2019 IL App (3d) 170062-U

Order filed February 27, 2019.
Modified upon denial of rehearing March 7, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0062
v.	)	Circuit No. 14-CF-464
	)	
ROBERT L. BEARD,	)	Honorable David A. Brown,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Schmidt and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: The court did not err when it summarily dismissed defendant's postconviction petition.

¶ 2 Defendant, Robert L. Beard, appeals from the circuit court's summary dismissal of his *pro se* postconviction petition. Defendant argues that the court's dismissal was erroneous because his petition alleged the gist of a claim of ineffective assistance of plea counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant with two counts of burglary (720 ILCS 5/19-1(a) (West 2014)) and one count of attempted burglary (*id.* §§ 8-4(a), 19-1(a)). Thereafter, defendant entered a fully negotiated plea agreement. In exchange for defendant's guilty plea, the State agreed to dismiss one of the burglary charges and the attempted burglary charge and seek a sentence of 13½ years' imprisonment.

¶ 5 At the plea hearing, plea counsel provided the details of the parties' agreement to the court. Plea counsel further indicated that defendant's 13½-year sentence would run concurrent with the sentences imposed in related cases from Henry, McDonough, and Stark counties. The parties agreed that defendant was entitled to day-for-day credit for the period of February 9, 2015, to May 22, 2015.

¶ 6 Defendant told the court that he understood the plea agreement and that he wanted to plead guilty to the burglary charge in exchange for the 13½-year sentence. Defendant had discussed the plea agreement with counsel and he was satisfied with counsel's representation. Defendant said that he was entering the plea of his own free will without threat or coercion.

¶ 7 The court found that defendant had been duly advised of his rights, understood the charges against him, his rights, and consequences of the guilty plea. The court concluded that defendant was entering the plea knowingly and voluntarily. The court accepted the plea and imposed the agreed sentence. The court then explained to defendant his right to appeal and the appeal process. Defendant said that he understood this right.

¶ 8 Ten months after the court accepted defendant's plea, the court amended the mittimus, on defendant's motion, to award defendant additional day-for-day credit. The amended judgment stated defendant was entitled to receive credit for the period of July 7, 2014, to May 22, 2015.

¶ 9 On December 5, 2016, defendant filed a *pro se* postconviction petition. Defendant's petition made the following allegations:

> "I stated to Chief Public Defender Joel Brown that there was conflict of interest with counsel that he appointed me. My attorney lied to me and refused to talk with me or my wife. I had to file motions through my wife to get them to this court on time because he refuses to defend me. My public defender has lied to me about my plea agreement and has not responded to me or my wife (Teresa Beard). Please see 'Attached statement of facts' marked page 3."

In the referenced statement of facts, defendant alleged, in relevant part that

> "I believe my Attorney Mr. Sheets maliciously led me into this plea agreement. Every response to my questions were different than the outcome. This is a multi-jurisdictional case which I cooperated fully with each jurisdiction. I was under the impression from Mr. Sheets that I was receiving the same amount of time running concurrent with all other jurisdictions which was 13 years with time credit served from June 16, 2015. There was confusion at my sentence hearing with the time credit and also with the 13 years. It ended up that I had a 13½ year sentence and my time credit was missing 300 and some odd days. The court stated on record they did not have any warrant on file to which I stated 'I have a copy' but my attorney said to me 'just take it, its better than 18 years consecutive' and said he would talk to me later about time credit. I have sent a copy of that warrant that was served to me at Stark County Jail with a copy of the *nunc pro tunc* motion that I have previously filed. I have not heard or received any response from that motion either. I filed that motion in a timely manner and pray I have followed the

> correct procedure. I also pray this court will correct my sentence to 13 years concurrent with credit for time served along with the other counties that were involved."

Defendant filed with his petition numerous documents that indicated counsel and the court had been confused as to his sentence credit. In another exhibit, defendant wrote he had told counsel he wanted to speak with him about filing a postplea motion and an appeal, but counsel ignored defendant's request. Defendant also filed copies of e-mails sent by his wife to counsel regarding defendant's sentence credit. Counsel sent defendant's wife a single responsive e-mail on June 18, 2015, that indicated that counsel would investigate the sentence credit concern.

