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2012 IL App (3d) 090844-U

Order filed April 18, 2012

IN THE
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
)	Whiteside County, Illinois
Plaintiff-Appellee,)	
)	Appeal No. 3-09-0844
v.)	Circuit No. 05-CF-516
)	
MAURICIO AGUILERA-HERNANDEZ,)	
)	Honorable John L. Hauptman,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Schmidt and Justice Lytton specially concurred in the judgment.

ORDER

¶ 1 *Held:* At the dismissal stage of postconviction proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true. Reversible error exists where the trial court engages in fact-finding at the dismissal stage of postconviction proceedings.

¶ 2 Defendant, Mauricio Aguilera-Hernandez, filed a *pro se* postconviction petition that proceeded to stage two pursuant to section 122-2.1 (725 ILCS 5/122-2.1(West 2008)) as the trial court failed to act on the petition within 90 days. The State filed a motion to dismiss the postconviction petition, which the circuit court of Whiteside County granted. Defendant appeals from the trial court's order granting the State's motion. For the reasons set forth below, we affirm in part, reverse in part and remand for an evidentiary hearing on certain claims raised by defendant.

¶ 3 **FACTS**

¶ 4 On January 3, 2005, the State filed a three count information against defendant. Count I alleged that between October and November of 2005 while he was 37 years of age, defendant committed the offense of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2004)) by knowingly engaging in an act of sexual penetration, placing "his penis on the vagina" of a victim under the age of 13 years of age. Count II alleged that between December 2, 2005 and December 5, 2005, he committed the offense of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2004)) by knowingly committing an act of sexual penetration in placing his penis on the vagina of the same victim. Count III alleged that defendant committed the act of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(I) (West 2004)) by knowingly touching the victim's vagina with his hand for the purpose of his own sexual arousal.

¶ 5 During a February 1, 2006, hearing, the parties informed the court that they had reached a plea agreement. On that day, defendant signed a written plea of guilty and jury waiver in English

and a second written plea of guilty and jury waiver written in Spanish. The court swore in a Spanish-speaking interpreter for the hearing.

¶ 6 The State proffered that it could produce evidence showing the victim of the crimes to be 10 years old during their occurrence. Defendant is the victim's uncle and he approached her during a weekend visit, pulled down her pants and, in the victim's words, he "put it in me." The victim recalled that defendant used his hand to put his penis in her vagina and tried to make her move by placing his hands on her hips.

¶ 7 The State further indicated that interviews with defendant revealed his admissions that he "made a mistake and had touched his niece" on several occasions. Defendant further admitted that he rubbed his penis on her exposed vagina but denied penetrating her. He indicated that he touched her vagina with his penis at least two times and that all of these events took place inside Whiteside County. Defense counsel agreed that the events described by the State is what "the evidence would be at the course of the trial."

¶ 8 After defense counsel acknowledged the State accurately depicted what the evidence would be at trial, the trial court asked defendant, "Would you agree with [defense counsel], sir?" Through the interpreter, defendant answered, "I don't understand, I didn't do something."

¶ 9 The trial court acknowledged the language barrier and stated it needed to ensure that defendant's plea and jury waiver were both knowing and voluntary. Thereafter, defense counsel asked the court to "phrase it in the first alternative [as] I think he will get it, as far as did you do the act, I think asking him about the jury trial was throwing him off." The court then asked the

defendant, "Okay. Let me ask you this question: Did you in fact commit this act as [the State] indicated?" Defendant replied, "Yes."

¶ 10 The court then asked the State and the defendant if defendant had any prior criminal record. Both answered no. The defendant stated that this case is the first time he has ever been in court "and that's part of the reason that I don't understand because I've never been in court before, neither here nor in my original country."

¶ 11 The trial court then read the charging instrument for count I to defendant and asked if he understood the nature of the offense. He stated he did. The trial court then explained predatory criminal sexual assault is a Class X felony with a possible punishment of 6 to 30 years' incarceration and stated that upon "your release from the Department of Corrections you would be, you would be on what is known as mandatory supervised release, or using another term parole, for a period of three years." The court also stated the offense was nonprobationable and that defendant could be fined up to \$25,000. Defendant then acknowledged that the trial court explained the nature of the offense, the possible penalties, and that he understood those possible penalties.

