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2014 IL App (3d) 121035-U

Order filed October 23, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-12-1035
JARED ARNOLD,)	Circuit Nos. 10-CF- 230, 11-CF-283, and 11-CF-486
Defendant-Appellant.)	Honorable Scott A. Shore, Judge, Presiding.

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

ORDER

¶ 1 *Held:* The trial court did not err in dismissing defendant's postconviction petition at the second stage of proceedings.

¶ 2 Defendant, Jared Arnold, appeals from the second-stage dismissal of his postconviction petition. Defendant argues that the cause should be remanded for a third-stage evidentiary hearing because his guilty plea was involuntary. We affirm.

¶ 3 **FACTS**

¶ 4 On May 27, 2010, in case No. 10-CF-230, defendant was charged by indictment with burglary (720 ILCS 5/19-1(a) (West 2010)) and criminal damage to property (720 ILCS 5/21-1(1)(a) (West 2010)). Defendant pled guilty to the charged offenses in exchange for a sentence of five years of Treatment Alternatives for Safe Communities (TASC) probation.

¶ 5 On October 6, 2011, the State filed a petition to revoke defendant's TASC probation. The petition alleged that defendant had violated the conditions of probation when he committed the offenses of aggravated domestic battery and theft. Prior to the petition, defendant had been charged with aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2010)) and aggravated battery (720 ILCS 5/12-3.05(a)(1) (West 2010)) in case No. 11-CF-486, and theft (720 ILCS 5/16-1(a)(1)(B) (West 2010)) in case No. 11-CF-0283.

¶ 6 On October 24, 2011, defendant entered a negotiated plea agreement that resolved the three pending cases. In exchange for pleading guilty to aggravated domestic battery in case No. 11-CF-486, defendant was sentenced to five years' incarceration. Defendant was required to serve 85% of the sentence. In case No. 11-CF-283, defendant pled guilty to theft in exchange for a sentence of 40 days' incarceration with credit for 40 days served. In case No. 10-CF-230, the State withdrew its petition to revoke probation, and defendant was sentenced to serve 40 days of incarceration with credit for time served.

¶ 7 During the plea hearing, defense counsel asked the court to recommend impact incarceration and noted that the court had received defendant's consent form. The form stated, in relevant part, that defendant understood that he had been "recommended by the Court for this program but may not be accepted by the Department of Corrections [(DOC)] for participation in the Impact Incarceration Program." Defense counsel "made it very clear to [defendant] that the Court can only make a recommendation for [impact] incarceration" and "[i]t's up to the [DOC] as

to whether he will be accepted into the program." Defense counsel was unaware of any reasons why defendant would be ineligible for the program, and he had advised defendant that if he was not accepted into impact incarceration, he would be required to serve 85% of his five-year prison sentence. Defendant acknowledged that he might not be accepted into the program and agreed that his participation was a privilege and not a right. The court concluded that defendant's participation in the program was voluntarily and willingly undertaken, provided the DOC "takes him."

¶ 8 On February 1, 2012, defendant filed a *pro se* postconviction petition. The petition alleged that defendant was denied effective assistance of counsel and his right to due process had been violated. In an attached affidavit, defendant averred that he pled guilty because his attorney told him that he was eligible for impact incarceration; however, when he arrived at Stateville Correctional Center, defendant was denied admission into the program because he was required to serve 85% of his sentence. Defendant contended that if he had known he would not be accepted into the program, he would not have pled guilty. The trial court appointed counsel, who filed an amended petition. Defense counsel also filed a petition for direction from the court that was supported by an affidavit from defendant's plea counsel, Frederick Bernardi. Bernardi averred that he had indicated to defendant prior to the plea that "although the final decision whether to allow him to enter [impact incarceration] was up to the [DOC]," he had every confidence that defendant would be given that opportunity because he appeared to satisfy all of the statutory requirements. After defendant was incarcerated, Bernardi contacted the DOC and learned that defendant was rejected from the impact incarceration program because he was required to serve 85% of his sentence.

¶ 9 On November 29, 2012, the State filed a motion to dismiss defendant's postconviction petition. After a hearing, the trial court granted the State's motion to dismiss. Defendant appeals.

