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2012 IL App (3d) 100839-U

Order filed May 8, 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 13th Judicial Circuit,
	)	Bureau County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-10-0839
v.	)	Circuit No. 09-CF-18
	)	
JOHN AMES,	)	Honorable
	)	Marc P. Bernabei,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in dismissing the defendant's postconviction petition at the first stage where the defendant: (1) did not ask to withdraw his guilty plea, but instead sought a unilateral modification of his sentence; and (2) did not allege that the State promised him additional sentencing credit for participating in a substance abuse or educational program.

¶ 2 Pursuant to a negotiated plea, the defendant, John Ames, pled guilty to one count of attempted armed violence. 720 ILCS 5/8-4(a), 33A-2 (West 2008). He was sentenced to 10 years' imprisonment, 2 years of mandatory supervised release, and various fines, court costs, and

fees. He did not file a motion to withdraw his guilty plea.

¶ 3 The defendant subsequently filed a postconviction petition. He alleged that his sentence should be reduced because defense counsel assured him that he would be eligible for good conduct credit if he joined a substance abuse program. However, because of the nature of his conviction, the defendant was actually ineligible for the credit. The petition was summarily dismissed at the first stage, and the defendant appealed. We affirm.

¶ 4 FACTS

¶ 5 The defendant pled guilty to one count of attempted armed violence on August 13, 2009. Specifically, the defendant was charged with the intent to commit the offense of armed violence, in violation of section 33A-2(a) of the Criminal Code of 1961 (720 ILCS 5/33A-2(a) (West 2008)), in that he knowingly possessed more than 30 but less than 500 grams of cannabis, and he intended to arm himself with a handgun while possessing cannabis. In exchange for the plea of guilty, the State agreed to drop three other charges. The parties agreed to a sentence of 10 years' imprisonment.

¶ 6 The trial court accepted the defendant's guilty plea. After accepting the plea, the court read the statutory truth in sentencing statement pursuant to section 5-4-1(c-2) of the Unified Code of Corrections (730 ILCS 5/5-4-1(c-2) (West 2008)). Specifically, the court stated that "[t]he defendant may also receive an additional one-half day of good conduct credit for each day of participation in vocational, interest or substance abuse and educational programs as provided for by criminal statute." The court also informed the defendant that, if he wanted to appeal his sentence, he could file a motion to withdraw his guilty plea within 30 days of entering his plea.

¶ 7 The defendant mailed his postconviction petition from Pontiac Correctional Center on

September 15, 2010. In that petition, the defendant stated that his defense counsel provided misleading advice and coerced him into accepting the guilty plea. Specifically, the defendant alleged that defense counsel informed him that he would receive between 1 and 1½ years' credit for participating in a substance abuse program in prison. However, upon joining the substance abuse program, the defendant learned that he was not eligible to receive the credit because he pled guilty to an attempt to commit a Class X offense. In the conclusion of the petition, the defendant asks that his 10 year negotiated plea be reduced "to at least 5 years to 6 years."

¶ 8 The trial court summarily dismissed the defendant's petition in a written order dated September 27, 2010. The court found that the defendant clearly sought a unilateral modification of a portion of his plea agreement to reduce his sentence by 1 to 1½ years, and that result would deprive the State of the benefit of the bargain that it made with the defendant. It found that there was no remedy available to defendant under the law, and therefore dismissed his postconviction petition. The defendant appealed.

¶ 9 ANALYSIS

¶ 10 On appeal, the defendant argues that his postconviction petition was improperly dismissed at the first stage. We review *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 11 The Post-Conviction Hearing Act (Act) 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 2010). At this stage, the petition's allegations, liberally construed and taken as true, need present only the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115 (2007). A claim is frivolous if it has no

basis in either law or fact. *Hodges*, 234 Ill. 2d 1. A claim has no basis in law if it is based on an "indisputably meritless legal theory." *Id.* at 16.

¶ 12 In the instant case, the defendant first argues that his petition should not have been dismissed because his guilty plea was involuntary due to the inaccurate advice of defense counsel. If the defendant were asking to withdraw his guilty plea, we might agree. However, the defendant's petition does not seek relief in the form of withdrawing his guilty plea, but instead specifically asks to have his 10-year sentence reduced to 5 or 6 years. Defendant, however, "may not seek to unilaterally reduce his conviction or sentence while holding the State to its part of the bargain." *People v. Bean*, 389 Ill. App. 3d 579, 584 (2009). A defendant may instead seek to modify the terms of a guilty plea "by withdrawing that plea and returning the parties to the status quo." *Id*. at 585. Even liberally construing the defendant's postconviction petition, we find that there is no legal theory under which a court would be permitted to grant the defendant relief.

¶ 13 The defendant also argues that he was deprived of the benefit of his bargain that he made with the State because his plea agreement contemplated that he would receive certain credit against his sentence for which he was not eligible. He relies on *People v. Clark*, 2011 IL App (2d) 091116, to support his argument. In *Clark*, the State agreed in open court that the defendant was entitled to 339 days of credit toward his sentence on residential burglary, as well as 311 days of credit toward his sentence for attempted armed robbery; however, because the sentences were to run consecutively, the 311-day credit "essentially merge[d] into the 339-day credit." *Id.* ¶ 5. The trial court then "ratified the agreement as stated by the prosecutor" without clarifying that the defendant would only receive 339 days of credit. *Id.* ¶ 6. The *Clark* court found that, in order for the defendant to receive the benefit of the bargain that he made with the State, the defendant

should receive 311 days' credit toward his sentence for armed robbery, and an additional 311 days of good-conduct credit, and therefore reduced his sentence for attempted armed robbery by 622 days. *Id.*

¶ 14 *Clark* is distinguishable from this case in that the defendant has not alleged, and the record does not demonstrate, that the State ever agreed to give the defendant credit for participating in a substance abuse program or that it was part of his plea agreement. Instead, the defendant's postconviction petition seeking additional sentencing credit is based only upon the alleged misadvice of counsel, which we have already addressed above. While it is true that the trial court stated on the record that the defendant would be entitled to one-half day of credit for every day he spent in a substance abuse or educational program, it is also true that the trial court's truth in sentencing statement is "solely to inform the public, [and] has no legal effect on the defendant's actual release, and may not be relied on by the defendant on appeal." 730 ILCS 5/5-4-1(c-2) (West 2010). Accordingly, we find that the defendant's petition is frivolous and patently without merit in that it is based on indisputably meritless legal theories.

¶ 15 CONCLUSION

¶ 16 For the foregoing reasons, the judgment of the circuit court of Bureau County is affirmed.

¶ 17 Affirmed.