2019 IL App (2d) 160707-U
No. 2-16-0707
Order filed June 20, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PAUL MAIOR, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 13-CF-577 Honorable Liam C. Brennan, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justice Zenoff concurred in the judgment.
Justice McLaren concurred in part and dissented in part.

ORDER

¶ 1 *Held*: (1) Even if postconviction counsel arguably provided unreasonable assistance due to an insufficient ineffective-assistance claim, defendant could not show the prejudice required for a reversal of the trial court's summary dismissal, as he could only speculate that counsel could have raised the claim sufficiently; (2) defendant could not be awarded additional sentencing credit in an appeal from the dismissal of a postconviction petition that did not raise the sentencing credit issue.

¶ 2 Defendant, Paul Maior, appeals from the summary dismissal of his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) for relief from his sentence for residential burglary (720 ILCS 5/19-3 (West 2012)). Defendant argues on appeal

that he did not receive reasonable assistance from the attorney he retained to prepare the petition. Defendant also contends that he is entitled to sentencing credit for an additional day in custody. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On June 19, 2014, defendant entered a nonnegotiated plea of guilty to a single count of residential burglary. On September 12, 2014, the trial court sentenced defendant as a Class X offender (730 ILCS 5/5-4.5-95(b) (West 2012)) to a 16-year prison term. Defendant was represented by private counsel when he entered his plea and at his sentencing hearing. On November 19, 2014, defendant filed a *pro se* motion to reconsider his sentence, in which he argued that the maximum prison term for residential burglary was 15 years. He also argued that the trial court exhibited prejudice against him during sentencing. The trial court denied the motion because it was both untimely and without merit. Defendant appealed and the Office of the State Appellate Defender was appointed to represent him. However, appellate counsel moved to withdraw on the basis that defendant's failure to file a timely postplea motion required dismissal of the appeal. See Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013). We granted the motion and dismissed the appeal. *People v. Maior*, No. 2-14-1250 (2015) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 5 On May 31, 2016, defendant retained another attorney, who filed defendant's postconviction petition. In the petition, defendant claimed that he was deprived of the effective assistance of counsel at sentencing because his attorney failed to argue that the trial court improperly imposed an extended-term sentence. Defendant also claimed that he "was denied his right to the effective assistance of counsel where trial counsel failed to file a Motion to Withdraw [his] Guilty Plea thus foreclosing all appeal of the sentence imposed on him." No affidavits were

attached to the petition. The trial court summarily dismissed the petition. See 725 ILCS 5/122-2.1(a)(2) (West 2016). This appeal followed.

¶ 6 II. ANALYSIS

¶ 7 Before considering defendant's arguments, we first summarize the relevant principles governing postconviction proceedings. Our supreme court has stated as follows:

> "The Act [citation] provides a remedy for incarcerated defendants who have suffered a substantial violation of their constitutional rights at trial. Under the Act, a postconviction proceeding contains three stages. At the first stage, the circuit court must independently review the postconviction petition, without input from the State, and determine whether it is 'frivolous or is patently without merit.' [Citation.] If the court makes this determination, the court must dismiss the petition in a written order. [Citation.] If the petition is not dismissed, the proceedings move to the second stage. [Citation.]
>
> At the second stage, counsel is appointed to represent the defendant, if he is indigent [citation], and the State is permitted to file responsive pleadings [citation]. The circuit court must determine at this stage whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. [Citation.] If no such showing is made, the petition is dismissed. If, however, the petition sets forth a substantial showing of a constitutional violation, it is advanced to the third stage, where the circuit court conducts an evidentiary hearing [citation]." *People v. Johnson*, 2018 IL 122227, ¶¶ 14-15.

¶ 8 A petition will be dismissed at the first stage, as frivolous or patently without merit, if the petition has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 12 (2009).

