2013 IL App (5th) 110336-U

NO. 5-11-0336

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 09-CF-587
	)	
DARRYL SHARP,	)	Honorable
	)	Stephen P. McGlynn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Spomer and Justice Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: First-stage dismissal of the defendant's postconviction petition was not proper where the petition alleged that defense counsel failed to interview a witness who could have corroborated the defendant's claim that he was in the getaway car while the offense was carried out and an affidavit supporting this claim was attached to the petition. Claim was not affirmatively refuted by the record merely because the factual basis presented at a guilty plea hearing included evidence that would have contradicted the witness's testimony.

¶ 2 The defendant, Darryl Sharp, pled guilty to armed robbery. He filed a *pro se* postconviction petition, alleging that counsel provided him with ineffective assistance by failing to investigate potential defense witnesses and incorrectly advising the defendant of the possible sentencing range. The postconviction court dismissed the petition as frivolous and patently without merit. The defendant appeals, arguing that his petition stated the gist of a constitutional claim as to both issues. We reverse.

¶ 3 On May 23, 2009, two men entered a Hallmark store in Belleville, Illinois,

robbed two store employees at gunpoint, and fled the scene. The defendant and a codefendant, Corey Ford, were charged in the incident. The defendant was indicted on two counts of armed robbery. Both counts alleged that the defendant committed the offenses while carrying a firearm. See 720 ILCS 5/18-2(a)(2) (West 2008).

¶ 4 On April 22, 2010, the defendant pled guilty to a modified charge pursuant to a negotiated plea agreement. In exchange for the defendant's plea, the State agreed to ask the court to sentence him to 20 years on each count, to be served concurrently. The plea agreement called for the State to dismiss the indictment and file a modified information in its place. The modified information alleged that the defendant was armed with a "dangerous weapon" when the offenses were committed rather than a firearm, but was otherwise identical to the indictment. See 720 ILCS 5/18-2(a)(1) (West 2008). The purpose of this change was to allow the State to ask the court to sentence the defendant to 20 years in prison on each charge and avoid a mandatory sentence enhancement. Armed robbery is a Class X felony, carrying a sentence of 6 to 30 years. 720 ILCS 5/18-2(b) (West 2008); 730 ILCS 5/5-8-4 (West 2008). However, the armed robbery statute provides a mandatory 15-year sentence enhancement if the offense is committed while carrying a firearm. 720 ILCS 5/18-2(b) (West 2008).[1]

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[1]We note that, in *People v. Hauschild*, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the Illinois Supreme Court held that the 15-year sentence enhancement provision violated the proportionate penalties clause of the Illinois state constitution. In reaching this conclusion, the court found that, under the statutes in effect at the time, the elements of armed robbery when committed with a firearm were identical to the elements of armed violence predicated on robbery with a category I or II weapon. *Hauschild*, 226 Ill. 2d at 86, 871 N.E.2d at 14. The court further noted, however, that armed violence carried a lower penalty than armed

¶ 5 The State presented a factual basis. The State's attorney told the court that the State had evidence that the defendant and Corey Ford walked into the Hallmark store and Ford demanded that one of the store employees go to the back room and lie down on the floor. He then went through her pockets and stole several items from her. Meanwhile, the defendant demanded that the other store employee go through the cash registers in the front of the store. The defendant then brought the other store employee to the back room, hit her in the head with his gun, and demanded more money. When Ford and the defendant were told there was no more money, they fled the store.

¶ 6 The State's evidence would further show that a witness who saw a vehicle leaving the parking lot at an excessive speed gave police the license plate number and a description of the vehicle. A police officer saw the vehicle traveling westbound on Interstate 64. The vehicle pulled off the highway into the parking lot of a restaurant near the Fairview Heights exit. The officer saw three men flee from the vehicle on foot. The driver was identified as Corey Ford, the front-seat passenger was the defendant, and the back-seat passenger was Cortez Beckman. The defendant was

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robbery with the mandatory 15-year sentence enhancement. *Hauschild*, 226 Ill. 2d at 86-87, 871 N.E.2d at 14. In the wake of the decision in *Hauschild*, the legislature amended the armed violence statute to exclude predicate offenses that include possession of a covered weapon as an element of the offense or as a factor that increases the penalty for an offense. *People v. Brown*, 2012 IL App (5th) 100452, ¶ 9, 968 N.E.2d 658 (quoting Pub. Act 95-688, § 4 (eff. October 23, 2007)). This amendment "effectively cured the proportionate-penalties violation." *Brown*, 2012 IL App (5th) 100452, ¶ 12, 968 N.E.2d 658. This court thus held that the enhancement provision was "revived" by the statutory amendment. *Brown*, 2012 IL App (5th) 100452, ¶ 17, 968 N.E.2d 658.

later apprehended in a store on the other side of Interstate 64. One of the two Hallmark store employees was able to identify the defendant.

