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2013 IL App (3d) 110319-U

Order filed January 10, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
Plaintiff-Appellee,)	Henry County, Illinois,
)	
v.)	Appeal No. 3-11-0319
)	Circuit No. 07-CF-241
)	
TERRI L. JOHNSEN,)	Honorable
)	Ted J. Hamer,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's postconviction petition did not raise the gist of a claim of ineffective assistance of counsel.

¶ 2 Defendant, Terri L. Johnsen, pled guilty to possession with intent to deliver a controlled substance (720 ILCS 570/401(a)(2)(C) (West 2006)) and was sentenced to 12 years' imprisonment. On appeal, defendant argues that the trial court erred in dismissing her postconviction petition because she raised the gist of a claim that her trial counsel was

ineffective. We affirm.

¶ 3

FACTS

¶ 4 Defendant was charged by information with controlled substance trafficking (720 ILCS 570/401.1 (West 2006)), unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(D) (West 2006)), and unlawful possession of a controlled substance (720 ILCS 570/402(a)(2)(D) (West 2006)). The trial court appointed the public defender, and defendant filed a motion to suppress.

¶ 5 On September 19, 2007, the case proceeded to a hearing. Brian Strouss testified that he was an Illinois state trooper. Strouss stopped defendant on the afternoon of June 8, 2007, for driving 72 miles per hour in a 65 miles-per-hour zone. Strouss approached defendant's vehicle and asked for her driver's license and proof of insurance. Defendant gave Strouss the requested documents along with a rental agreement that listed her as the secondary driver of the vehicle. Defendant's rental contract indicated that the vehicle was due to be returned to Tucson, Arizona, in three days. Defendant stated that she was traveling from Tucson to a family reunion at her mother's house in Chicago. However, she did not know exactly where her mother lived. Strouss returned to his car to write a warning citation, and trooper Clint Thulen pulled up. Strouss advised Thulen that defendant had volunteered information about her travel plans that was suspicious. Thulen approached defendant's vehicle, spoke with defendant, and escorted her back to Strouss' car. Thulen conducted a dog sniff search while Strouss finished writing defendant's warning citation. Strouss issued the warning and returned defendant's paperwork, and defendant exited Strouss' car. As defendant walked towards her car, Strouss inquired if he could ask her a few more questions. Strouss advised defendant that she was not obligated to answer the

questions. Defendant consented, and Strauss eventually asked if he could search defendant's car. Defendant responded "[s]ure, go ahead and search the car" and opened the rear hatch of the vehicle. During the search, Strauss discovered approximately five kilograms of cocaine concealed within door panels of the vehicle. During Strauss' testimony, the State introduced a videotaped recording of the traffic stop. The recording confirmed Strauss' testimony.

¶ 6 At the close of Strauss' testimony, the parties agreed to submit their arguments on the motion to suppress in writing.

¶ 7 On November 21, 2007, private counsel Steve Hanna entered his appearance on behalf of defendant and requested a continuance to file defendant's brief in support of her motion to suppress. The trial court continued the case for a pretrial hearing. On December 13, 2007, the trial court denied defendant's motion to suppress.

¶ 8 On January 24, 2008, defendant entered a partially negotiated plea agreement in open court. In exchange for defendant's agreement to plead guilty to an amended lesser charge of unlawful possession of a controlled substance with intent to deliver, with a sentencing range of 12 to 50 years' imprisonment (720 ILCS 570/401(a)(2)(C) (West 2006)), the State would dismiss the remaining charges. Defendant agreed to the plea and acknowledged that the plea waived her right to appeal the court's decision on her motion to suppress. The court admonished defendant "[e]ven though you wish to plead guilty today, *** you could plead not guilty, and you could have a trial by a judge or a jury." Defendant acknowledged that she was giving up this right and pled guilty. Defendant agreed that she signed her guilty plea freely, voluntarily, and without force, threats, or promises. Later, the trial court sentenced defendant to 12 years' imprisonment, but noted that she was eligible for day-for-day credit from the beginning of her sentence in the

department of corrections and she might also be able to get credit for taking educational or drug treatment classes.

¶ 9 Defendant filed a motion to reconsider sentence and a motion to withdraw her guilty plea. However, she later withdrew her motion to withdraw her guilty plea, and the court found that her motion to reconsider sentence was moot as she received the minimum sentence. Defendant filed a notice of appeal, and we remanded the case for compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). *People v. Johnsen*, No. 3-08-0584 (2009) (unpublished order under Supreme Court Rule 23).