¶ 10 ANALYSIS

¶ 11 Defendant argues that the cause should be remanded for a third-stage evidentiary hearing because he made a substantial showing that he pled guilty based on a misapprehension about his eligibility for impact incarceration. See *People v. Jamison*, 197 Ill. 2d 135 (2001).

¶ 12 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a three-stage process for the adjudication of postconviction petitions. *People v. Hodges*, 234 Ill. 2d 1 (2009). The dismissal of a postconviction petition is warranted at the second stage where the defendant's claims, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Hall*, 217 Ill. 2d 324 (2005). At this stage, all factual allegations that are not positively rebutted by the record are accepted as true. *People v. Young*, 355 Ill. App. 3d 317 (2005). We review *de novo* the trial court's dismissal of a second-stage postconviction petition. *People v. Turner*, 2012 IL App (2d) 100819.

¶ 13 Defendant argues that his postconviction petition made a substantial showing of a due process violation because his guilty plea was not entered knowingly or intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969); *People v. Williams*, 188 Ill. 2d 365 (1999). Defendant entered his guilty plea based on the mistaken belief that he was eligible to receive impact incarceration. Defendant contends that when he was admitted to the DOC, he learned that he was ineligible for the program because of his 85% sentence.

Section 5-8-1.1(a) of the Unified Code of Corrections permits a trial court to approve an offender for placement in impact incarceration by stating such in the sentencing order. 730 ILCS 5/5-8-1.1(a) (West 2010). The statutory requirements for impact incarceration include:

- "(1) The person must be not less than 17 years of age nor more than 35 years of age.
- (2) The person has not previously participated in the impact incarceration program and has not previously served more than one prior sentence of imprisonment for a felony in an adult correctional facility.
- (3) The person has not been convicted of a Class X felony, first or second degree murder, armed violence, aggravated kidnapping, criminal sexual assault, aggravated criminal sexual abuse or a subsequent conviction for criminal sexual abuse, forcible detention, residential arson, place of worship arson, or arson and has not been convicted previously of any of those offenses.
- (4) The person has been sentenced to a term of imprisonment of 8 years or less.
- (5) The person must be physically able to participate in strenuous physical activities or labor.
- (6) The person must not have any mental disorder or disability that would prevent participation in the impact incarceration program.
- (7) The person has consented in writing to participation in the impact incarceration program and to the terms and conditions thereof.
- (8) The person was recommended and approved for placement in the impact incarceration program in the court's sentencing order." 730 ILCS 5/5-8-1.1(b) (West 2010).

Placement into the program is conditioned upon DOC approval. 730 ILCS 5/5-8-1.1(a) (West 2010). If a defendant is accepted into and completes the program, his prison sentence shall be reduced to time considered served. *Id.* If a defendant is not accepted into the program or fails to complete the program, his term of imprisonment remains as set forth by the sentencing order. *Id.*

¶ 15 In this case, defendant does not argue that he did not satisfy the statutory requirements, but contends that his ignorance of the DOC blanket policy denying impact incarceration to all inmates with 85% sentences rendered his plea involuntary.

¶ 16 Here, the trial court recommended that the DOC consider defendant for impact incarceration as an alternative to his five-year prison sentence. The DOC had no obligation to include defendant in the program and had discretion to exclude him for any number of reasons. See *People v. Manoharan*, 394 Ill. App. 3d 762 (2009) (defendant did not receive ineffective assistance of counsel where his attorney did not advise him that he was ineligible for impact incarceration as a result of his immigration status). Furthermore, defendant was repeatedly notified and admonished that the court could only make a recommendation for impact incarceration and that defendant's acceptance into the program would ultimately be made by the DOC. The court also admonished defendant that if the DOC did not accept him into the program he would have to serve the five-year prison sentence. Because of those admonishments, defendant was unable to make a substantial showing of a due process violation. The trial court did not err when it granted the State's motion to dismiss defendant's postconviction petition.

¶ 17 CONCLUSION

¶ 18 The judgment of the circuit court of Tazewell County is affirmed.

¶ 19 Affirmed.