¶ 7 The court found that the defendant's plea was knowing and voluntary and that a factual basis existed. The court accepted the plea and entered judgment on it, sentencing the defendant to concurrent terms of 20 years on each count in accordance with the plea agreement.

¶ 8 On June 6, 2011, the defendant filed a *pro se* petition for postconviction relief. In it, he alleged that counsel was ineffective for failing to interview and call two witnesses who could have corroborated the defendant's claim that he was asleep in the back seat of the getaway car drunk and high on marijuana when the robbery occurred. The petition alleged that one of these witnesses was codefendant Corey Ford; however, the petition did not identify the second alleged witness. The defendant alleged that he told counsel how to reach both witnesses, but she did nothing to investigate. The defendant raised additional claims that counsel was ineffective in preparing a defense; however, none of these additional claims are at issue in this appeal. He alleged that, had counsel adequately prepared a defense, he would not have pled guilty.

¶ 9 The defendant further alleged that counsel was ineffective for incorrectly informing him that he was facing a possible sentencing range of 21 to 45 years if he went to trial. As we explained previously, the sentencing range for armed robbery is ordinarily 6 to 30 years; however, there is a 15-year sentence enhancement if the crime is committed with a firearm, bringing the total to 21 to 45 years. The defendant alleged that he was not eligible for this range because he was not carrying a weapon when the offence occurred, and that he would not have pled guilty if he had known that he was only facing a sentence of 6 to 30 years.

¶ 10 The defendant attached several supporting affidavits to the petition. These included his own affidavit and the affidavits of some of his family members supporting his allegation that counsel informed him he faced a possible sentence of 21 to 45 years if he went to trial. Also attached was an affidavit of Corey Ford. Ford stated, "When the robbery was going on, Darryl Sharp was in the back seat of the car the whole time."

¶ 11 On July 25, 2011, the court summarily dismissed the defendant's *pro se* petition, finding that the claims raised were without merit. This appeal followed.

¶ 12 The Post-Conviction Hearing Act provides a three-step procedure to resolve a defendant's claim that his conviction was the result of a substantial deprivation of rights protected under the state or federal constitution. *People v. Makiel*, 358 Ill. App. 3d 102, 104, 830 N.E.2d 731, 736 (2005). At the first stage of postconviction proceedings, the court reviews the petition independently without input from either party. If the court finds that the claims in the petition are frivolous and patently without merit, the court may dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Hernandez*, 283 Ill. App. 3d 312, 316, 669 N.E.2d 1326, 1329 (1996). At this stage, courts must take all well-pleaded facts in the defendant's petition as true. In order to survive a first-stage dismissal, a defendant must present only the "gist of a constitutional claim." *People v. Clark*, 386 Ill. App. 3d 673, 675, 899 N.E.2d 342, 345 (2008). Because most defendants are acting *pro se* at this stage, Illinois courts have held that this standard is a very low threshold. *People v. Ligon*, 239 Ill. 2d 94, 104, 940 N.E.2d 1067, 1073 (2010). Our review of the court's determination is *de novo*. *Clark*, 386 Ill. App. 3d at 675, 899 N.E.2d at 345.

¶ 13 Claims of ineffective assistance of counsel, such as that raised in the defendant's petition, are evaluated under the test set forth in *Strickland v. Washington*,

466 U.S. 668 (1984). To prevail, a defendant must demonstrate that counsel's performance was deficient because it fell below an objective standard of reasonableness. *Makiel*, 358 Ill. App. 3d at 105, 830 N.E.2d at 737. The defendant must also demonstrate prejudice as a result of counsel's deficient performance. *Makiel*, 358 Ill. App. 3d at 105-06, 830 N.E.2d at 737 (citing *Strickland*, 466 U.S. at 694). In the context of a guilty plea, this means the defendant must show that there is a reasonable probability that but for counsel's errors, he would not have pled guilty and would instead have insisted on going to trial. *People v. Presley*, 2012 IL App (2d) 100617, ¶ 23, 969 N.E.2d 952.

