

2011 IL App (1st) 093335-U
No. 1-09-3335

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FIFTH DIVISION
August 19, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 94 CR 8733
)	
ANTHONY HORTON,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *HELD:* Where defendant's postconviction petition alleged that he chose not to file a motion pursuant to section 115-4.1(e) of the Code of Criminal Procedure of 1963 based on his counsel's erroneous advice, he adequately alleged an arguable ineffective assistance of counsel claim.

¶ 2 Defendant Anthony Horton appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). Defendant contends his petition adequately alleged a claim of ineffective assistance of counsel where he alleged his counsel told him that he could appeal his conviction *in absentia* without first filing a motion pursuant to section 115-4.1(e) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-4.1(e) (West 1994)). We reverse and remand for further proceedings.

¶ 3 Defendant was charged with the first degree murder of Steven Green based on a gang-related incident that occurred on January 23, 1994. At the bond hearing, the trial court informed defendant that he was required to appear in court and if he failed to do so, the trial would continue in his absence.

¶ 4 The bench trial began on May 11, 1995. The day after the defense rested, defendant failed to appear in court. Defendant's counsel explained that defendant had received death threats from gang members and was possibly in hiding. Because defendant had been admonished that he could be tried *in absentia*, the court issued a warrant for his arrest and continued to closing arguments.

¶ 5 On June 1, 1995, the trial court found defendant guilty of first degree murder. Defendant's motion for new trial was denied. On August 18, 1995, the court sentenced defendant *in absentia* to 35 years in prison.

¶ 6 Defendant was eventually arrested in Louisiana and returned to the jurisdiction in June 2007. On September 18, 2007, defendant's appointed counsel told the court that he had prepared a motion for new trial pursuant to section 115-4.1(e). However, counsel explained that defendant requested the motion not be filed because he did not want to risk receiving a greater sentence if the motion for new trial was granted. Instead, defense counsel filed a motion to

reconsider the sentence, which was denied. The trial court granted leave to file a notice of appeal from the August 18, 1995, judgment.

¶ 7 Subsequently, defendant's appellate counsel filed a motion to withdraw pursuant to *Anders v. California*, 366 U.S. 738 (1967). This court granted counsel's motion and dismissed defendant's direct appeal. *People v. Horton*, No. 1-07-2688 (2009) (unpublished order under Supreme Court Rule 23). This court explained that it did not have jurisdiction to consider defendant's appeal because defendant had failed to file a motion to reconsider sentence or a notice of appeal within 30 days of final judgment:

"Having failed to invoke our jurisdiction to consider an appeal from his conviction, he was limited to the method provided to absent defendants in section 115-4.1(e) of the Code. (Citation omitted)." *Horton*, No. 1-07-2688, order at 4.

¶ 8 On September 1, 2009, defendant filed a *pro se* postconviction petition claiming he received ineffective assistance of counsel. Specifically, defendant alleged counsel advised him that he could appeal his underlying conviction without filing a section 115-4.1(e) motion. Counsel also informed defendant that if his section 115-4.1(e) motion was granted, defendant risked receiving a greater sentence. Relying on this advice, defendant agreed not to file the section 115-4.1(e) motion. Defendant also alleged appellate counsel later informed him that the only way he could appeal the underlying conviction was by filing a section 115-4.1(e) motion. Defendant concludes that he received ineffective assistance because he lost his right to appeal his underlying conviction based on counsel's erroneous advice.

¶ 9 The trial court summarily dismissed defendant's postconviction petition.

¶ 10 On appeal, defendant contends that his petition presented the gist of an ineffective assistance of counsel claim because he did not file a section 115-4.1(e) motion based on erroneous advice received from counsel, thereby forfeiting his right to have his underlying conviction reviewed by an appellate court.

¶ 11 We review the summary dismissal of a postconviction petition *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 12 At the first stage of proceedings, a defendant's petition should be liberally construed and taken as true. *People v. Jones*, 211 Ill. 2d 140, 148 (2004). A petition will be summarily dismissed only if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 1994); *Brown*, 236 Ill. 2d at 184. Frivolous or patently without merit means the petition has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). Petitions based on meritless legal theory or fanciful factual allegations will be dismissed. *Hodges*, 234 Ill. 2d at 16. At this stage, defendant's petition need only demonstrate the "gist" of a constitutional claim. *Brown*, 236 Ill. 2d at 184.

¶ 13 A first stage petition claiming ineffective assistance of counsel must show that it is arguable counsel's performance fell below an objective standard of reasonableness and that it is arguable defendant was prejudiced by counsel's performance. *Hodges*, 234 Ill. 2d at 17.

¶ 14 There is no dispute that if a defendant who was convicted *in absentia* wants to obtain relief from that judgment when he returns, then he must file a motion under section 115-4.1(e), which provides, in relevant part:

"When a defendant who in his absence has been ***
both convicted and sentenced appears before the court, he
must be granted a new trial or new sentencing hearing if the
defendant can establish that his failure to appear in court

was both without his fault and due to circumstances beyond his control." 725 ILCS 5/115-4.1(e) (West 1994).

