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2011 IL App (3d) 100227-U

Order filed October 5, 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,)	
)	Appeal No. 3--10--0227
v.)	Circuit No. 08--CF--1639
)	
TERRANCE D. GODFREY,)	Honorable
)	Edward A. Burmila, Jr.,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's order summarily dismissing the defendant's post-conviction petition at the first stage for failing to state the gist of a constitutional claim was correct.

¶ 2 The defendant, Terrance D. Godfrey, was charged with two counts of theft. On November 19, 2008, following a negotiated guilty plea, the defendant was sentenced to two concurrent terms of three years of imprisonment. The defendant subsequently filed a *pro se* motion to reconsider his sentence, which the trial court dismissed as untimely. The defendant

then took a direct appeal from the dismissal order but later voluntarily dismissed that appeal. See *People v. Godfrey*, No. 3--09--0084(voluntary dismissal order entered January 11, 2010). The defendant subsequently filed a *pro se* post-conviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-2.1 *et seq.* (West 2008)), wherein the defendant claimed the trial court erred in promising him that his concurrent three-year terms would be served concurrent to a sentence imposed for a previous offense. The defendant maintained that, in fact, he was required to serve the concurrent three years consecutive to the sentence for the previous offense. The circuit court summarily dismissed the defendant's petition as being frivolous and patently without merit. The defendant appeals from that order. We affirm.

¶ 3 Under the terms of the negotiated agreement, the defendant pled guilty to both counts of theft as charged in the indictment in exchange for concurrent sentences of three years' imprisonment on each count. When the parties informed the trial judge of the terms of the agreement, they also noted that, at the time of the hearing, the defendant was on mandatory supervised release for a prior offense. The parties expressed uncertainty as to whether the instant sentences would be concurrent with or consecutive to the sentence in the previous offense. The judge indicated that he would "recommend" that the instant sentences be served concurrent with the sentence in the previous offense. The record indicated that the judge did, in fact, write a letter to the Illinois Department of Corrections (DOC), recommending that the instant sentences be served concurrent with the sentence in the previous offense. The record also indicated that the judge made no findings that the instant sentences should be served consecutive to the prior sentence as provided under section 5-8-4(b) of the Code of Criminal Procedure (730 ILCS 5/5-8-4(b) (West 2008)).

¶ 4 Attached to the defendant's petition was a copy of a printout from the DOC website which declared the defendant's expected parole date was 2 years and 15 days after his custody date. In his petition, the defendant noted that "under normal circumstances, a person serving two concurrent three-year sentences would be released within a year and six months of his custody date." Thus, the defendant surmised, the sentences in the instant matter were imposed by the DOC consecutive to rather than concurrent with the sentence for the prior offense. In the petition, the defendant maintained that the trial judge "promised" that the sentences would be concurrent.

¶ 5 On appeal, the defendant recognizes that the trial judge did not promise that the sentences would be concurrent but merely stated that he would make such a recommendation to the DOC. The defendant maintains either that he is serving an unauthorized consecutive sentence or, alternatively, his plea was involuntary because the judge implied that he could receive concurrent sentences even though consecutive sentences were mandatory.

¶ 6 In the present case, the trial judge dismissed the defendant's post-conviction petition at the first stage of a three-stage process. See *People v. Makiel*, 358 Ill. App. 3d 102 (2005). Dismissal at the first stage is appropriate where the trial court determines, based upon the petition with attached affidavits, the record from the original proceedings, and any other evidence determines that the petition is frivolous and patently without merit. *People v. Gaultney*, 174 Ill. 2d 410 (1996). A post-conviction petition is considered frivolous and patently without merit if the allegations in the petition, when taken as true, fail to present the gist of a constitutional claim. *Id.* To state the gist of a constitutional claim, the defendant must plead some facts from which a valid claim can be discerned, and this standard incorporates the

provision that the petition must be supported by affidavits, the record, and any other evidence. *Gaultney*, 174 Ill. 2d at 418. In judging whether a petition is frivolous and patently without merit, the trial judge may review and rely upon the record before him even though the alleged constitutional deprivation might concern matters outside the record. *People v. Ramirez*, 162 Ill. 2d 235 (1994). More succinctly, a *pro se* petition for post-conviction relief may be dismissed at the first stage "only if the petition has no arguable basis either in law or fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). The standard of review of a first-stage dismissal of a post-conviction petition is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 7 The defendant's first claim or error, that he is serving unauthorized consecutive sentences, has no arguable basis in either fact or law. Under applicable sentencing statutes, the defendant can only be required to serve consecutive sentences if: (1) the trial court makes a specific finding that consecutive sentences are required to protect the public from further criminal conduct by the defendant and the basis is clearly set forth in the record (730 ILCS 5/5-8-4(b) (West 2008)); or (2) the defendant is in physical custody of the DOC at the time of the commission of a subsequent offense (730 ILCS 5/5-8-4(f) (West 2008)). Here, neither statutory provision authorized consecutive sentences. The trial judge in the instant matter did not find that consecutive sentences were warranted, and the defendant was not in the custody of the DOC when the subsequent offense occurred. See *People ex rel. Gibson v. Cannon*, 65 Ill. 2d 366, 371 (1976) (mandatory consecutive sentencing does not apply to those who are on parole at the time of the commission of a subsequent offense because they are not in physical custody of the Department). Thus, there is no arguable basis in law that the defendant was serving unauthorized consecutive sentences.

¶ 8 Moreover, the defendant has failed to allege an arguable basis in fact from which a claim that he is serving unauthorized consecutive sentences could even be discerned. The mere fact that the DOC website reported a parole/release date different from that which the defendant would calculate for the imposition of concurrent sentences does not provide an arguable basis in fact to support a constitutional deprivation. As the State points out, and the defendant concedes, there are multiple explanations for this apparent discrepancy, including an error in the DOC's entry on its website or that defendant has been denied good time credit. While the requirement that the defendant state the gist of a constitutional claim is a relatively low threshold (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001)), the allegation of constitutional deprivation must be supported by some well-pled facts, supporting affidavits, or the record. *People v. Roberts*, 318 Ill. App. 3d 719, 723 (2000). Here, the defendant's allegation that he is serving an unauthorized sentence finds no support in the petition, affidavits, or the record.

¶ 9 The defendant's alternative theory is that his plea was involuntary because the trial judge improperly implied that the defendant would receive a sentence which would run concurrently with the sentence remaining on the prior offense. As we have previously discussed, the record is devoid of any facts from which we could surmise that the defendant has been subjected to consecutive sentencing. All the well-pled facts in the petition, as well as the record, point to the fact that the defendant was sentenced properly. No affidavits were supplied to counter the facts articulated in the record.

¶ 10 Because the defendant has failed to establish the gist of a constitutional deprivation in the substance or manner of imposition of his sentence, we hold that the trial court properly dismissed

the defendant's *pro se* post-conviction petition at the first stage. Thus, we affirm the judgment of the circuit court of Will County.

¶ 11 Affirmed.