

2012 IL App (2d) 101123-U
No. 2-10-1123
Order filed January 17, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 05-CF-2230
)	
MARK L. MARINO,)	Honorable
)	Robert G. Kleeman,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Bowman and Burke concurred in the judgment.

ORDER

Held: Defendant adequately stated the gist of a constitutional claim. The trial court's summary dismissal of the defendant's *pro se* postconviction petition was therefore reversed and the case remanded for second-stage postconviction proceedings.

¶ 1 The defendant, Mark Marino, pled guilty to two counts of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2004)), and on July 9, 2007, he was sentenced to a total of 27 years' imprisonment. The defendant did not file any motions to withdraw his plea or reduce his sentence, or any direct appeal. However, on July 2, 2010, he filed a postconviction petition, alleging that his attorney during the sentencing and posttrial period was ineffective for, among other things,

failing to file a posttrial motion to reduce his sentence as requested. The trial court summarily dismissed the petition and the defendant appeals. We reverse and remand for further proceedings.

¶ 2 On August 3, 2005, the defendant was arrested after police, acting on a request from Texas child welfare authorities, knocked on the door of the extended-stay motel room he was sharing with a 12-year old girl who had been missing from Texas since June 20, 2005. When questioned, he admitted to police that he had had repeated sexual intercourse with the girl, for whom he had been babysitting. He was indicted by a grand jury on three counts of predatory criminal sexual assault of a child pursuant to 720 ILCS 5/12-14.1(a)(1) (West 2004). On April 6, 2007, after being admonished by the trial court, the defendant pled guilty to counts I and II, and the State entered a *nolle prosequi* on count III. On July 9, 2007, he was sentenced to consecutive sentences of imprisonment: 15 years on count I and 12 years on count II, for a total of 27 years. The State had asked for 12 years on each count. The sentencing range on each count was from 6 to 30 years.

¶ 3 On July 2, 2010, the defendant filed a postconviction petition. It raised seven arguments regarding ways in which the attorney who represented him through the sentencing and posttrial period was ineffective, including that the attorney failed to file a posttrial motion to reduce his sentence as requested. The petition included the defendant's affidavit that the following statements in his petition were true and correct:

“[Counsel] failed to file petitioners [*sic*] motion to reconsider sentence.

* * *

Petitioner maintains that counsel failed to file his motion to reconsider sentence[;] this denied petitioner the opportunity to bring relevant [*sic*] issues important to his case. This caused the petitioner to miss the deadline for said motion.”

One of the documents attached to the petition was an affidavit from the defendant's mother, Clela Stanfield, which averred among other things:

“After Mark was sentenced, he called me and instructed me to call his attorney and tell him to take back Marks [*sic*] guilty plea[;] I did so. His attorney failed to file the motion as instructed.

Marks [*sic*] attorney then failed to file his motion to reconsider sentence, as he said he would.”

The trial court summarily dismissed the petition as frivolous and patently without merit. The defendant filed a timely notice of appeal.

¶ 4

ANALYSIS

¶ 5 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) establishes a three-stage process for adjudicating a postconviction petition. *People v. Jones*, 213 Ill. 2d 498, 503 (2004). At the first stage, the trial court reviews the petition within 90 days of its filing to determine whether it is either frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008). “A post-conviction petition is considered frivolous or patently without merit only if the allegations, taken as true and liberally construed, fail to present” the “gist” of a claim of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The trial court makes this determination solely on the basis of the petition, the affidavit(s) attached to it, and the record, and if it finds that the petition is frivolous or patently without merit it must dismiss the petition in a written order. *Id.* That is what the trial court here did.

¶ 6 Because most petitions at the first stage are drafted by defendants with little legal knowledge, the threshold for survival is low. *People v. Torres*, 228 Ill. 2d 382, 394 (2008). “But nonfactual and nonspecific assertions that merely amount to conclusions are not sufficient to require a hearing under

the Act.” *Id.* Although only a limited amount of detail need be presented in a *pro se* petition, the petition must clearly set forth how the petitioner’s constitutional rights were violated. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); see also 725 ILCS 5/122-2 (West 2008).