That is the case when a petition "is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* at 16. Section 122-2 of the Act (725 ILCS 5/122-2 (West 2016)) governs the form of postconviction petitions. Section 122-2 provides that a petition shall "clearly set forth the respects in which petitioner's constitutional rights were violated" and "have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." *Id.* An unexplained failure to provide such support is grounds for summary dismissal of the petition. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 9 There is no right to counsel at the first stage of the proceedings, and at later stages, the defendant is entitled only to a reasonable level of assistance from counsel. *Johnson*, 2018 IL 122227, ¶ 16. Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) provides that, when a defendant appeals from an adverse decision on a postconviction petition, the record filed in the appellate court "shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." When the record does not make the necessary showing, the trial court's decision will be reversed; the defendant need not establish prejudice to secure a reversal. *People v. Jennings*, 345 Ill. App. 3d 265, 275 (2003). Although a defendant is not entitled to have counsel appointed at the first stage, he or she may retain counsel. Retained counsel is required to provide reasonable assistance at the first stage. *Johnson*, 2018 IL 122227, ¶ 23. However, Rule 651(c) does not apply to retained counsel at the first stage. *People v. Richmond*, 188 Ill. 2d 376, 382-83 (1999). Where retained counsel fails to provide reasonable assistance at the first stage, the defendant

must establish prejudice in order to secure a reversal. *People v. Zareski*, 2017 IL App (1st) 150836, ¶¶ 54-55.

¶ 10 With these principles in mind, we turn our attention to defendant's arguments. Defendant contends that his petition "contain[ed] at least the potential gist of a meritorious claim for relief" based on trial counsel's failure to file a postplea motion that would have enabled defendant to appeal from his sentence.[1] However, according to defendant, "post-conviction counsel failed to adequately present the claim in the petition itself or tender any supporting documentation." The claim consisted of a single sentence: "Petitioner was denied his right to the effective assistance of counsel where trial counsel failed to file a Motion to Withdraw Petitioner's Guilty Plea thus foreclosing all appeal of the sentence imposed on him." First, defendant contends that that allegation was inaccurate because, as defendant correctly notes, trial counsel could have preserved defendant's right to an appeal by filing either a motion to withdraw his plea or a motion to reconsider his sentence. Ill. S. Ct. R. 604(d) (eff. July 1, 2017). Second, defendant contends that postconviction counsel did not plead or properly substantiate facts establishing ineffective assistance of counsel under the principles set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

¶ 11 Claims of ineffective assistance of counsel are governed by *Strickland*, which requires a showing that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance was prejudicial in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 668, 688, 694. In *Flores-Ortega*, the Court explained how *Strickland*

[1] Defendant raises no argument concerning the claim that trial counsel was ineffective for failing to argue that his sentence exceeded the maximum.

applies in cases where a defendant claims that, due to ineffective assistance of counsel at trial, he or she lost the right to an appeal. Under *Flores-Ortega*, "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Flores-Ortega*, 528 U.S. at 477. When the defendant has not told counsel whether to bring an appeal, "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480.

¶ 12 In this case, it is clear that defendant's claim of ineffective assistance of counsel, as pleaded, could not succeed. Defendant merely alleged that trial counsel failed to take steps that would have preserved his right to an appeal. He did not allege either that he specifically asked trial counsel to bring an appeal or that trial counsel failed to consult with him about bringing an appeal. Absent such allegations, the claim was based on an indisputably meritless legal theory and was properly dismissed at the first stage of the proceedings.

¶ 13 Defendant blames postconviction counsel for the petition's inadequacy. According to defendant, the petition "should have included allegations about plea counsel's unreasonable failure to consult [with him]." However, defendant's argument assumes that there were facts that would support an allegation that trial counsel failed to consult with him. Defendant himself appears to recognize that this is speculation. According to defendant, "[i]t is also possible that [defendant] did talk to plea counsel about challenging the sentence or appealing at the courthouse after sentencing or during the time period before he was sent to [the Department of Corrections]." Defendant adds that "[i]f [defendant] did so and indicated in any way his desire

to challenge the sentence, counsel's failure to file a motion to reconsider sentence was arguably ineffective." The key word here—"if"—underscores that defendant's ineffective-assistance-of counsel claim is purely hypothetical. It is also possible that counsel consulted with defendant and that defendant expressed no desire to pursue a postplea motion or an appeal. If that is the case, postconviction counsel obviously could not be faulted for failing to include baseless allegations in the petition, although one might ask why counsel chose to bring the ineffective-assistance-of-counsel claim at all. Another possibility is that postconviction counsel was unaware of what he needed to plead under *Strickland* and *Flores-Ortega* and that he simply failed to make the relevant inquiry. It would be hard to conclude that counsel provided reasonable assistance where he or she was unaware of the fundamental legal principles underlying a postconviction claim advanced on the defendant's behalf. However, under *Zareski*, retained counsel's failure to provide reasonable assistance at the first stage of a postconviction proceeding is grounds for reversal only if the defendant shows prejudice. Because the record here does not establish that there were grounds for a claim of ineffective assistance of trial counsel, defendant cannot show prejudice.