¶ 10 On September 16, 2009, defendant filed a new motion to withdraw her guilty plea. Defendant alleged that she was ineligible for day-for-day credit as mentioned by the trial court during her sentencing hearing. The trial court stated that it would allow defendant to withdraw her guilty plea based on its mistaken impression that she was eligible for day-for-day credit. However, the court cautioned that if defendant withdrew her guilty plea, the State could reinstate the dismissed charges, and if she was found guilty, the minimum sentence would be 30 years' imprisonment. The defendant withdrew her motion.

¶ 11 On April 13, 2011, defendant filed a *pro se* postconviction petition. Defendant alleged that private counsel was ineffective for failing to follow through with her motion to suppress and informing her that no appeal could be taken from a finding against her motion to suppress evidence. She also argued that she was unconstitutionally seized and the discovered cocaine should have been suppressed as the fruit of an unlawful seizure. The trial court found that defendant's petition was untimely. The court also noted that defendant would have faced a minimum of 30 years' imprisonment if she had gone to trial and her attorney did "an excellent job

in getting the State to agree to the plea negotiation." The court dismissed defendant's petition, noting that it was frivolous and patently without merit. Defendant appealed.

¶ 12

ANALYSIS

¶ 13 On appeal, defendant argues that the trial court erred in dismissing her postconviction petition because it raised the gist of a claim that counsel was ineffective for failing to proceed to a stipulated bench trial to preserve her right to appeal the denial of her motion to suppress evidence.

¶ 14 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2006)) 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 2006). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. The petition's allegations, liberally construed and taken as true, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115 (2007). At the first stage of postconviction proceedings, a petition alleging ineffective assistance may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness and that defendant was prejudiced. *Hodges*, 234 Ill. 2d 1.

¶ 15 We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 16 Initially, we note that the trial court erred in dismissing defendant's petition on timeliness grounds. A postconviction petition may not be dismissed at the first stage on untimeliness

grounds. *People v. Boclair*, 202 Ill. 2d 89 (2002). Moreover, we note that defendant's petition was mailed on March 30, 2011, three days before the expiration of the limitations period mentioned in the trial court's order.

¶ 17 However, we find that the trial court did not err when it dismissed defendant's petition on the merits. Defendant argues that she raised the gist of an ineffective assistance of counsel claim as a result of counsel's failure to proceed to a stipulated bench trial to preserve her right to appeal.

¶ 18 Defendant did not demonstrate that counsel's performance either fell below an objective standard of reasonableness or resulted in prejudice to her. First, defendant likely would have received a greater sentence if she proceeded to a stipulated bench trial. Defendant pled guilty to unlawful possession of a controlled substance with intent to deliver and was sentenced to 12 years' imprisonment. Defendant pled guilty to possession of a lesser amount of cocaine than was originally charged. Compare 720 ILCS 570/401(a)(2)(C) (West 2006) (forbidding possession of 400 to 900 grams of a substance containing cocaine), with 720 ILCS 570/401(a)(2)(D) (West 2006) (forbidding possession of 900 grams or more). Defendant received the minimum sentence authorized by section 401(a)(2)(C). If defendant had proceeded to a trial, and had been convicted of the original charged offenses, she would have faced a sentencing range of 15 to 60 years' imprisonment for unlawful possession of a controlled substance with intent to deliver, 30 to 100 years' imprisonment for controlled substance trafficking, and 10 to 50 years' imprisonment for unlawful possession of a controlled substance. 720 ILCS 570/401(a)(2)(D), 401.1(b), 402(a)(2)(D) (West 2006). By accepting the plea agreement, counsel assured that defendant would receive a much lower sentence than if she proceeded to trial.

¶ 19 Second, an appeal of defendant's motion to suppress evidence would not have been successful. Defendant was validly stopped for speeding. See *People v. McDonough*, 239 Ill. 2d 260 (2010) (decision to stop a vehicle is reasonable where the police have probable cause to believe that a traffic violation occurred). After Strouss returned defendant's documents and issued the warning citation, defendant left Strouss' car. At this point, the stop had ended. Defendant's subsequent agreement to answer Strouss' additional questions and consent to the search of her vehicle were freely given. See *People v. Oliver*, 236 Ill. 2d 448 (2010) (defendant was not unconstitutionally seized when he gave consent to search the trunk of his vehicle). Therefore, defendant would not have succeeded on an appeal of her motion to suppress.

¶ 20 We hold that counsel was effective in encouraging defendant to enter a plea agreement to a lesser sentencing term rather than face a greater sentence after a stipulated bench trial in an effort to preserve an unsuccessful appeal of her motion to suppress evidence. Therefore, the trial court did not err in dismissing defendant's postconviction petition.

¶ 21 **CONCLUSION**

¶ 22 For the foregoing reasons, the judgment of the circuit court of Henry County is affirmed.

¶ 23 Affirmed.