¶ 10 The court summarily dismissed defendant's postconviction petition finding that it had already addressed the presentence credit issue. Defendant appeals.

¶ 11 II. ANALYSIS

¶ 12 Defendant argues the court erroneously dismissed his postconviction petition because the petition reasonably demonstrated that plea counsel had failed to consult with defendant about pursuing an appeal despite defendant's expressed interest in an appeal. We find that the court did not err as defendant cannot establish that counsel had a duty to consult with him about pursuing an appeal after defendant knowingly entered and the court accepted his fully-negotiated guilty plea.

¶ 13 At the first stage of postconviction proceedings, the court must independently review defendant's petition to assess its substantive merit. 725 ILCS 5/122-2.1 (West 2016). If the court determines that the petition is frivolous or patently without merit, it must dismiss the petition. *Id.* § 122-2.1(a)(2). A petition that has no arguable basis in law or fact is subject to dismissal at

the first stage. *People v. Tate*, 2012 IL 112214, ¶ 9. We review, *de novo*, the dismissal of a first-stage postconviction petition. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 14 Generally, to advance to the second stage of postconviction proceedings, a petition that alleges a claim of ineffective assistance of counsel must establish that "(i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). While a defendant need not make a specific assertion of prejudice when he alleges that counsel failed to conduct an appeal consultation, defendant must show that counsel's deficient performance caused the forfeiture of defendant's right to appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 483-84 (2000); *People v. Edwards*, 197 Ill. 2d 239, 252 (2001). Stated another way, a defendant must demonstrate a reasonable probability that, "but for counsel's deficient failure to consult with [defendant] about an appeal, [defendant] would have timely appealed." *Flores-Ortega*, 528 U.S. at 484; *Edwards*, 197 Ill. 2d at 252.

¶ 15 With respect to the "reasonableness" component of the ineffective assistance of counsel test, defendant argues, for the first time on appeal, that plea counsel acted unreasonably when he did not consult with defendant regarding an appeal. "[C]ounsel has a constitutionally imposed duty to consult with a defendant about the possibility of 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.' " *People v. Torres*, 228 Ill. 2d 382, 396 (2008) (quoting *Flores-Ortega*, 528 U.S. at 480).

¶ 16 Defendant's postconviction petition fails to make an arguable claim of either of the *Flores-Ortega* requirements for an appeal consultation. First, defendant cannot establish that a

rational defendant would want to appeal after he entered a fully negotiated plea agreement that included the dismissal of two charges and the imposition of an agreed sentence that was less than the maximum possible sentence. See 730 ILCS 5/5-4.5-35(a), 5-8-2(a), 5-5-3.2(b)(1) (West 2014). Moreover, the record establishes that defendant was fully apprised of his rights before entering his guilty plea and clearly indicated that he was both satisfied with counsel's representation and he was knowingly entering the plea. These facts reasonably indicated to plea counsel that defendant had no justifiable reason to appeal his conviction.

¶ 17 Second, defendant did not allege in his petition that he reasonably demonstrated to counsel that he was interested in pursuing an appeal. Instead, defendant's petition made several very general allegations that defendant was dissatisfied with plea counsel's representation. Relevant to this appeal, the petition alleged that plea counsel lied to defendant about the terms of his appeal and maliciously deceived defendant into entering the plea. While the lenient eye of first-stage postconviction review might view these allegations as grounds to file a motion to withdraw a guilty plea, they are not tantamount to an allegation that counsel failed to consult with defendant about his right to an appeal. Moreover, these claims are rebutted by the record. Defendant indicated at the time that he entered the guilty plea that he understood the terms of the plea agreement, wished to enter it, and made this decision without external influence. See *People v. Rogers*, 197 Ill. 2d 216, 222 (2001) (summary dismissal is appropriate where the allegations in the postconviction petition are rebutted by the record). Therefore, in light of this record, we conclude the court's dismissal was not erroneous because defendant's petition did not make an arguable claim of ineffective assistance of counsel.

¶ 18 III. CONCLUSION

¶ 19 The judgment of the circuit court of Peoria County is affirmed.

¶ 20 Affirmed.