

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FILED
May 28, 2019
Carla Bender
4th District Appellate
Court, IL

2019 IL App (4th) 170022-U
NOS. 4-17-0022 & 4-17-0023 cons.

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Logan County
TARRUS BUGGS, JR.,)	Nos. 14CF15
Defendant-Appellant.)	12CF17
)	
)	Honorable
)	William G. Workman,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Holder White and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant forfeited any claim the trial court erred by allowing defendant’s postconviction appointed counsel to withdraw and by granting the State’s motion to dismiss because defendant failed to address why his guilty plea was not knowingly and voluntarily entered.

¶ 2 On December 16, 2016, the trial court dismissed a postconviction petition filed by defendant, Tarrus Buggs, Jr., during second-stage proceedings under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2014)). Defendant appeals, arguing the trial court erred by allowing his postconviction appointed counsel to withdraw and by dismissing his postconviction petition. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On February 26, 2014, the State charged defendant by information in case No. 14-CF-15 with being an armed habitual criminal, a Class X felony (720 ILCS 5/24-1.7(a)(3) (West

2014)), two counts of unlawful possession of a weapon by a felon with a prior conviction (720 ILCS 5/24-1.1(a) (West 2014)), and unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2014)). On March 7, 2014, the State filed a petition to revoke defendant's conditional discharge in case No. 12-CF-17, alleging defendant violated the terms of his conditional discharge by committing the offenses alleged in case No. 14-CF-15.

¶ 5 The trial court held a preliminary hearing in case No. 14-CF-15 on April 29, 2014. Officer Matthew Comstock, a corporal with the Lincoln Police Department who was currently assigned as an inspector to the Illinois State Police Central Illinois Enforcement Group (drug task force), testified he assisted in the execution of a search warrant at 1307 North Kankakee Street in Lincoln on February 11, 2014, at 9:22 p.m. According to the police investigation, defendant and Alyssa McFarland lived at that address.

¶ 6 Some children also resided at the residence on occasion. Based on statements the children made at school regarding defendant having cannabis inside the house and giving it to people who visited, the police obtained a search warrant for the residence. During the search, the police found a white substance which tested positive for the presence of cocaine, a shotgun, a .38 revolver, sandwich bags, and scales in a basement bedroom at the residence. In this same bedroom, the police found mail addressed to defendant.

¶ 7 Officer Comstock stated McFarland was interviewed twice by the police. On February 19, 2014, she indicated the drugs and firearms belonged to defendant. On March 19, 2014, she told the police the same thing. McFarland identified several sources for defendant's cocaine. She provided the names of these individuals, the number of trips she had taken with defendant to see these suppliers, and the amount of drugs defendant purchased. She did not provide any information about the guns.

¶ 8 On June 30, 2015, defendant entered a written, fully negotiated plea agreement with the State. Defendant agreed to plead guilty to being an armed habitual criminal (Count I) and the State agreed to *nolle pros* the other charged offenses in case No. 14-CF-15. Pursuant to the plea bargain, defendant would be sentenced to 12 years in prison and 3 years of mandatory supervised release (MSR) with credit for 445 days served. Defendant also admitted to the State's petition to revoke.

¶ 9 On the same day, the trial court held a plea hearing. At the hearing, the court questioned defendant about the fully negotiated written plea agreement and the written admission to the petition to revoke. Defendant stated he had gone over the documents with his attorney before he signed them and felt he knew and understood the documents. He also indicated he understood the charges and the possible penalties that could be imposed. Defendant stated he had not been threatened and was not being forced to enter a guilty plea. He indicated no promises had been made in exchange for his guilty plea other than those contained in the plea agreement document. The court accepted defendant's plea in case No. 14-CF-15 and sentenced defendant to 12 years in prison with 3 years of MSR and credit for 445 days served. The court also accepted defendant's admission in case No. 12-CF-17 and sentenced defendant to a concurrent term of five years' imprisonment followed by two years of MSR with credit for 663 days pretrial detention credit. Defendant did not file a direct appeal in either case No. 12-CF-17 or case No. 14-CF-15.

¶ 10 On January 4, 2016, defendant filed a *pro se* petition for relief from judgment and/or petition for postconviction relief. According to the petition, his prosecution was based on information that may have been given by McFarland. He noted the drugs and firearms at issue were found in McFarland's residence and the State had no evidence defendant lived with

McFarland. Defendant alleged he told his trial counsel McFarland was his girlfriend at times but he had no knowledge or control over the illegal items found at her residence. Defendant asked his attorney to challenge his arrest and the charges against him. However, his attorney said defendant would need to prove beyond a reasonable doubt he was innocent of the charges, would lose if he went to trial, and would be sentenced to 30 years in prison. Defendant also argued his trial counsel was ineffective for failing to investigate the charges, prepare a defense, and file a motion to have his case transferred to another court or heard by a different judge.