¶ 7 A *pro se* postconviction petition is frivolous or patently without merit when it has “no arguable basis either in law or in fact.” *Hodges*, 234 Ill.2d at 16. “A petition has no basis in law when it is based on an ‘indisputably meritless legal theory,’ meaning that the legal theory is ‘completely contradicted by the record.’ ” *People v. Carballido*, 2011 IL App (2d) 090340, ¶37 (2011) (quoting *Hodges*, 234 Ill. 2d at 16). “A petition has no basis in fact when it is based on ‘fanciful factual allegation[s],’ meaning that the factual allegations are ‘fantastic or delusional.’ ” *Id.* (quoting *Hodges*, 234 Ill. 2d at 17). A petition not dismissed as frivolous or patently without merit advances to the second stage. *Id.* at ¶37. A trial court’s first-stage dismissal is reviewed *de novo*. *Id.*

¶ 8 A defendant has a constitutional right to effective assistance of counsel. *People v. Taylor*, 237 Ill. 2d 356, 374 (2010). We review claims of ineffective assistance according to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (adopted by the Illinois Supreme Court in *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984)), which requires the defendant to show that: “(1) as determined by prevailing professional norms, counsel’s performance fell below an objective standard of reasonableness; and (2) the defendant was prejudiced by counsel’s deficient performance.” *Carballido*, 2011 IL App (2d) 090340 at ¶34. Under this standard, “[a]t the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel’s performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced.” *Hodges*, 234 Ill. 2d at 17.

¶ 9 In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the United States Supreme Court applied the *Strickland* standard for ineffective assistance claims to the setting in which a defendant raises a postconviction claim that his attorney failed to file a notice of appeal. The Supreme Court rejected a *per se* rule that failure to file a notice of appeal equaled ineffective assistance. *Id.* at 481. Instead, the Supreme Court provided certain guideposts. First, addressing the prong of deficient performance, the Court stated that it had “long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.” *Id.* at 477. “At the other end of the spectrum, a defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently.” *Id.*

¶ 10 The more difficult issue, the Court noted, is how to evaluate a claim of ineffective assistance when the defendant’s communications with his attorney fall somewhere between these two ends of the spectrum. The Court held that an attorney has a constitutional duty to either file an appeal or to consult with his client about filing such an appeal “when there is reason to think (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.” *Id.* at 480. In connection with this determination, the Court noted that, although it is not determinative, a defendant’s guilty plea is a “highly relevant factor” because it reduces the number of potentially appealable issues and “may indicate that the defendant seeks an end to judicial proceedings.” *Id.*

¶ 11 In this case, the defendant complains not about a failure to file a notice of appeal, but about his attorney’s failure to file a motion to reduce his sentence. However, because a postjudgment motion challenging the sentence was a prerequisite to the defendant being able to file any appeal of

his sentence (*People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010)), we treat the failure to file a motion to reconsider a sentence as equivalent to failing to file a notice of appeal when (as here) the issues the defendant seeks to raise relate to sentencing.

¶ 12 Turning to the *Flores-Ortega* tests, we find that the facts asserted by the defendant in his petition and the attached affidavits, when viewed alongside the record as a whole, support a finding that the defendant has stated the gist of a constitutional violation based on his attorney's failure to file a motion to reconsider the sentence. The first aspect of the test, whether a rational defendant in the petitioner's shoes would want to file an appeal (or in this case, a motion to reconsider the sentence), favors the defendant. The State's brief argument on this point—that a rational defendant would not appeal because there were no nonfrivolous grounds for appeal—is not supported by the record. The defendant pled guilty in a “blind plea” without any negotiated length of term, and although the sentence was less than half of the possible maximum, the sentence the defendant received was not the minimum possible and it was three years longer than the sentence requested by the State. In these circumstances, a rational defendant might well see some advantage (and little disadvantage) in seeking a reduction of his sentence.

