

2013 IL App (2d) 120902-U
No. 2-12-0902
Order filed December 24, 2013

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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 Lee County.
)	
Plaintiff-Appellee,)	
)	
v.)	Nos. 08-CF-104
)	08-CM-172
)	
RYAN L. PROELL,)	Honorable
)	Ronald M. Jacobson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant's postconviction petition, which alleged that the State induced his guilty pleas with a promise (later unfulfilled) that a charge would be dismissed in exchange for his cooperation with an investigation: defendant's claim was foreclosed by the record of his plea hearing, during which he assured the court that the parties' plea agreement included no such promise.

¶ 2 Defendant, Ryan L. Proell, appeals a judgment granting the State's motion to dismiss his petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)). We affirm.

¶ 3 Defendant's petition challenged his convictions in two separate criminal cases. In case No. 08-CF-104, defendant was charged with one count of harassing a witness (720 ILCS 5/32-4a(a)(2) (West 2008)) and four counts of violating an order of protection (720 ILCS 5/12-30(a)(1) (West 2008)). In case No. 08-CM-172, defendant was charged with one count of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2008)). On May 29, 2008, the parties appeared in court. Assistant State's Attorney Paul Whitcombe stated that they had reached a plea agreement that applied to both cases and to case No. 07-CF-87, a proceeding to revoke defendant's probation for aggravated driving while under the influence of alcohol. Whitcombe explained that, in case No. 08-CM-172, defendant would plead guilty to domestic battery, in exchange for a sentence of two years' probation; in case No. 07-CF-87, defendant would admit to having violated his probation, in exchange for a sentence of 30 months' probation; and, in case No. 08-CF-104, defendant would plead guilty to harassing a witness, which, because of his prior convictions, carried a mandatory Class X sentence; the State would dismiss the remaining charges; and there was no agreement on the sentence. Whitcombe did not say anything about any agreement to dismiss the harassment count if defendant performed certain actions. Defendant and his attorney did not dispute or add to Whitcombe's summary of the plea agreement.

¶ 4 The trial judge asked defendant, "Is that your understanding of the agreement, Mr. Proell?" Defendant responded, "Yes, sir." The judge asked defendant, "Mr. Proell, you understand that you're pleading guilty to a charge of harassment of a witness ***. Do you understand that?" Defendant responded, "Yes." The judge then stated that, because of his prior convictions, defendant's sentence "must be a penitentiary sentence of between six and thirty years. There is no possibility of parole. Do you understand that?" Defendant responded, "Yes." The judge asked

defendant whether he had received any other promises in exchange for his plea. Defendant said no. The judge then finished admonishing defendant in accordance with Illinois Supreme Court Rule 402(a) (eff. July 1, 1997) and heard factual bases for the pleas. The court sentenced defendant as agreed in case Nos. 08-CM-172 and 07-CF-87 and continued the cause for sentencing in case No. 08-CF-104. On July 14, 2012, the court sentenced defendant to 15 years' imprisonment. On July 28, 2008, defendant, through counsel, moved to reconsider the sentence, contending generally that it was excessive.

¶ 5 On February 24, 2010, in case No. 08-CM-172, defendant filed a *pro se* motion to withdraw his guilty plea. He asserted that he had pleaded guilty “under thee [*sic*] impression that [case No. 08-CF-104] would be dismissed for a plea of guilty.” Defendant’s motion did not elaborate on this allegation or suggest any basis for his “impression.” On March 19, 2010, in case No. 08-CF-104, defendant filed a *pro se* motion to withdraw his guilty plea, contending that the State “promised defendant that [case No. 08-CF-104] would be dismissed, [f]or a guilty plea [in case No. 08-CM-172].” The motion did not elaborate on this “promise.” On March 4, 2010, the trial court denied the *pro se* motion in case No. 08-CM-172 as untimely. On April 7, 2010, the court dismissed the *pro se* motion in case No. 08-CF-104 as untimely. On May 19, 2010, in case No. 08-CF-104, the trial court denied defendant’s motion to reconsider sentence. On appeal in case No. 08-CF-104, defendant argued only that his sentence was excessive. This court affirmed. *People v. Proell*, 2011 IL App (2d) 100524-U.