¶ 12 The trial court explained defendant's right to a jury or bench trial, the right to present witnesses and cross-examine the State's witnesses, the right to use the powers of the court to force witnesses to testify, the right to testify in his defense, the right not to testify and not have that choice held against him, the right to counsel, and the right to have the State provide him counsel should he be unable to afford his own attorney. Defendant acknowledged that he

understood those rights and that if he pled guilty, he would be "admitting that [he] committed this offense ***." He stated he understood that fact.

¶ 13 The court then stated, "Knowing all of those things do you still wish to plead guilty as we have discussed here?" Defendant answered, "Yes." The court then stated, "Are you sure that's what you want to do? The only reason I asked that is because you looked at [defense counsel] as if to say what should I do." Defendant answered, "Yes." The trial court then verified defendant's signature on both the English and Spanish versions of the guilty plea and jury waiver forms, and also verified that no promises beyond the plea agreement were made in exchange for defendant's plea. Thereafter, the trial court accepted the plea and found that it was knowingly and voluntarily made.

¶ 14 Defendant waived the presentence investigation report, as well as a sentencing hearing. The trial court then stated that "having accepted the terms of the plea agreement, it is the sentence of this court that Mauricio Aguilera-Hernandez be placed into the custody of the Illinois Department of Corrections for a period of nine years followed by a period of three years mandatory supervised release." The court advised defendant of his appellate rights, as well as his right to file a motion within 30 days asking to "have the judgment vacated and for leave to withdraw the plea of guilty."

¶ 15 Sixteen days thereafter, on February 17, 2006, the court received a handwritten letter from defendant seeking an extension of time to file a sentence reduction form. On February 22, 2006, the court issued an order stating the defendant "may file motion to withdraw guilty plea

within 30 days of the plea, but court may not extend the time for the filing of the motion as the time limit is jurisdictional. Motion for additional time denied. Copy to deft and State."

¶ 16 On February 27, 2006, defendant filed a motion to withdraw his guilty plea, claiming that at the time of pleading guilty, he did not fully understand the consequences of the guilty plea. Defendant amended this motion to include a claim that his penis did not touch the victim's vagina and due to the language barrier, he did not understand the nature of the proceedings against him. On August 16, 2006, the trial court issued a written order denying defendant's motion "for the reasons made on the record this date." The record on appeal, however, does not include a copy of the transcript from the hearing on defendant's motion.

¶ 17 After the denial of his motion to withdraw his guilty plea, defendant appealed to this court. The sole issue raised in defendant's direct appeal concerned the trial court's calculation of his time spent in presentence custody. On August 2, 2007, this court issued a summary order modifying the *mittimus* to reflect the proper credit for time served in presentence custody. *People v. Aguilera-Hernandez*, No. 3-06-0619 (2007) (unpublished order under Supreme Court Rule 23). The mandate from this court issued on October 4, 2007.

¶ 18 While his direct appeal pended, defendant filed a postconviction petition on February 9, 2007, claiming he was not made aware of the three-year term of mandatory supervised release. On February 21, 2007, the trial court found it did not have jurisdiction to entertain the petition as an appeal had been filed in the case.

¶ 19 Defendant filed a second postconviction petition on September 12, 2007. On September

13, 2007, the trial court noted the matter was still on appeal and no mandate had been issued by this court, leading it to find it did not have jurisdiction to entertain defendant's September 12, 2007, petition.

¶ 20 Finally, on August 5, 2008, defendant filed a third postconviction petition. The matter proceeded to stage two and, eventually defendant filed an amended petition titled, "Culmination of three previously filed and unresolved post-conviction petitions." The amended petition alleges that the State denied defendant the benefit of his bargain: that being, the plea agreement did not include a term of mandatory supervised release.

¶ 21 Defendant acknowledges in the amended petition that "the Court advised Defendant that he would be sentenced to a term of Mandatory Supervised Release ***." However, the petition states that defendant did not understand that it "would be an automatic part to the agreement." The amended petition further alleges that defendant informed the interpreter that he did not understand the term mandatory supervised release but the interpreter told him "to shut-up, just say yes, and let him, the interpreter, listen to the judge." The amended petition notes that defendant's sister-in-law, who is fluent in English and Spanish, heard this exchange between defendant and the interpreter. Defendant attached an affidavit from his sister-in-law indicating that she heard defendant "ask a question to the interpreter and tell him that he did not understand what the judge was telling him, and heard the interpreter tell [defendant] to just be quiet and just say yes."

