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No. 3--10--0386

Order filed June 29, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	
v.)	No. 07--CF--1733
)	
OLIVER BEACH,)	Honorable
)	Richard C. Schoenstedt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

Held: The defendant's postconviction petition sufficiently alleged a claim of ineffective assistance of counsel where trial counsel allegedly failed to consult with the defendant about challenging his sentence after he expressed interest in an appeal. In addition, the defendant sufficiently demonstrated that, but for counsel's allegedly deficient performance, he would have challenged his sentence.

The defendant, Oliver Beach, pled guilty to attempted first degree murder (720 ILCS 5/8-4(a), 9--1(a)(1) (West 2006)), and was sentenced to 12 years in the Department of Corrections

(DOC). The defendant argues on appeal that his postconviction petition should not have been dismissed because it presented the gist of an ineffective assistance of counsel claim.

FACTS

On August 25, 2008, the defendant entered a blind plea of guilty to attempted first degree murder. His contested sentencing hearing took place on November 21, 2008. At the hearing, the victim, defendant's mother, testified that the defendant had hit her with a board, dragged her down to the unfinished basement, stabbed her in the stomach with a knife, hit her in the head with a hammer, and tried to force her to drink bleach. The victim also stated that the defendant had frequently been on medication, and that at the age of 15 he was diagnosed with bipolar disorder.

The defense called witnesses who testified that they had never known the defendant to be physically aggressive. The defense also called a psychiatrist who had treated the defendant and prescribed him risperidone. The psychiatrist testified that individuals on risperidone should stay on that medication for an extended period of time, and that someone who abruptly stopped taking risperidone could become aggressive.

At the conclusion of the hearing, the trial court sentenced the defendant to 12 years in the DOC. He did not appeal his sentence.

On March 1, 2010, the defendant filed a postconviction petition based on ineffective assistance of counsel. The petition alleged that the defendant was deprived of effective assistance of counsel because his trial counsel failed to consult with him about filing either a motion to reduce his sentence or an appeal. The defendant explained that after the sentencing

hearing, he asked his counsel whether he could take back his plea or appeal his sentence. Counsel's only reply was that "any other judge would give [the defendant] more time."

The defendant's petition further alleged that trial counsel did not inform him that, if he was awarded a new sentencing hearing, he could not receive an increased sentence absent any misconduct in jail or new evidence introduced at the hearing. He claimed that he did not challenge his sentence because he believed that if he did so he would receive more time in jail.

The trial court dismissed the defendant's petition as frivolous and patently without merit. The defendant appealed.

ANALYSIS

The Post-Conviction Hearing Act (725 ILCS 5/122--1 *et seq.* (West 2008)) provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Hodges*, 234 Ill. 2d 1 (2009). At the first stage, the trial court must independently determine whether the petition is "frivolous or is patently without merit[.]" 725 ILCS 5/122--2.1(a)(2) (West 2008). A petition is frivolous or patently without merit only if it has no arguable basis in law or fact. *Hodges*, 234 Ill. 2d 1. At this stage, the petition's allegations, liberally construed and taken as true, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115 (2007). We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

To prevail in a constitutional claim of ineffective assistance of trial counsel, a defendant must show both that: (1) the attorney's performance fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668 (1984). In *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000), the

Supreme Court held that counsel has a duty to consult with the defendant about an appeal when "there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing."

The State in this case admits that the defendant was considering an appeal after his sentence was imposed. However, the State argues that the defendant's trial counsel consulted with the defendant when she informed him that any other judge would have given him more time. Essentially, the State's argument is that trial counsel consulted with the defendant because her statement informed him that there was no legal basis to attack the defendant's sentence.

We are not convinced that counsel's brief statement to the defendant qualified as a consultation. The Supreme Court has stated that "consult" in this context has a specific meaning, which is "advising the defendant about the advantages and disadvantages of taking an appeal[.]" *Flores-Ortega*, 528 U.S. at 478. Using this definition of "consult," it is at least arguable that trial counsel failed in her duty to consult with the defendant about challenging his sentence. The defendant specifically alleged that trial counsel did not inform him that, absent any misconduct in jail or new evidence introduced at a new sentencing hearing, the defendant could not receive a higher sentence. Accordingly, the details of this purported consultation should be developed in the court below to determine whether counsel acted in an objectively unreasonable manner.

Regarding the second prong of the *Strickland* test, the defendant does not have to prove that he would have prevailed on appeal. *Flores-Ortega*, 528 U.S. 470. Since the defendant was deprived of a new proceeding altogether, he only needs to demonstrate that there is a reasonable probability that, but for counsel's failure to consult with him, he would have filed a motion

challenging his sentence or timely appealed. *Id.* In the instant case, the defendant has alleged, and it is reasonable to believe, that he would have challenged his sentence if he had known that it was unlikely he would have received a higher sentence on appeal. Therefore, because it is at least arguable that trial counsel did not consult with the defendant about an appeal, and as a result the defendant did not appeal, we reverse and remand for further proceedings.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Will County is reversed and remanded.

Reversed and remanded.