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No. 1-10-0312

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF PEOPLE.)	Appeal from the
)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 05 CR 18507
)	
ANTOINE EDWARDS,)	
)	The Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

O R D E R

HELD: Dismissal of section 2-1401 post-judgment petition was proper because defendant inappropriately asserted a claim of ineffective assistance of counsel, and furthermore the record rebutted that claim.

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Defendant Antoine Edwards appeals from the denial of his *pro se* section 2-1401 petition for post-judgment relief, contending that he alleged a valid claim of ineffective assistance of counsel because counsel affirmatively misinformed him about a collateral consequence of the guilty plea, namely, the percentage of the sentence that he would be required to serve. Defendant asks this court to reverse the circuit court's dismissal of his section 2-1401 petition, and remand for further proceedings.¹

On August 29, 2006, defendant entered a negotiated guilty plea to one count of aggravated discharge of a firearm, and was sentenced as a Class X offender to a seven-year prison term. During the guilty plea proceeding, the circuit court admonished defendant, *inter alia*, that although the offense was a Class 1 felony, he was required to be sentenced as a Class X offender, which meant that the minimum prison term was six years, the maximum prison term was 30 years, and there would be three years of mandatory supervised release, which was formerly called

¹ Defendant originally contended further that the circuit court abused its discretion in refusing to treat the section 2-1401 petition as a petition for post-conviction relief, but defendant withdrew that issue because the Illinois Supreme Court has ruled that the issue is not reviewable. See *People v. Stoffel*, 239 Ill. 2d 314, 316, 324 (2010) ("a trial court's decision *not* to recharacterize a defendant's *pro se* pleading as a postconviction petition may not be reviewed for error" (emphasis in original)).

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parole. Defendant acknowledged that he understood. The court stated that it had participated in a conference and had told defense counsel that in exchange for defendant's guilty plea to aggravated discharge of a firearm, the court would impose a seven-year prison sentence. Defendant acknowledged that that was his understanding of what the court had told defense counsel. Defendant further acknowledged that he was giving up his rights to plead not guilty, to have a jury trial, a bench trial, or any kind of a trial, to confront or cross-examine the State's witnesses, to present evidence on his own behalf, and to testify on his own behalf. Defendant also indicated that no one had threatened him or had promised him anything other than the offer he had received from the court:

"THE COURT: Sir, has anybody threatened you or promised you anything in an effort to get you to plead guilty in this case other than this offer that I've made to you?

THE DEFENDANT: No, Your Honor."

The parties stipulated to the following factual basis for the guilty plea. If Eric Estrada were called as a witness, he would testify that at approximately 12:25 p.m. on July 13, 2005, he was driving around the area of 2850 North Melvina Avenue in Chicago in a gray and black Suburban with Roman Evanez and Alexis

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Santana Ibanez, when he saw defendant, whom he would identify in court. Estrada had originally seen defendant start to throw gang signs on Wellington Avenue. Later, at the intersection of Melvina Avenue and George Street, defendant stopped his red motor scooter in the middle of the intersection, fired three or four shots at Estrada and Ibanez, and drove away. Jose Carrera witnessed the incident, and defendant was arrested approximately 10 minutes later. A gun was recovered, and shell casings were recovered at the scene. Defendant was identified as the shooter.

Defendant waived his right to a presentence investigative report. The circuit court then sentenced him to a seven-year prison term.

Defendant did not file a motion to withdraw the guilty plea or a direct appeal. Instead, on July 10, 2007, defendant filed a *pro se* petition for post-judgment relief (735 ILCS 5/2-1401 (West 2008)), alleging that the circuit court's failure to admonish him that he would have to serve 85% of his sentence deprived him of due process of law. Defendant alleged further that defense counsel admonished him that he would have to serve only 50% of his sentence and that he relied on that incorrect information when he pleaded guilty. He alleged that, when he arrived at the penitentiary, he was informed that he would have to serve 85% of the sentence.

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On August 3, 2007, before the State had filed a response and before the 30-day period for the State to do so had expired, the circuit court denied defendant's section 2-1401 petition *sua sponte*.

Defendant appealed, and this court vacated the judgment and remanded the cause pursuant to *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009), because the court's *sua sponte* denial of the petition occurred during the 30-day period for the State to answer the petition or otherwise plead and consequently was premature. *People v. Edwards*, No. 1-07-2520 (2009) (unpublished order under Supreme Court Rule 23). This court stated that it expressed no opinion on the merits of defendant's arguments.

On remand, defendant requested the circuit court to recharacterize the section 2-1401 petition as a post-conviction petition. Defendant also filed a *pro se* post-conviction petition, in which he again alleged that he was denied effective assistance of counsel because defense counsel affirmatively misrepresented the percentage of the sentence that he would be required to serve, which defendant acknowledged was a collateral consequence of the guilty plea. Defendant alleged that he pleaded guilty based on that misrepresentation, which was that he would have to serve only 50% of the seven-year prison sentence. He alleged that when he arrived at the penitentiary, he was told that he

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would have to serve 85% of the sentence. He subsequently alleged that even if the advice concerning the truth-in-sentencing law is considered a collateral consequence of the guilty plea, the post-conviction petition should be granted because defense counsel actively misinformed him and did not passively fail or refuse to advise him. Defendant alleged that he would not have pleaded guilty but for defense counsel's erroneous advice. Defendant verified the allegations of the petition, and he also provided his own handwritten affidavit in support of the post-conviction petition.