¶ 14 The defendant first argues that the court erred in dismissing his petition at the first stage of postconviction proceedings because the petition set out the gist of a constitutional claim with respect to his allegation that his attorney was ineffective for failing to interview potential defense witnesses he told her about. As previously discussed, the petition alleged that two witnesses could have provided testimony to corroborate the defendant's claim that he was asleep in the back seat of the getaway car while the offense took place. The defendant specifically mentioned codefendant Corey Ford as a potential witness and provided an affidavit from Ford in support of his claim; however, he did not identify the other witness or provide an affidavit. As the State correctly points out, the court may dismiss a petition at the first stage if a defendant fails to attach affidavits, records, or other evidence in support of his claims. *People v. Delton*, 227 Ill. 2d 247, 255, 882 N.E.2d 516, 520 (2008). Thus, as the State argues, in determining whether the petition sets forth the gist of a claim on this issue, we consider only the testimony Ford stated he would have given. With this limitation in mind, we agree with the defendant that his petition sets forth the gist of a constitutional claim.

¶ 15 The State's argument to the contrary is twofold. First, the State contends that Ford's testimony does not support the defendant's claim that he had passed out in the back seat of the car because he was drunk and high on marijuana. As previously discussed, Ford's brief affidavit states only that the defendant was in the back seat of the vehicle while the robbery took place. We are not persuaded. Ford's testimony could have contradicted the State's evidence that the defendant was inside the store participating in the robbery. Resolving the conflict between Ford's testimony and that of the State's witnesses would have been a matter for the jury to decide; however, the defendant alleged that had the evidence been available to him, he would have had a stronger defense and would not have pled guilty. The fact that Ford's statement does not corroborate every detail of the defendant's claim does not change our conclusion that the allegation is sufficient to survive a first-stage dismissal.

¶ 16 The State also argues that the court properly dismissed the petition at the first stage because the defendant's claim is affirmatively refuted by the record. Specifically, the State contends that the defendant's claim that he was in the back seat of the getaway car is refuted by the State's evidence that the officer saw the defendant exit the front passenger seat. As the State argues, the court may dismiss the petition at the first stage if the defendant's claims are positively refuted by the record. *People v. Coleman*, 183 Ill. 2d 366, 381-82, 701 N.E.2d 1063, 1072 (1998). Again, we are not persuaded.

¶ 17 The State's argument overlooks the nature of the factual basis presented at a guilty plea hearing. The factual basis is simply the prosecutor's description of some of the evidence the State would present if the matter went to trial. It is not "the equivalent of a trial, at which the State must present evidence proving beyond a reasonable doubt each of the elements of the offense with which the defendant is

charged." *People v. Bassette*, 391 Ill. App. 3d 453, 456, 908 N.E.2d 1062, 1064 (2009). Indeed, the prosecutor's statement outlining the factual basis does not constitute evidence at all. *Bassette*, 391 Ill. App. 3d at 456, 908 N.E.2d at 1064. A court accepting a defendant's guilty plea only needs to consider the factual basis presented to determine whether the evidence described would allow the court to find that the defendant had actually committed the offense charged. This finding does not require the court to weigh the evidence or to consider whether there are any possible defenses. *Bassette*, 391 Ill. App. 3d at 457, 908 N.E.2d at 1065.

¶ 18 As the State points out, the evidence described by the prosecutor in the factual basis includes testimony that contradicts the testimony the defendant alleges Ford could have provided. One of the store employees identified the defendant, and the officer would have testified that the defendant was a front-seat passenger in the vehicle, not the back-seat passenger. However, this testimony was not presented to a court, subject to cross-examination, or weighed against conflicting evidence. The existence of conflicting evidence does not mean that the defendant's claim is affirmatively refuted by the record. The first-stage dismissal of a postconviction petition is not appropriate unless " 'a quick look at the record' " shows that the allegations are " '*absolutely* untrue' " or without merit. (Emphasis in original.) *People v. Rivera*, 198 Ill. 2d 364, 373, 763 N.E.2d 306, 311 (2001) (quoting 83d Ill. Gen. Assem., House Proceedings, June 21, 1983, at 89 (statements of Representative Johnson)). We find that the allegations related to counsel's failure to investigate the possibility of calling Ford as a witness are sufficient to meet this standard.

¶ 19 The defendant next contends that his petition stated the gist of a constitutional claim with regard to his claim that counsel was ineffective for incorrectly advising him of the sentencing range he faced. We need not resolve this claim. If a *pro se*

petition sets forth the gist of a constitutional claim, the entire petition is then docketed for second-stage proceedings so that counsel can be appointed and make whatever amendments are necessary to present the defendant's claims. *Rivera*, 198 Ill. 2d at 370-71, 763 N.E.2d at 310. We find the defendant's petition sufficiently sets forth the gist of a claim that counsel was ineffective for failing to interview his potential witness. Thus, dismissal at the first stage was not appropriate.

¶ 20 For the reasons stated, we reverse the court's order summarily dismissing the defendant's petition. We remand for further proceedings.

¶ 21 Reversed; cause remanded.