¶ 13 The second situation that may constitutionally require an attorney to file a postjudgment motion or appeal for a defendant is when the defendant reasonably demonstrated to counsel that he was interested in appealing (or, as here, attacking his sentence). Taking the assertions of the defendant's petition and affidavits as true and liberally construing them, as we must at this stage (*Edwards*, 197 Ill. 2d at 244), the petitioner has adequately pled that: he told his mother to contact his attorney about filing a postjudgment motion attacking the plea; he also wished to file a motion to reconsider his sentence; his mother spoke with counsel about both motions; and counsel told her that he would file such motions but he did not. Thus, the defendant's attorney performed deficiently

by failing to file any postjudgment motions. This deficient performance prejudiced the defendant by denying him the ability to appeal any aspect of his sentence. *Flores-Ortega*, 528 U.S. at 486. We note that, at this stage, a defendant need not specify the points he wished to raise on appeal. *Id.*

¶ 14 The State argues that the record contradicts the defendant's allegation that he wanted to seek a reduced sentence because, in his statement on allocution, the defendant, speaking of his sentence, said that "[w]hatever happens is far less than I deserve," and expressed no unhappiness with the sentence that he received. Further, his guilty plea showed that he had an interest in terminating the judicial proceedings. We accept these indications of the defendant's intent at the time of the sentencing not to challenge his sentence, but they do not preclude a change of heart during the period in which he might have brought a postjudgment motion. Thus, the defendant's allegations that he wished to file a motion to reduce his sentence are not "positively rebutted by the original trial record" (*Carballido*, 2011 IL App (2d) 090340 at ¶40), and we must accept them as true.

¶ 15 The fact that the postconviction petition omitted several important facts does not dictate a different result. The trial court found that the defendant had not sufficiently shown that he indicated to his counsel that he wanted to seek reconsideration of his sentence because of some of these "missing facts"—the affidavits submitted by the defendant do not spell out how the defendant's mother became "authorized" to speak to the defendant's attorney on his behalf, or state whether the defendant's mother spoke with the attorney during the 30-day window in which the attorney could have filed a postjudgment motion, or even explicitly state that the defendant notified his attorney that he wanted to file a motion to reconsider his sentence. Similarly, the State complains that the defendant never stated that he was unable to contact his attorney himself during the 30-day period, or even that he attempted to do so.

¶ 16 These objections are correct, but they do not mean that the petition is therefore frivolous or patently without merit. Instead, they are essentially objections to the petition’s lack of completeness. If we were to accept these arguments, we would be holding the defendant to a higher standard than may be imposed on a defendant at the first stage of postconviction proceeding. We reject this approach, based on the guidance provided by the supreme court in *Edwards*:

“[R]equiring this type of full or complete pleading is contrary to this court’s holding that the *pro se* defendant ‘need only present a limited amount of detail’ (*People v. Gaultney*, 174 Ill. 2d [410,] 418 [(1996)]) to survive summary dismissal at the first stage of a post-conviction proceeding. It is also at odds with the ‘gist’ standard itself since, by definition, a ‘gist’ of a claim is something less than a completely pled or fully stated claim.” *Edwards*, 197 Ill. 2d at 245.

The court went on, stating that this approach:

“imposes too heavy a burden on the *pro se* defendant. While in a given case the *pro se* defendant may be aware of all the facts pertaining to his claim, he will, in all likelihood, be unaware of the precise legal basis for his claim or all the legal elements of that claim. In many cases, the *pro se* defendant will be unaware that certain facts, which in his mind are tangential or secondary, are, in fact, critical parts of a complete and valid constitutional claim.” *Id.*

¶ 17 Here, the facts pled by the defendant in his petition and his affidavits, although not stating a complete claim, are sufficient to provide a clear understanding of that claim and are not rebutted by the record. Accordingly, we reverse the trial court’s first-stage dismissal of the defendant’s postconviction petition and remand for further proceedings consistent with the Act and this order.

¶ 18 Reversed and remanded.