¶ 14 The same reasoning applies to defendant's argument that the petition was "inaccurate" because it stated that trial counsel could have preserved defendant's right to appeal *only* by moving to withdraw his guilty plea. As noted, counsel could have alternatively filed a motion to reconsider defendant's sentence. However, correcting that error would not have rescued the petition, which, as discussed above, was deficient for more fundamental reasons.

¶ 15 We thus conclude that, even if postconviction counsel arguably did not provide reasonable assistance, defendant cannot establish prejudice on the record before this court. Accordingly, defendant is not entitled to reversal of the dismissal of his petition.

¶ 16 Defendant next contends that the trial court erred in calculating his sentencing credit for time spent in custody. The trial court calculated defendant's time in custody from March 16, 2003, which was the first day he spent in the Du Page County Jail. Defendant argues that he was in custody a day earlier, when he was placed under arrest. Our review is barred by Illinois Supreme Court Rule 472(c) (eff. March 1, 2019), which provides, in pertinent part, that "[n]o appeal may be taken by a party from a judgment of conviction on the ground of any sentencing error specified above unless such alleged error has first been raised in the circuit court." Pursuant to Rule 472(e) (eff. May 17, 2019), we must remand to the circuit court to decide this issue.

¶ 17 III. CONCLUSION

¶ 18 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed. We remand to the circuit court to determine whether defendant is entitled to an additional day of sentencing credit. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Knapp*, 2019 IL App (2d) 160162, ¶¶ 45-67; *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 19 Affirmed and remanded.

¶ 20 JUSTICE McLAREN, concurring in part and dissenting in part:

¶ 21 I concur with the majority's affirmance of the trial court and the remand regarding sentence credit. However, I dissent from the assessment of the $50 appellate fee contained in section 4-2002 of the Counties Code (55 ILCS 5/4-2002 (West 2016)). In *Nicholls*, the supreme court affirmed the appellate court's assessment of the fee against defendant Nicholls, who had appealed from the dismissal of his postconviction petition; the supreme court recognized "a

legislative scheme which authorizes the assessment of State's Attorney's fees as costs in the appellate court against an unsuccessful *criminal* appellant upon affirmance of his conviction." (Emphasis added.) *Nicholls*, 71 Ill. 2d at 174.

¶ 22 However, as I have demonstrated in *People v. Knapp*, 2019 IL App (2d) 160162, *Nicholls* was "based on the false premise that a postconviction petition is a criminal case." *Id*. at ¶ 97 (McLaren, J., dissenting). Postconviction proceedings are not criminal proceedings; they are civil, collateral proceedings. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). This well-established fact was recently reaffirmed in *People v. Johnson*, 2013 IL 114639, where all of the participants, including the State and the supreme court, recognized this fact. See, *i.e.*, *id*. at ¶ 12 ("The statutory provision that allows imposition of the $50 [*habeas corpus*] fee first appeared in the statute in a 1907 amendment, and has remained unchanged, despite the creation of *additional collateral proceedings* such as a section 2–1401 petition and a postconviction petition" (emphasis added); *Knapp*, 2019 IL App (2d) 160162, ¶ 133.

¶ 23 My dissent in *Knapp* provides a full exposition of the faulty premise of *Nicholls*, the illogic of its application to appeals from civil collateral proceedings, and the absurd results that may obtain from such application. The *Knapp* majority declined to address *Nicholls*' faulty premise; now the majority here cites to *Knapp* and similarly fails to address, let alone reconcile, the *Nicholls* counterfactual. Suffice to say, the conclusion that appellate fees are collectible in collateral civil proceedings, such as postconviction proceedings, is not based in reality. *Nicholls* has no application to civil collateral proceedings since, by its own terms, it was adjudicating *criminal* proceedings, and it has been wrongly cited as support for the assessment of this fee for too long. As there is no basis for the assessment of the fee in this case, I dissent from its imposition.