¶ 6 On June 28, 2010, defendant filed a *pro se* postconviction petition challenging the judgments in both case Nos. 08-CM-172 and 08-CF-104. The petition alleged in part that the State breached

its plea agreement with defendant, thus rendering his pleas involuntary. After the trial court appointed counsel for defendant, he filed an affidavit. As pertinent here, the affidavit stated:

“I, Ryan Proell with the understanding of a negotiation agreed upon by myself, Head States [sic] Attorney Paul Whitcombe, & assistant [sic] States [sic] Peter Buh, Plead [sic] guilty to the offense of Domestic Battery, and agreed to wear a wire, and/or a recording devise [sic], in a [sic] attempt to buy drugs from 10 diffrent [sic] individuals, as requested by Paul Whitcombe and Peter Buh, in exchange for a dismissal or nolle pros in the alleged offense of harassment of a witness, which is predicated to [sic] the above mentioned misdemeanor charge of Domestic Battery.”

¶ 7 The State moved to dismiss the petition, arguing that the claim was forfeited because it could have been raised on direct appeal and that, in any event, the petition was substantively insufficient. The trial court granted the motion; its reasons “include[d], but were not limited to” the fact that the claim could have been raised on direct appeal. Defendant timely appealed.

¶ 8 On appeal, defendant contends that (1) the trial court erred in holding that the claim at issue was forfeited; and that (2) his petition sufficiently raised a constitutional violation. The State concedes that forfeiture was not a proper basis to dismiss the petition, but it contends that the petition was substantively deficient because its allegations were refuted by the record.¹ Of course, we may affirm on any basis of record, regardless of the trial court’s reasoning. See *People v. Wright*, 2013

¹ We agree that forfeiture does not apply, as the postconviction petition was based on matters outside the record on direct appeal. See *People v. Stroud*, 208 Ill. 2d 398, 402-03 (2004) (generally); *People v. Willis*, 50 Ill. App. 3d 498, 502 (1977) (claim that guilty plea was induced by promise that went unfulfilled was properly raised in postconviction petition).

IL App (4th) 110822, ¶ 32. For the reasons that follow, we agree with the State that the petition was substantively insufficient, and we affirm on that ground.

¶ 9 When the State moves to dismiss a postconviction petition, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). In deciding the motion, the trial court must accept as true all well-pleaded facts in the petition that are not positively rebutted by the record. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). Our review is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 10 Defendant contends that the well-pleaded allegations of his petition, including those in his affidavit, made a substantial showing that he pleaded guilty only because the State made promises that it later failed to fulfill. Defendant observes that, if a guilty plea is induced by such promises, the State's failure to honor them entitles the defendant to relief. See *Santobello v. New York*, 404 U.S. 257, 262 (1971); *People v. Hughes*, 2012 IL 112817, ¶ 68. The State contends that defendant's claim is refuted by the record. For the reasons that follow, we agree with the State.

¶ 11 In *People v. Gomez*, 409 Ill. App. 3d 335 (2011), which the State cites, the defendant pleaded guilty to predatory criminal sexual assault of a child. He moved to reconsider the sentence, but he did not move to withdraw his plea, and he repeatedly expressed remorse for his offense. The trial court denied the motion; the defendant appealed his sentence; and this court affirmed. *Id.* at 336-37. Later, the defendant filed a postconviction petition alleging that he was innocent and that, although he asked his trial attorney to move to withdraw the plea for this reason, the attorney failed to do so, thus rendering ineffective assistance. *Id.* at 337. The petition attached affidavits from the defendant and his mother, stating that they had told the attorney that the defendant wished to withdraw his plea. The trial court dismissed the amended petition. *Id.* at 337-38.

¶ 12 This court affirmed, holding that, despite the allegations in the affidavit, the record rebutted the defendant's claim that he asked his trial counsel to withdraw his plea. We noted that, at several points before he pleaded guilty and was sentenced, the defendant expressed his desire to plead guilty precisely because he was guilty. Moreover, at no time during these proceedings did he ever express a desire to withdraw his plea for any reason. Thus, the petition did not make a substantial showing of ineffective assistance of trial counsel. *Id.* at 340-41.

¶ 13 *Gomez* relied upon *People v. Arbuckle*, 42 Ill. 2d 177 (1969), which neither party cites. In *Arbuckle*, the defendant filed a postconviction petition challenging his conviction, based on a guilty plea, of statutory rape. The petition alleged, in part, that the defendant entered the plea only because the State promised that, in return, he would receive a reduced sentence. *Id.* at 181. The petition did not attach any affidavits or explain the absence of affidavits. *Id.* at 179. The supreme court held that the petition did not make a substantial showing of a constitutional violation.

