2019 IL App (3d) 170375-U

Order filed August 21, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-17-0375 Circuit No. 16-CF-864
ERIC D. WALKER,	)	Honorable Daniel L. Kennedy
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Schmidt and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in dismissing the defendant's *pro se* postconviction petition at the first stage.

¶ 2 The defendant, Eric D. Walker, pled guilty to attempted burglary and was subsequently sentenced to a term of three years' imprisonment. He filed a *pro se* postconviction petition alleging, *inter alia*, that defense counsel had been ineffective for failing to share and discuss discovery documents with him. The trial court dismissed the petition as frivolous and patently without merit. On appeal, the defendant argues that the dismissal was erroneous.

¶ 3 I. BACKGROUND

¶ 4 On September 29, 2016, the defendant pled guilty to attempted burglary (720 ILCS 5/19-1(a), (b) (West 2016)) and aggravated battery (*id.* § 12-3.05(f)(1)). The charging instrument alleged that the victim of the attempted burglary was Timothy Kable and that the offense had occurred on February 15, 2016, in the parking lot of Nico's Pizza. As a factual basis for the attempted burglary charge, the State averred that the defendant could be seen on surveillance video "hovering around" and eventually reaching into a vehicle that did not belong to him in the parking lot of the restaurant. The trial court accepted the plea and sentenced the defendant to a term of three years' imprisonment for attempted burglary.

¶ 5 Notably, both the attempted burglary and aggravated battery charges were brought in separate, otherwise unrelated cases—Nos. 16-CF-864 and 16-CF-767, respectively. On March 17, 2017, the defendant filed a *pro se* postconviction petition in each case. The two postconviction petitions are substantively similar, with each petition referencing both of the defendant's convictions.

¶ 6 In his petition—which, with attached exhibits, spans 250 pages—the defendant alleged that defense counsel visited him in jail on May 27, 2016, and that counsel showed him "a video recording which was about 30 seconds." The defendant alleged that he told counsel that the person in the video was not him and that counsel "attempted to get me to say the person in the video was me." The defendant alleged that counsel also allowed him "to read one incident report that really didn't say much of anything." The defendant alleged that counsel "refused" to show him any other discovery materials.

¶ 7 The defendant alleged in his petition that on December 19, 2016, he received a number of partially redacted police reports relating to both of his cases. He alleged that upon reading those

reports he learned that counsel "had been lying to the defendant all the time" and had induced him to plead guilty when she "knew that they had absolutely no evidence to support the allegations made against the defendant." He concluded: "had Defendant known all that [*sic*] facts and information and discovery information among other things before Defendant plead guilty Defendant would not have plead guilty to any of these charges."

¶ 8 On May 25, 2017, the trial court summarily dismissed both postconviction petitions in a single order. On June 8, 2017, the defendant filed separate notices of appeal in each case.

¶ 9 II. ANALYSIS

¶ 10 On appeal, the defendant argues that his petition presented an arguable constitutional claim of ineffective assistance of counsel due to counsel's failure to show and discuss discovery materials with him. Accordingly, he argues that the trial court erred in dismissing his petition at the first stage. He also argues that he is entitled to a $5-*per-diem* credit against his fines for the time he spent in presentence custody.

¶ 11 A. Postconviction Petition

¶ 12 This court previously set forth in detail the controlling principles of law in the defendant's companion appeal. *People v. Walker*, 2019 IL 170374, ¶¶ 13-18. At the first stage of postconviction proceedings, the defendant alleging ineffective assistance of counsel must plea facts which, when taken as true, render it arguable that counsel performed deficiently and arguable that the defendant suffered prejudice as a result of that deficient performance. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); see also *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Further, section 122-2 of the Post-Conviction Hearing Act requires that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2016).

¶ 13 In the companion case, we held that defense counsel's decisions regarding what discovery materials to share with the defendant are an issue of trial strategy, and are therefore presumed to be sound decisions. *Walker*, 2019 IL 170374, ¶ 18. The presumption of sound trial strategy, however, may be rebutted with a showing that "counsel's decisions appear to be so irrational that no reasonably effective defense attorney in similar circumstances would pursue such a strategy." *People v. Peterson*, 2017 IL 120331,. Accordingly, in *Walker*, we held that a the defendant at the first stage may rebut that presumption where he pleads facts creating a basis for arguing "that counsel withheld discovery information that cast doubt on the State's ability to prove him guilty or was otherwise particularly relevant to his decision to plead guilty." *Walker*, 2019 IL 170374, ¶ 18.