¶ 22 Finally, the amended petition alleges ineffective assistance of counsel. Defendant

claimed his trial counsel failed to inform him of the maximum possible sentence, failed to inform him that he would be required to serve the term of mandatory supervised release, failed to inform the court that mandatory supervised release was not part of the plea agreement, and further told the defendant that if the case proceeded to trial the court would impose the maximum sentence.

¶ 23 The State filed a motion to dismiss the amended postconviction petition. The State attached an affidavit from defendant's trial counsel to its motion. The affidavit indicates that on January 27, 2006, defense counsel met with defendant in jail. Defense counsel informed defendant that he must serve a term of three years' mandatory supervised release and the two discussed "a possible offer of 10 years on a single count, for which he would serve 8.5 years, followed by 3 years of Mandatory Supervised Release."

¶ 24 The affidavit continued that on the day defendant pled guilty, "I met with the defendant in court ***. We discussed that the offer was for one year less than we had hoped. I do not recall any conversation regarding the fact that the offer did not include parole. We discussed his options. Defendant wished to accept the offer and plead guilty." The affidavit concludes that at no time did counsel ever tell defendant the court would impose the maximum sentence should he choose to go to trial.

¶ 25 The trial court granted the State's motion to dismiss. This appeal followed.

¶ 26 ANALYSIS

¶ 27 Defendant appeals from the trial court's order dismissing his amended petition at the second stage of postconviction proceedings. We review the trial court's dismissal of a

postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 28 The amended petition breaks defendant's constitutional claims into two categories. First, defendant alleges in the amended petition a "denial of benefit of the bargain" claiming he "did not understand" the term of mandatory supervised release (MSR) "would be an automatic part to the agreement because it was not specifically stated to the Court as being part of the deal."

Defendant also alleges "ineffective assistance of trial counsel," claiming: (1 & 2) counsel failed to inform him of the maximum possible sentence and the term of MSR, (3) counsel failed to inform the court that the term of MSR was not part of the plea agreement and (4) counsel told him that if he took the case to trial the court would impose the maximum sentence.

¶ 29 At the second stage of the postconviction process, counsel is appointed to represent the defendant (725 ILCS 5/122-4 (West 2008)) and the State is allowed to file responsive pleadings. 725 ILCS 5/122-6 (West 2008). At this stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d at 381. If the State moves to dismiss, the trial court may hold a dismissal hearing which is still part of the second stage. *Coleman*, 183 Ill. 2d at 380-81. At the second stage of proceedings, all well-pleaded facts that are not *positively* rebutted by the trial record are to be taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 30 *Benefit of the bargain*

¶ 31 Defendant accurately notes that when describing the plea agreement to the court, the State made no mention of MSR. He claims this fact, coupled with allegations of interpreter problems

and faulty admonishments rendered him unaware that his sentence would include a three-year term of MSR. Defendant posits that these facts and allegations satisfy his burden of showing a substantial deprivation of his constitutional rights. Specifically, these matters resulted in the violation of his right to due process as he did not receive the benefit of his bargain. To comport with the requirements of due process, a guilty plea must be knowing and voluntary. *People v. Young*, 355 Ill. App. 3d 317, 322 (2005).

¶ 32 Clearly, the record establishes that the trial court advised defendant that he would be sentenced to a term of MSR. The record, however, does not *positively* rebut defendant's claim that he did not understand that the MSR "would be an automatic part to the agreement." Moreover, the record does not *positively* rebut defendant's claim that he notified the interpreter of his confusion regarding the MSR, but the interpreter told him "to shut-up, just say yes, and let him, the interpreter, listen to the judge."¹ Instead, the record presents us with an affidavit from defendant's sister-in-law, which provides she heard this exchange between defendant and the interpreter. The record also presents us with evidence of defendant's language barrier and the fact that defendant had never previously been subject to a criminal proceeding. Thus, we accept defendant's well-pled facts as true. See *Coleman*, 183 Ill. 2d at 380.

¶ 33 In light of the above facts, we cannot say that defendant's plea was knowing and voluntary. While the State calls our attention to its own affidavits from defendant's trial counsel and the interpreter, we note that these affidavits do not *positively* rebut defendant's claims.