In the affidavit, defendant stated that, based on the information he had received from his attorney after her conference with the judge, he would have to serve seven years at 50%, and that was why he agreed to the guilty plea. Defendant stated that he did not agree to seven years at 85%. Defendant stated that he was never told that he would have to serve 85% until he arrived at the penitentiary.

On December 15, 2009, the circuit court issued a written decision dismissing the section 2-1401 petition, and denying the motion to treat the section 2-1401 petition as a post-conviction petition. The court found that defendant's arguments could be considered under section 2-1401, that they were frivolous and without merit, and that defendant had failed to show the

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existence of a meritorious claim or defense. The court explained that defendant was not entitled to relief because he complained only about a collateral consequence of the guilty plea--the penitentiary's discretion in awarding good conduct credit--and because he failed to support the allegation that defense counsel misinformed him with an affidavit of defense counsel or any other document. The court further explained that the allegations affecting the sentence served are collateral because they affect only the sentence that would be served, not the sentence that was imposed.

On appeal, defendant contends that the circuit court erred in dismissing the section 2-1401 petition. Defendant argues that defense counsel was ineffective because she misinformed him about the percentage of the sentence required to be served. Defendant argues further that he did submit supporting documentation in the form of his own affidavit.

To obtain post-judgment relief, the defendant must prove, by a preponderance of the evidence, a claim or defense that would have prevented the original judgment, diligence in discovering the claim or defense, and diligence in presenting the post-judgment petition. *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007); see also *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003) (the defendant must set forth a meritorious claim or defense). The

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petition is required to be supported by "affidavit or other appropriate showing as to matters not of record." 735 ILCS 5/2-1401 (West 2008). The court can decide the petition based on the materials before it, "including the record of the prior proceedings." *Vincent*, 226 Ill. 2d at 9. Although section 2-1401 is a civil remedy, it can be used in criminal cases. *Id.* at 8. Ineffective assistance of counsel claims are generally not appropriately raised in section 2-1401 proceedings. *Pinkonsly*, 207 Ill. 2d at 567.² *De novo* review applies to the dismissal of a section 2-1401 petition. *Vincent*, at 18.

Pursuant to the truth-in-sentencing law, a prisoner convicted of aggravated discharge of a firearm generally must serve at least 85% of the sentence imposed. See 730 ILCS 5-3-6-3(2) (iv) (West 2008); see also *People ex rel. Ryan v. Roe*, 201 Ill. 2d 552, 556 (2002); *People v. Stewart*, 381 Ill. App. 3d 200, 201, 204 (2008).

During a guilty plea proceeding, the defendant's acknowledgment in open court that there were no promises concerning his plea, contradicts the defendant's post-conviction allegation that he pleaded guilty "in reliance upon an alleged,

² Exceptions exist for ineffective assistance claims involving the Sexually Dangerous Persons Act. *People v. Lawton*, 212 Ill. 2d 285, 299-300 (2004).

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undisclosed promise by defense counsel regarding sentencing."

People v. Torres, 228 Ill. 2d 382, 396-97 (2008); see also *People v. Maury*, 287 Ill. App. 3d 77, 83 (1997).

Here, defendant inappropriately asserted an ineffective assistance of counsel claim in a section 2-1401 petition. *Pinkonsly*, 207 Ill. 2d at 567. Furthermore, defendant acknowledged in open court during the plea hearing that, other than the court's offer of a seven-year sentence, there were no promises that induced him to plead guilty. See *Torres*, 228 Ill. 2d at 396-97; see also *Maury*, 287 Ill. App. 3d at 83. By reasonable implication, defendant acknowledged during the plea hearing that there was no promise that he would serve only 50% of the sentence imposed. There was no affidavit attached to the section 2-1401 petition, and there were no other documents supporting defendant's claim that defense counsel advised him that he would be required to serve only 50% of the seven-year sentence. Defendant's own affidavit was subsequently filed with the motion to treat the section 2-1401 petition as a post-conviction petition; it was not filed with the section 2-1401 petition. Even considering that affidavit, the record contradicts defendant's claim. The record shows that when the circuit court asked defendant in open court if any promises had been made to him other than the promise of a seven-year sentence, defendant

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answered no. Thus, the record contradicts defendant's allegations in the section 2-1401 petition and in the subsequently-filed affidavit that defense counsel misadvised him about the percentage of the sentence he would have to serve. See *Torres*, 228 Ill. 2d at 396-97; see also *Maury*, 287 Ill. App. 3d at 83. Under the circumstances, the circuit court properly dismissed the section 2-1401 petition.

We have considered, and rejected, all of defendant's arguments on appeal.

The judgment of the circuit court is affirmed.

Affirmed.