a person to contest the decision of a parole agent to deny approval of a host site." *Id*. at *22. In so ruling, the court commented:

> "The coercive power of the state is awesome, but it is not absolute. The defendants cannot chalk everything up to discretion and call it a day. Discretion without procedure leads to arbitrary governance, and eventually, the loss of liberty. That is what the Due Process Clause guards against." *Id*. at *23.

¶ 38 Although the district court's decision is not binding on us, we share its concerns. In the email document that defendant supplemented to the record, the IDOC official (who shall remain nameless) stated that defendant "has not left our custody due to the fact that neither him *nor IDOC can find a viable parole site*. He can leave anytime suitable approved housing is found." (Emphasis added.) This begs the question: What, exactly, is IDOC doing to help defendant find a viable parole site? Defendant has already been violated at the door on four occasions, so it is hard to imagine that IDOC has put forth any meaningful effort to assist him.

¶ 39 However, we must leave these concerns for another day. Defendant began his *pro se* petition by stating, "I believe my 14th ammendment [*sic*] for the guarantees of due process and equal protection has been violated." However, defendant immediately transitioned to alleging facts in support of his ineffective-assistance-of-counsel claim. He then turned directly to his proportionate penalties claim. Because defendant's petition is devoid of any factual allegations

supporting his due process and equal protection claims, we cannot say that the petition should have survived the first stage of the post-conviction proceedings. *People v. Torres*, 228 Ill. 2d 382, 394 (2008) (noting that "nonfactual and nonspecific assertions that merely amount to conclusions" are not sufficient to survive summary dismissal under the Act). By that same token, we cannot say that appellate counsel should have raised due process or equal protection arguments upon our request for supplemental briefing "on the constitutional claims raised in [defendant's] *pro se* postconviction petition."

¶ 40 In sum, while we are concerned by defendant's continued incarceration, neither of the grounds on which he contests the summary dismissal of his petition has merit. Therefore, the trial court's judgment of dismissal must be affirmed.

¶ 41 The judgment of the circuit court of Du Page County is affirmed.

¶ 42 Affirmed.