¶ 11 Defendant also stated he believed his trial counsel had a conflict of interest because his law partner represented McFarland. According to defendant, the two lawyers worked together to secure defendant's conviction so McFarland would get a shorter sentence. According to defendant, his trial counsel was aware he would have testified he did not live with McFarland and the items found at her home were not his. Defendant alleged his testimony would have damaged or destroyed McFarland's plea agreement.

¶ 12 Defendant alleged trial counsel pressured and coerced him into pleading guilty against his will and told defendant not to complain to the trial court or the trial judge would become angry and impose the maximum sentence. According to defendant, "I did what he told me to do and plead [*sic*] guilty, which I did under duress and fear and because I could not afford to hire an attorney and I did not want to offend the court or Judge."

¶ 13 On February 2, 2016, the trial court appointed an attorney to represent defendant during the postconviction proceedings.

¶ 14 On June 2, 2016, postconviction counsel filed an Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) certificate. Postconviction counsel said she attempted to amend defendant's *pro se* petition but found it meritless. The same day, defense counsel filed a motion

to withdraw as defendant's attorney, noting defendant tendered both a fully negotiated guilty plea on June 30, 2015, in case No. 14-CF-15 and an admission with regard to the State's petition to revoke defendant's conditional discharge in case No. 12-CF-17. Citing *People v. Smith*, 383 Ill. App. 3d 1078, 1085, 892 N.E.2d 55, 63 (2008), postconviction counsel noted a knowing and voluntary guilty plea waives all nonjurisdictional errors or irregularities, including constitutional errors. Defendant's only recourse was to claim his plea was not knowing and voluntary.

¶ 15 Citing *McMann v. Richardson*, 397 U.S. 759 (1970), postconviction counsel noted one way to establish a plea was not knowing and voluntary is to show trial counsel did not provide the type of competent advice expected from a criminal defense attorney. Postconviction counsel stated an attorney's performance falls below an objective standard of reasonableness if he fails to ensure his client entered a knowing and voluntary plea (*People v. Hall*, 217 Ill. 2d 324, 335, 841 N.E.2d 913, 920 (2005)). However, according to the motion to withdraw, defendant neither alleged in his postconviction petition nor told postconviction counsel his trial attorney gave him bad advice or misled him with regard to the terms of defendant's plea agreement. Further, postconviction counsel pointed out defendant was properly admonished at the plea hearing, acknowledged he had the opportunity to go over the written agreements with his attorney, understood the written agreements, and signed both agreements. Defendant told the trial court his plea and admission were not the result of force or threats and he had not been promised anything not contained within the agreements. Defendant declined the court's invitation to ask any question he might have had after the State provided the factual basis for the guilty plea.

¶ 16 On July 20, 2016, at a hearing on the motion to withdraw as counsel, postconviction counsel stated she had spoken with defendant on several occasions and

communicated with him through written correspondence. After reviewing the file and taking into consideration what defendant said and the issues he considered to be appropriate, appointed counsel stated she found no merit in any of the issues defendant raised based on her review of the case.

¶ 17 The trial court asked defendant if he had any objection to appointed counsel withdrawing from the case. Defendant told the court he did not think counsel had been giving him “fair assistance of counsel.” Defendant stated he did not understand what to do because postconviction counsel was not going to help him even if she remained his lawyer. The trial court responded:

“And that’s part of the problem. She’s looked at your petition and she does not find that there are any merits to that petition, so that she doesn’t feel that she could adequately represent you, that’s why she’s asking to withdraw. I’m going to give you the opportunity to proceed with your motion and you can do that on a *pro se* basis if you wish to, but at this point my question to you is are you objecting to her withdrawal from the case?”

Defendant responded he was not objecting. The court then ruled appointed counsel would be allowed to withdraw from both case No. 12-CF-17 and No. 14-CF-15 based on a finding of no merit. The court stated defendant could proceed *pro se* on his motions or hire counsel to represent him.

¶ 18 On August 18, 2016, the State filed a motion to dismiss defendant’s *pro se* petition for postconviction relief. The State argued defendant waived any nonjurisdictional errors because he entered a guilty plea and did not have a trial. While acknowledging defendant could challenge the voluntary and intelligent character of his guilty plea by showing the advice

he received from his attorney was not within the range of competence demanded of attorneys in criminal cases, the State pointed to the fact the trial court properly admonished defendant prior to his plea, and the record shows defendant's plea and admission were knowing and voluntary.

¶ 19 On November 8, 2016, defendant responded to the State's motion, arguing it should be denied because his trial attorney "coerced him" into pleading guilty and did not inform him of the availability of exonerating evidence. He also mentioned his trial counsel and McFarland's trial counsel were law partners. However, he provided no explanation how this made his plea unknowing or involuntary.

