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No.3-09-0552

Order filed April 25, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will, Illinois,
Plaintiff-Appellee,)	
v.)	No. 05-CF-1759
BRYAN O. JORDAN,)	Honorable Daniel Rozak,
Defendant-Appellant.)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

Held: The trial court correctly summarily dismissed defendant's postconviction relief petition claiming ineffective assistance of appellate counsel because his appellate attorney failed to raise the issue of excessive sentencing on appeal.

Following a bench trial, the court convicted defendant Bryan O. Jordan of aggravated discharge of a firearm, a Class 1 felony, and aggravated domestic battery, a Class 4 felony. After a sentencing hearing, taking into consideration defendant's prior convictions and certain

aggravating factors, the court sentenced defendant to serve consecutive 15-year and 6-year prison terms, respectively. On direct appeal, the appellate court affirmed defendant's convictions.

Defendant then filed a "Petition for Post-Conviction Relief," with accompanying affidavits, regarding the 15-year sentence imposed for the charge of aggravated discharge of a firearm, claiming that he was denied his right to "due process" and "ineffective [*sic.*]" counsel. The trial court summarily dismissed defendant's postconviction petition, after finding that the petition was frivolous and patently without merit. Defendant appeals the trial court's summary dismissal of his postconviction relief petition.

BACKGROUND

The Will County grand jury issued a two-count indictment against defendant charging him with aggravated discharge of a firearm, a Class 1 felony, occurring on August 21, 2005, and aggravated domestic battery, a Class 4 felony, occurring on August 14, 2005.

The court began hearing the bench trial on December 6, 2005. On January 6, 2006, the court found defendant guilty of both charges.¹ The court then ordered a presentence investigation report. Defendant opted to proceed *pro se* at the sentencing hearing and filed his own posttrial motions which the trial court denied.

The court held a contested sentencing hearing on May 5, 2006. On May 12, 2006, the court found the following factors in aggravation existed: defendant's conduct caused or threatened serious harm to not only the complaining witness but other people who were in the car when gunshots were fired in that direction; defendant had a history of prior delinquency and

¹ The record reflects that defendant represented himself during the circuit court proceedings but the court appointed "stand-by" counsel, the public defender's office, to assist defendant if necessary.

criminal activity resulting in four prior felony convictions, three of which were crimes of violence, including attempt murder, aggravated unlawful restraint, and unlawful use of weapons by a felon; defendant's imprisonment was necessary for the protection of the public and a sentence of probation would deprecate the seriousness of his conduct; defendant's conviction for this felony occurred while defendant was on mandatory supervised release from prison on a different felony; defendant had a history of not complying with court orders in past sentences; defendant's conduct in court during this trial was disrespectful to the court and its orders and, on at least two occasions, defendant had to be physically restrained by deputies during proceedings; and defendant's history and character were aggravating factors, as well as the nature and the circumstances of the offenses. The court found no factors existed in mitigation.

Since the offenses occurred on two separate days, the court ordered consecutive sentences of 15 years imprisonment for the Class 1 aggravated discharge of a weapon charge and 6 years imprisonment for the Class 4 aggravated domestic battery charge. The court ordered credit for time served and court costs.

Defendant appealed the court's judgment. The appellate court issued a mandate on May 1, 2009, and affirmed defendant's convictions, but remanded defendant's judgment to the trial court to enter an order which reflected \$5 per day credit for pretrial confinement against court-ordered fines and penalties and modified the allowable fines and assessments.² *People v. Jordan*, No. 3-06-0366 (2008) (unpublished order under Supreme Court Rule 23). Consequently, the trial court modified the fines and assessments.

² The only sentencing issues raised during the direct appeal involved the fines and penalties imposed by the trial court.

On May 12, 2009, defendant filed a postconviction relief petition. In that petition, defendant only raised issues concerning his conviction for aggravated discharge of a firearm and his sentence of 15 years imprisonment for that offense. In the petition, defendant claimed that he was denied his right to “due process and ineffective [*sic.*] assistance of counsel guaranteed by the 5th and Fourteenth Amendments.” In his accompanying affidavits, defendant alleged he was denied a fair trial because he “was not found guilty beyond a reasonable doubt and ineffective assistance of counsel.”

In defendant’s affidavit, defendant also claimed he “repeatedly” asked his appellate attorney to “get the grand jury minutes” and appellate counsel told him “they wouldn’t give them to him.” According to the affidavit, defendant asked for the grand jury transcripts on November 18, 2008, following the first appeal, and the trial court denied this request on November 20, 2008. He also claimed that he asked his appellate attorney to raise the issue of “excessive amount of time” for his sentence and his appellate counsel refused. In the post conviction petition, defendant claimed the trial court abused its discretion by imposing a 15-year sentence because the occupants of the car did not suffer any physical injury.

On June 18, 2009, the trial judge entered an order which stated:

“This cause coming on this court’s review of petitioner’s post conviction petition and the court having reviewed this petition as well as the court file and all relevant documents, the court finds:

- 1) Issues of proof beyond a reasonable doubt and the discretion of the court in imposing sentence raise no constitutional issues[.]
- 2) Petitioner was indicted by a properly impaneled grand jury, there is nothing

to indicate otherwise, and petitioner's counsel was not ineffective for not challenging the indictment.

Wherefore: this court finds that:

A) The petition is frivolous and patently without merit and is therefor[e] dismissed

B) The clerk send the petitioner a copy of this order within ten (10) days by certified mail

C) The clerk comply with the notice requirements in Supreme Court Rule 651.”