If the motion is granted, the defendant receives a new trial or a new sentencing hearing and thus, the need for a review of the underlying conviction no longer exists. If the section 115-4.1(e) motion is denied, then the defendant may file a notice of appeal, which "may also include a request for review of the judgment and sentence not vacated by the court." 725 ILCS 5/115-4.1(g) (West 1994); *People v. Pontillo*, 267 Ill. App. 3d 27, 33-34 (1994). This mandate was the basis for both our prior decision in 2009 and the trial court's decision here in which defendant was informed that his recourse was limited to the method provided in section 115-4.1(e).

¶ 15 The dispute in the present appeal is whether defendant still can file a section 115-4.1(e) motion. Defendant maintains that the language "appears before the court" in section 115-4.1(e) means that he has forfeited his right to file the motion for failing to do so when he first returned to the jurisdiction. In turn, having lost his right to file the requisite motion, he has lost his right to a direct appeal.

¶ 16 Notably, defendant provides no legal authority for the proposition that he lost his right to file a section 115-4.1(e) motion by not filing when he first returned. Our prior decision cited *People v. Laster*, 328 Ill. App. 3d 391, 395-96 (2002). The *Laster* court held that section 115-4.1 does not require the trial court to inform a defendant of the steps necessary to perfect an appeal when the defendant was convicted or sentenced *in absentia*. *Laster*, 328 Ill. App. 3d at 395-96. In reaching its decision, the court discussed that the appropriate time for a defendant to file a section 115-4.1(e) motion was when he "appears before the court." *Laster*, 328 Ill. App. 3d at 395. There, the defendant first appeared before the court after his absence in July 2000, and appeared before the judge who sentenced him *in absentia* represented by counsel on October 5, 2000. *Laster* 328 Ill. App. 3d at 393. The appellate court found that the "proper

date" for the defendant to have filed his section 115-4.1(e) motion was October 5, 2000, and because he "failed to timely present" a section 115-4.1(e) motion, it did not have jurisdiction to consider his appeal. *Laster*, 328 Ill. App. 3d at 396.

¶ 17 Similarly, in *People v. Lozada*, 323 Ill. App. 3d 1015 (2001), the court found that the appropriate date for the defendant to have filed a section 115-4.1(e) motion was April 20, 1999, the day he was brought before the court after he was arrested on a warrant. *Lozada*, 323 Ill. App. 3d at 1017, 1021.

¶ 18 In accordance with the positions taken in *Laster* and *Lozada*, the appellate court in *People v. Sayles*, 130 Ill. App. 3d 882 (1985), found that "the defendant waived his right to proceed under section 115-4.1 when defense counsel chose to file a notice of appeal from his conviction." *Sayles*, 130 Ill. App. 3d at 888. See also *People v. Schieffeld*, 181 Ill. App. 3d 364, 366-67 (1989) (finding that the defendant waived his right to a hearing under section 115-4.1(e) because his attorney timely filed a notice of appeal).

¶ 19 The State, however, asserts that defendant is free to file a section 115-4.1(e) motion because such relief is not limited by the passage of time. Therefore, defendant has not forfeited review of the underlying judgment. In turn, defendant cannot show prejudice to demonstrate, even arguably, an ineffective assistance of counsel claim based on counsel's advice.

¶ 20 The State relies on *People v. Manikowski*, 288 Ill. App. 3d 157, 161 (1997). The court in *Manikowski* held that the defendant's postconviction counsel was not ineffective for filing a postconviction petition rather than a section 115-4.1(e) motion. *Manikowski*, 288 Ill. App. 3d at 160-61. In so holding, the court reasoned that the potential relief provided by section 115-4.1(e) "is not limited by the passage of time." *Manikowski*, 288 Ill. App. 3d at 161. Therefore, the defendant could not show prejudice from his counsel's decision to file a

postconviction petition because the defendant was still free to file a section 115-4.1(e) motion. *Manikowski*, 288 Ill. App. 3d at 161.

¶ 21 To the extent that *Laster*, *Lozada*, and *Sayles* suggest that there is a specific time period in which it is appropriate to file a section 115-4.1(e) motion, defendant has lost his right to file such a motion. However, *Manikowski*, suggests that there is no time limit to when a defendant can file a section 115-4.1(e) motion. Absent a definitive decision, we must defer to the *Hodges* standard that at the first stage, a defendant need only show that it was arguable he was prejudiced by his counsel's actions. Here, based on *Laster*, *Lozada*, and *Sayles*, defendant arguably forfeited his rights pursuant to section 115-4.1 when he relied on his counsel's alleged advice that he could appeal his underlying conviction and sentence without filing a section 115-4.1(e) motion. Therefore, we find defendant presented an arguable claim of ineffective assistance of counsel.

¶ 22 For the foregoing reasons, we reverse the judgment of the trial court, and remand for further proceedings.

¶ 23 Reversed and remanded.