¶ 20 The trial court held a hearing on December 16, 2016, on the State's motion to dismiss defendant's postconviction petition. The court found defendant's guilty plea was knowing and voluntary. The court did not find any newly discovered evidence to contradict this or show actual innocence.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 Defendant argues his appointed postconviction counsel should not have been allowed to withdraw and his postconviction petition should not have been dismissed. Defendant contends his "petition not only presented the gist of a constitutional claim that his trial attorney suffered from a conflict of interest, it satisfied the second stage post-conviction requirement that a petitioner plead a substantial constitutional violation." We review the dismissal of a postconviction petition prior to an evidentiary hearing *de novo*. *Hall*, 217 Ill. 2d at 334, 841 N.E.2d at 920.

¶ 24 In this case, the trial court had advanced defendant's postconviction petition to the second stage of postconviction proceedings, and defendant was entitled to the appointment of an

attorney. *People v. Lee*, 2016 IL App (1st) 152425, ¶ 45, 57 N.E.3d 686. Appointed counsel is required to provide reasonable assistance, which includes consulting with defendant, examining the trial record, and making any amendments to the petition necessary to adequately present defendant's claims. *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977, 979-80 (2007); Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). During second-stage proceedings, the court reviews both the postconviction petition and any documents attached thereto to determine whether a petitioner made "a substantial showing of a constitutional violation." (Internal quotations omitted.) *People v. Brown*, 2017 IL 121681, ¶ 24, 102 N.E.3d 205. If a substantial showing is not made, the petition should be dismissed. *Brown*, 2017 IL 121681, ¶ 24.

¶ 25 An attorney appointed to represent a defendant during postconviction proceedings is ethically obligated to move to withdraw as counsel if she finds no issue merits review or determines the petition is frivolous or patently without merit. *People v. Greer*, 212 Ill. 2d 192, 209, 817 N.E.2d 511, 522 (2004). However, if a trial court has determined a *pro se* postconviction petition should be advanced to the second stage of postconviction proceedings based on the merits of the petition, an attorney appointed to represent the defendant with regard to the petition must establish each of the claims raised by defendant in his postconviction petition are meritless before she can withdraw from the case. *People v. Kuehner*, 2015 IL 117695, ¶ 21, 32 N.E.3d 655. In other words, counsel cannot simply state the claims are meritless and be allowed to withdraw.

¶ 26 In this case, according to postconviction counsel's motion to withdraw, defendant could not pursue the claims he raised in his *pro se* postconviction petition because he forfeited any nonjurisdictional errors, including constitutional errors, by pleading guilty. See *People v. Ivy*, 313 Ill. App. 3d 1011, 1017, 730 N.E.2d 628, 635 (2000); see also *People v. Townsell*, 209

Ill. 2d 543, 545, 809 N.E.2d 103, 104 (2004) (“It is well established that a voluntary guilty plea waives all nonjurisdictional errors or irregularities, including constitutional ones.”). The State made this same argument in its motion to dismiss defendant’s postconviction petition. In dismissing defendant’s petition, the trial court noted defendant’s plea was knowing and voluntary.

¶ 27 Absent a jurisdictional claim, defendant could only proceed on a claim his guilty plea was not knowing and voluntary.

“ [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.’ ” See *Smith*, 383 Ill. App. 3d at 1085, 892 N.E.2d at 63, quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), citing *McMann v. Richardson*, 397 U.S. 759 (1970).

Defendant does not argue on appeal his guilty plea was not knowingly and voluntarily entered. Further, defendant does not argue postconviction counsel did not adequately consider and address in her motion to withdraw pursuant to *Kuehner* why defendant could not make a meritorious claim his guilty plea was not knowing and voluntary. Instead, defendant focuses on the alleged merits of defendant’s claim his trial counsel was conflicted.

¶ 28 According to defendant, the trial court erred in allowing postconviction counsel to withdraw because he put forth a valid constitutional claim his trial counsel was conflicted.

However, while this may have been a valid constitutional claim, defendant forfeited the claim by pleading guilty.

¶ 29 On appeal, pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. May 25, 2018), defendant forfeited on appeal any claim the trial court erred in either allowing postconviction counsel's motion to withdraw or granting the State's motion to dismiss. Defendant failed to offer any argument why the constitutional arguments he raised in his postconviction petition were not forfeited when he entered his guilty plea in this case. Defendant failed to address why his guilty plea was not knowing and voluntary. Regardless of defendant's forfeiture on appeal, it appears from the record defendant's guilty plea was entered knowingly and voluntarily.

¶ 30

III. CONCLUSION

¶ 31 For the reasons stated, we affirm the trial court's orders granting postconviction counsel's motion to withdraw and dismissing defendant's postconviction petition.

¶ 32 Affirmed.