

2011 IL App (1st) 091146-U
No. 1-09-1146

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FOURTH DIVISION
July 7, 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. 07 CR 5575
)	
DARREL MOSLEY,)	Honorable
)	Diane Gordon Cannon,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Salone and Sterba concurred in the judgment.

O R D E R

HELD: Defendant filed a postconviction petition alleging that he forfeited his direct appeal based on trial counsel's deficient performance and that trial counsel therefore was constitutionally ineffective. The circuit court summarily dismissed defendant's petition. This court reversed the circuit court decision after finding defendant had stated a claim with arguable merit.

¶ 1 Defendant Darrel Mosley appeals from the summary dismissal of his petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). Defendant contends that trial counsel's unreasonable representation caused him to forfeit his direct appeal and he therefore stated a claim of arguable merit that counsel was constitutionally ineffective. We reverse and remand for further proceedings under the Act.

¶ 2 Following a bench trial, defendant was convicted of being an armed habitual criminal and sentenced to six years' imprisonment. Leslie Hayward testified that defendant ordered her to move her vehicle, which was stuck in a snow embankment and, when she did not respond, stated: "Bitch, you think I'm playing? I'll show your ass." Defendant went to his house and returned with a gun, which he shot in Hayward's direction. He then walked through the gangway towards the back of his home.

¶ 3 Chicago police officer Jolliff-Blake responded to Hayward's 911 emergency call. He testified that he followed snowprints into the gangway to the back of a basement apartment. There, he discovered a loaded revolver, which had an empty casing and smelled like it had been just discharged.

¶ 4 The parties stipulated to defendant's qualifying convictions for being an armed habitual criminal, and the State rested.

¶ 5 Defendant denied shooting at Hayward or having a gun. He and his former fiancé testified that they encountered Hayward outside the apartment building, where she asked them for drugs.

¶ 6 The court found defendant guilty as charged and, on October 30, 2008, sentenced him to six years' imprisonment.

¶ 7 Defendant did not file a direct appeal. On March 11, 2009, defendant filed this postconviction petition with an accompanying affidavit, claiming counsel was constitutionally ineffective. Defendant alleged that he asked defense counsel to file a notice of appeal in his case. Defense counsel, however, told defendant he would serve only 50% of his sentence, and within two-and-a-half years' time, when the case was considered on appeal, defendant would "be at home." Defendant stated "that's why I didn't put in for an appeal." Defendant later learned that he was required to serve at least 85% of his sentence. Defendant therefore claimed his attorney caused him to forfeit a direct appeal.

¶ 8 The circuit court summarily dismissed defendant's petition as frivolous and patently without merit. Defendant appealed.

¶ 9 Initially, the State contends that the record is insufficient for our review because defendant failed to provide the report of proceedings with the circuit court's reasoning for summarily dismissing the petition. However, at this stage we review the legal sufficiency of the petition *de novo*, not the

court's reasoning for its dismissal. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). Moreover, defendant has supplemented the record with the aforementioned report of proceedings. We therefore continue in our review.

¶ 10 The Act provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1 *et seq.* (West 2008); *Hodges*, 234 Ill. 2d at 9. A *pro se* postconviction petition may be summarily dismissed as frivolous and patently without merit if it has no arguable basis in law or fact, *i.e.* if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 11-12, 16-17.

¶ 11 Defendant contends that he stated a claim of arguable merit that counsel was constitutionally ineffective. Defendant contends counsel misinformed him that he would serve only 50% of his sentence and be released before consideration of his appeal, when in fact the statute mandated 85% service based on defendant's status as a Class X offender. See 730 ILCS 5/3-6-3(a)(2)(ii) (West 2008). Relying on *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), defendant contends that but for counsel's erroneous advice, he would have filed a direct appeal.

¶ 12 In *Roe*, the United States Supreme Court held that pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), counsel has a constitutionally imposed duty to consult with the defendant about an appeal when the defendant has reasonably demonstrated a desire to appeal. *Roe* held that to assert a successful claim of ineffective assistance of counsel under *Strickland* in this context, defendant must establish (1) that counsel failed to properly consult with him, and (2) this deficient performance "deprive[d] defendant of an appeal that he otherwise would have taken[.]" *Roe*, 528 U.S. at 484.

¶ 13 Consistent with *Roe*, we observe that a defendant has a fundamental right to appeal his criminal conviction (Ill. Const. 1970, art. VI, §6; *People v. Ross*, 229 Ill. 2d 255, 268 (2008)), and that right belongs solely to the defendant, not his attorney (*People v. Powers*, 376 Ill. App. 3d 63, 66 (2007)).

¶ 14 In this case, liberally construing the petition and taking defendant's allegations as true (see *People v. Edwards*, 197 Ill. 2d 239, 244 (2001)), we conclude that defendant has set forth a claim of arguable merit that counsel was ineffective. Defendant asked defense counsel to file a notice of appeal on his conviction. Once defendant made that request, counsel was required to fulfill the ministerial task of filing the notice of appeal. See *Roe*, 528 U.S. at 477. Counsel, however, essentially informed defendant that such an appeal would not be worthwhile,

as defendant would serve only 50% of his six-year sentence, which counsel calculated as some two years, and be out of prison before this court considered the direct appeal. As defendant later learned, he was required to serve 85% of his sentence. Assuming defendant's allegations are true, both counsel's erroneous advice and counsel's initial failure to file a notice of appeal would constitute unreasonable representation. Based on this unreasonable representation, defendant did not file an appeal that he otherwise would have taken, thus forfeiting it. These allegations are neither fanciful nor legally meritless, *i.e.* contradicted by the record. See *Hodges*, 234 Ill. 2d at 16. Therefore, it is at least arguable that counsel was ineffective. See *People v. Usher*, 397 Ill. App. 3d 276, 284 (2009).

¶ 15 Based on the foregoing, we reverse the summary dismissal of defendant's postconviction petition and remand for further proceedings in accordance with this order.

¶ 16 Reversed and remanded.