¶ 14 In the defendant's other appeal, he raised the same issue that he raises here, that counsel was ineffective for failing to share or discuss discovery materials with him. *Id.* ¶ 12. In that case, with respect to his aggravated battery conviction, the defendant alleged that defense counsel had not shared *any* discovery information with him. See *id.* ¶ 7. With the exception of one brief, redacted police report, however, the defendant's petition included no substantive information relating to the aggravated battery charge. *Id.* ¶ 20. In affirming the trial court's dismissal, we reasoned that the defendant had failed to allege with any specificity—or even demonstrate via his attached exhibits—that counsel had withheld any information from him, let alone information so potentially significant to his plea as to rebut the presumption of sound trial strategy. *Id.* ¶ 21.

¶ 15 This court's independent review of the defendant's postconviction petition and accompanying materials[1] reveals that the defendant did provide at least some substantive

[1]Appellate counsel asserts that the defendant "now presents evidence that his attorney did not show and discuss relevant discovery with him at the time of his plea proceedings." However, at no point in either her initial or reply brief does counsel discuss in any level of detail what that evidence is. Rather, counsel follows the above assertion with a broad citation to 53 pages of the common law record. We

allegations and supporting documents. The defendant alleged that (1) Joliet police did not have in evidence a purportedly stolen cell phone; (2) Kable was not the owner of Nico's Pizza; and (3) Kable did not make a police report regarding the attempted burglary until a week later, following an altercation between he and the defendant.

¶ 16 Initially, the defendant did not attach to his petition the police reports which purportedly revealed these new facts to him, as was required by statute. See 725 ILCS 5/122-2 (West 2016). The only police reports found in the defendant's extensive exhibit section relate to his aggravated battery conviction. Furthermore, there is no apparent nexus between those facts and the defendant's decision to plead guilty. As the defendant was charged with and pled guilty to attempted burglary, one would not expect any stolen items to be in evidence. The same can be said of the fact that Kable did not own the restaurant where his vehicle was burglarized. Finally, while the delayed nature of Kable's police report could potentially serve as impeachment evidence, it is not even arguable that such a fact could have such significant an impact on the defendant's decision to plead guilty as to rebut the strong presumption that counsel acted reasonably in withholding that information. See *Peterson*, 2017 IL 120331, ¶ 80.

¶ 17 The defendant's postconviction petition thus has two fatal flaws. First, he failed to attach to his petition the police reports that he claimed would have changed his decision to plead guilty, as required by statute. See 725 ILCS 5/122-2 (West 2016). He also failed to plead facts that, when taken as true, would serve to rebut the presumption that counsel's decisions regarding discovery materials were sound. That latter failure is compounded by the defendant's admission that counsel did show him the single-most important piece of evidence in this case, the video

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admonish appellate counsel that this court "is not a repository into which an appellant may foist the burden of argument and research; it is neither the function nor the obligation of this court to act as an advocate or search the record for error." *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 29.

footage purportedly of the defendant reaching into a vehicle that did not belong to him. Though the defendant argues in his petition that he did not appear in the video, the fact remains that counsel showed the defendant the video, and the defendant still chose to plead guilty. Because the factual allegations in the defendant's postconviction petition did not create a basis for arguing that counsel had performed deficiently, we affirm the trial court's first-stage dismissal of that petition.

¶ 18 B. *Per Diem* Credit

¶ 19 The defendant next argues that he is entitled to a full offset of his eligible fines based upon the 171 days he spent in presentence credit. Illinois Supreme Court Rule 472(a)(1) (eff. Mar. 1, 2019) provides that the trial court retains jurisdiction to correct, *inter alia*, "[e]rrors in the application of *per diem* credit against fines." Section (c) of the same rule dictates that "No 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." Ill. S. Ct. R. 472(c) (eff. Mar. 1, 2019). Finally, section (e) establishes that the rule applies retroactively:

> "In all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule." Ill. S. Ct. R. 472(e) (eff. May 17, 2019).

¶ 20 Because the trial court retains jurisdiction to correct the sentencing error raised here, we may not reach the merits of the defendant's argument because we lack jurisdiction. Instead, pursuant to Rule 472(e), the defendant must first file a motion in the trial court requesting the

correction of the errors alleged here. *People v. Whittenburg*, 2019 IL App (1st) 163267, ¶ 4. We remand to the trial court for that limited purpose.

¶ 21 III. CONCLUSION

¶ 22 The judgment of the circuit court of Will County is affirmed in part, dismissed in part, and remanded.

¶ 23 Affirmed in part, dismissed in part, and remanded.