¶ 14 Addressing the alleged plea bargain, the court explained that, in addition to being unsupported by affidavits, the claim was rebutted by the record. Specifically, at the guilty plea hearing, the trial judge asked the defendant, "You understand you are not pleading guilty because there is any understanding with the court what the sentence might be?," and the defendant responded, "That's right." *Id.* at 181. Further, the defendant's attorney stated that the defendant was pleading guilty without any understanding on what the sentence might be, and the defendant stated that this representation was correct. *Id.* Finally, the record included "statements in open court by all persons who could have formed such a bargain that no such promises were made." *Id.* at 182. Thus, the record refuted the defendant's claim.

¶ 15 In *Willis*, the defendant filed a postconviction petition claiming that his guilty pleas to various offenses had been induced by the State's promise, communicated to the defendant's trial attorney, that it would recommend concurrent sentences on charges subject to a petition to revoke probation, a promise that, he alleged, the State did not fulfill. *Willis*, 50 Ill. App. 3d at 502. The defendant filed an affidavit to this effect. The trial court dismissed the petition. The appellate court affirmed. The court reasoned that the defendant's claim was supported by his affidavit but not by the affidavits of the trial attorney or the defendant's mother. *Id.* at 503. Crucially, the claim was also refuted by the record; the transcripts of the plea hearing and the revocation-of-probation hearing were devoid of references to the alleged agreement, and the defendant and his attorney conspicuously failed to object when, at the probation-revocation hearing, the court made the sentence consecutive to those imposed on the guilty pleas. *Id.* Thus, the defendant's affidavit was insufficient because it did not "definitely show" that the alleged agreement had been reached. *Id.*; see also *People v. Robinson*, 58 Ill. App. 3d 331, 335 (1978) (dismissal of postconviction petition affirmed; claim that guilty plea was induced by promise of leniency if defendant assisted in other case was refuted by record of guilty plea hearing, at which defendant and his counsel acquiesced in State's summary of plea agreement, which mentioned no such promise).

¶ 16 Here, defendant's claim is partly akin to that in *Arbuckle*, in that he alleges that he pleaded guilty only because the State induced him, via a plea bargain of some sort, to do so. However, as in *Arbuckle*, the record affirmatively rebuts the claim. At no point in the plea proceedings did defendant raise the plea bargain that he alleged in his postconviction petition. Further, when the trial court specifically asked him whether he understood that he would be pleading guilty to harassment of a witness, with a Class X penalty and no agreement with the State as to the sentence, defendant

responded affirmatively. Defendant stated that the parties had correctly summarized the agreement. As in *Arbuckle*, neither party's summary included the slightest suggestion of the term or condition that the postconviction petition alleged was part of the agreement. Defendant added that he had received no other promises. Thus, the record refutes defendant's claim as surely as did the record in *Arbuckle*.

¶ 17 This case differs from *Arbuckle* in that here, the petition did contain an affidavit that (at least construed liberally) did allege the existence of the agreement term that the State allegedly failed to honor. However, this does not help defendant, as, under *Arbuckle*, both the absence of affidavits and the contents of the record were independent grounds to affirm the dismissal of the petition. Moreover, defendant's uncorroborated affidavit was too equivocal under *Willis* and *Robinson*, as it was vague and ambiguous as to whether defendant actually received a promise from the State or merely subjectively believed that a promise had been made.

¶ 18 To the extent that defendant's affidavit takes this case out of *Arbuckle* or the earlier appellate court cases, *Gomez* establishes that, even when a petition attaches an affidavit that appears to support its claim, the claim can still be rebutted by a sufficiently clear record. In *Gomez*, the affidavits' assertions that the defendant asked his trial attorney to move to withdraw the guilty plea were manifestly inconsistent with the defendant's actions—or inaction—during the proceedings that resulted in his guilty pleas. Here, defendant's conduct was equally inconsistent with his affidavit's allegations. The affidavit asserted that the State had agreed to drop a charge that carried a Class X sentence in return for defendant's cooperation in unspecified drug investigations. Yet, during the postplea proceedings, defendant never spoke or wrote a word on the record about any such deal. At the guilty-plea hearing, he assented to the representations of the State and his own attorney implying

that no such deal existed, and he added his own assurance. He also told the judge that he recognized and understood that there was no agreement on the sentence for harassment of a witness and that he would be treated as a Class X offender. Because the record rebutted the amended postconviction petition's claim, defendant did not make a substantial showing of a constitutional violation. The trial court properly dismissed the amended petition.

¶ 19 The judgment of the circuit court of Lee County is affirmed.

¶ 20 Affirmed.