¹ We note that defendant answered "yes" when the pertinent questions were put to him.

Instead, they act to create a dispute of material fact. It was improper for the trial court to resolve this factual dispute against defendant at this stage of the proceedings.

¶ 34 At the dismissal stage of a postconviction proceeding, the trial court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act. *Coleman*, 183 Ill. 2d at 380. The supreme court has expressly foreclosed the trial court from engaging in any fact-finding at a dismissal hearing because all well-pleaded facts are to be taken as true at this point in the proceeding. *Coleman*, 183 Ill. 2d at 380; *People v. Caballero*, 126 Ill. 2d 248, 259 (1989); see also *People v. Wegner*, 40 Ill. 2d 28, 31-32 (1968) (recognizing that factual disputes raised by the pleadings require a determination of the truth or falsity of the supporting affidavits or exhibits, a determination which cannot be properly made at a hearing on motion to dismiss, but rather can only be resolved through an evidentiary hearing).

¶ 35 The trial court's dismissal of the "benefit of the bargain" claim without an evidentiary hearing was improper and therefore requires reversal. On remand, the trial court is instructed to proceed to the evidentiary stage of the postconviction proceeding with respect to this claim.

¶ 36 *Ineffective assistance*

¶ 37 Defendant also alleged that his trial counsel was constitutionally ineffective for failing to inform him of the maximum possible sentence and that he would be required to serve the term of MSR. Defendant further alleged that his counsel failed to inform the court that the term of MSR was not part of the plea agreement. Finally, defendant alleged trial counsel was ineffective for

informing defendant that if the case proceeded to trial, the court would impose the maximum sentence. To survive dismissal, defendant bore the burden of making a substantial showing that these matters rendered his counsel's performance objectively unreasonable and that he was prejudiced by counsel's substandard performance. *Strickland v. Washington*, 466 U.S. 668, 691-92 (1984); *People v. Edwards*, 197 Ill. 2d 239, 246 (2001).

¶ 38 Applying the above reasoning, an evidentiary hearing is required to resolve the factual dispute concerning whether counsel failed to inform defendant of the maximum possible sentence and that he would be required to serve the term of MSR. Defendant's remaining two ineffective assistance claims, however, lack merit.

¶ 39 Because MSR was part of the plea agreement, counsel was not objectively unreasonable for failing to inform the trial court that MSR was not part of the agreement.² Counsel was also not objectively unreasonable for advising defendant that the court would impose the maximum sentence if he was convicted. What counsel was essentially telling defendant was that due to the posture of the case, he believed a maximum sentence was likely. A defense attorney's honest assessment of a case cannot be the basis for holding that a defendant's guilty plea was involuntary. See *People v. Edwards*, 49 Ill. 2d 522, 525 (1971) (plea not coerced where defendant's attorney advised him he would receive a shorter sentence if he pleaded guilty).

¶ 40 The trial court's dismissal of the claim regarding counsel's alleged failure to inform him

² In the interest of clarity we point out the distinction between the issues of MSR being part of the plea agreement and defendant actually understanding he was subject to MSR.

of the maximum possible sentence and the term of MSR without an evidentiary hearing was improper and therefore requires reversal. On remand, the trial court is instructed to proceed to the evidentiary stage of the postconviction proceeding with respect to this claim. We affirm the trial court's dismissal of defendant's remaining ineffective assistance claims.

¶ 41 For the foregoing reasons, the judgment of the trial court of dismissing defendant's amended petition without an evidentiary hearing is affirmed in part, reversed in part and remanded for an evidentiary hearing on certain claims raised by defendant.

¶ 42 Affirmed in part and reversed in part; cause remanded.

¶ 43 PRESIDING JUSTICE SCHMIDT, specially concurring:

¶ 44 I concur in the judgment.No. 2012 IL App (3d) 090844-U; *People v. Mauricio Aguilera-Hernandez*

¶ 45 JUSTICE LYTTON, specially concurring:

¶ 46 I concur with the majority's order in this cause.

¶ 47 I write only to note that the inclusion, in the first footnote, of the defendant's responses to the judge should not suggest any conclusion be drawn from them. In many guilty pleas, defendants answer the judge's questions with a simple "yes." I do not believe that this defendant's answers of "yes" should be construed as a response to the interpreter's alleged statement to defendant, as the majority seems to imply.