On July 7, 2009, defendant filed a timely appeal of the court's summary dismissal of his postconviction relief petition.

ANALYSIS

On appeal, defendant claims only that the trial court erroneously determined the alleged ineffective assistance of appellate counsel was not a constitutional violation and summarily dismissed defendant's postconviction relief petition. The State contends that the trial court properly summarily dismissed defendant's postconviction relief petition because defendant did not establish that his appellate counsel was ineffective when he failed to raise the excessive sentencing issue. This court reviews the summary dismissal of a postconviction petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); *People v. Coleman*, 381 Ill. App. 3d 561, 567 (2008).

The Code of Criminal Procedure of 1963 provides that any person imprisoned in a penitentiary may file a petition for postconviction relief based on an assertion that there was a substantial denial of his constitutional rights at trial. 725 ILCS 5/122-1(a)(West 2008). At the first of three stages after a defendant files a postconviction relief petition, a judge may summarily

dismiss a petition if the court finds the petition to be frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2)(West 2008). Illinois courts have held that a petition is considered frivolous or patently without merit if the petitioner's allegations, taken as true, fail to state the gist of a constitutional claim. *Coleman*, 381 Ill. App. 3d at 567. All well pled allegations should be liberally construed and normally taken to be true, but the trial court need not consider them as such if contradicted by the record. *People v. Coleman*, 381 Ill. App. 3d at 567.

In the instant case, defendant asserts that the trial court did not specifically address the issue of ineffective *appellate* counsel in his written order summarily dismissing the postconviction relief petition, therefore, that portion of defendant's argument was not dismissed. Our supreme court has previously held that courts do not have the authority to grant partial summary dismissals of postconviction relief petitions, but may only summarily dismiss those petitions in total. *People v. Rivera*, 198 Ill. 2d 364, 371 (2001). Therefore, defendant argues that the trial court, improperly granted a partial summary dismissal of his postconviction petition.

Although the court's written order summarily dismissing defendant's postconviction petition did not specifically address the ineffective assistance of appellate counsel claim, the court did address the excessive sentencing argument presented in defendant's postconviction petition by finding this contention did not raise a constitutional issue. Thus, the trial court addressed the issue but without mirroring the precise language included in defendant's petition. Moreover, this court "can sustain the decision of the circuit court on any grounds which are called for by the record regardless of whether the circuit court relied on the grounds and regardless of whether the circuit court's reasoning was correct." *Bell v. Louisville & Nashville R. Co.*, 106 Ill. 2d 135, 148 (1985).

We begin with defendant's contention that appellate counsel was ineffective, since this court reviews the summary dismissal of a postconviction petition *de novo*. *People v. Hodges*, 234 Ill. 2d at 9; *People v. Coleman*, 381 Ill. App. 3d at 567. The case law provides that appellate counsel is not mandated to raise every conceivable issue requested by a defendant on appeal, and it is not deemed incompetence of counsel to refrain from raising issues which, in counsel's judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. *People v. Simms*, 192 Ill. 2d 348, 362 (2000); *People v. Harris*, 206 Ill.2d 1, 34 (2002).

To prevail on a claim of appellate ineffective assistance of counsel for failing to argue a particular issue, a defendant must show that appellate counsel's failure to raise that issue was objectively unreasonable and prejudiced the defendant. *Simms*, 192 Ill. 2d at 362. Consequently, when determining whether defendant was prejudiced by counsel's failure to raise an issue on appeal, the reviewing court examines the merits of the underlying issue, because "a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal." *Simms*, 192 Ill. 2d at 362; *Harris*, 206 Ill.2d at 34.

In this case, appellate counsel did not challenge the defendant's sentence in the direct appeal. We conclude this decision did not constitute ineffective assistance of counsel since the trial court is entitled to great deference and weight in sentencing, and the appellate court may not substitute its judgment merely because it would have balanced the appropriate factors differently. *People v. Juarez*, 278 Ill. App. 3d 286, 294 (1996).

In the instant case, defendant challenges the sentence the court imposed for his conviction for the offense of aggravated discharge of a firearm, a Class 1 felony, for which the range of prison terms was four to fifteen years (730 ILCS 5/5-4.5-30(a)(West 2008)). Here, the court

sentenced defendant within the statutory limits to the maximum term of 15 years. An abuse of discretion can be found in a sentence that is within the statutory limitations if that sentence is greatly at variance with the purpose and spirit of the law, as well as if the sentence was based on improper considerations or is otherwise erroneous. *Juarez*, 278 Ill. App. 3d at 294.

In reaching this decision, the court properly considered multiple factors in aggravation including, but not limited to, the fact that three of defendant's previous convictions were based on crimes of violence, including attempt murder, aggravated unlawful restraint, and unlawful use of weapons by a felon. The court also found that defendant's conviction for this felony offense occurred while defendant was on parole or mandatory supervised release from prison. The trial court determined that defendant's imprisonment was necessary for the protection of the public and a grant of probation would deprecate the seriousness of his conduct. The court also found that no mitigating factors existed to warrant a reduction in defendant's sentence.

After our review of defendant's ineffective assistance of appellate counsel claims, we hold that the trial judge did not abuse his discretion in sentencing defendant to the maximum sentence of 15 years for the offense of aggravated discharge of a firearm based upon all of the factors in aggravation and the absence of any applicable factors in mitigation. Since defendant's claim of excessive sentencing is meritless, no prejudice arose against defendant from appellate counsel's failure to raise this issue on appeal.

CONCLUSION

For the foregoing reasons, we affirm the trial court's dismissal of defendant's postconviction relief petition.

Affirmed.