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2013 IL App (3d) 110538-UB

Order filed February 15, 2013
Modified Upon Denial of Rehearing April 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 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-11-0538
v.)	Circuit No. 07-CF-2377
)	
MARIO S. RUBIO,)	Honorable
)	Carla Alessio-Policandriotes,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Presiding Justice Wright, dissenting.

ORDER

¶ 1 *Held:* Defendant presented the gist of a constitutional claim where he alleged facts that could establish that his guilty plea was involuntary because the State had in bad faith threatened to charge his mother with a crime.

¶ 2 Defendant, Mario S. Rubio, pled guilty to predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)) and was sentenced to 15 years' imprisonment.

Defendant filed a notice of appeal but then moved to dismiss that appeal. Defendant later filed a

pro se petition for postconviction relief. In his petition defendant claimed that his guilty plea was involuntary, in violation of his constitutional right to due process. The circuit court summarily dismissed defendant's petition as patently without merit at the first stage of postconviction proceedings. On appeal, defendant alleges the circuit court erred in summarily dismissing his petition because the petition established the gist of a constitutional violation. Defendant claims his guilty plea was involuntary because: (1) he suffered violence while in pretrial detention; and (2) the State threatened to prosecute his mother for witness tampering if defendant did not plead guilty. We reverse and remand.

¶ 3

FACTS

¶ 4 Defendant was charged with two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)) based on events that occurred on November 7, 2007. He entered a negotiated guilty plea, in which one count would be nol-prossed, and defendant would be sentenced to 15 years' imprisonment.

¶ 5 During the plea colloquy, the court admonished defendant in compliance with Illinois Supreme Court Rule 402 (eff. July 1, 1997). The court noticed that defendant was dressed in red, indicating that he was receiving medical attention in jail. Defendant explained that he had received medical attention in response to a black eye he suffered during a fight in the jail. Defendant assured the court that his eye no longer hurt. The following exchange occurred:

"THE COURT: Are you doing this, sir, of your own free will?

[DEFENDANT]: Yes, your Honor.

THE COURT: Anyone promise you anything to induce you to plead guilty?

[DEFENDANT]: No, your Honor.

THE COURT: Has anyone forced you to plead guilty?

[DEFENDANT]: No, your Honor.

THE COURT: Anyone threaten you to make you plead guilty?

[DEFENDANT]: No, your Honor.

THE COURT: And you said you got into a fight over at the jail, does that have nothing to do with the nature of this charge of you pleading guilty?

[DEFENDANT]: No, your Honor.

THE COURT: And you're doing this of your own free will?

[DEFENDANT]: Yes, your Honor."

The court accepted defendant's guilty plea and sentenced him to 15 years' imprisonment.

¶ 6 Defendant's motion to reconsider sentence was dismissed as untimely. The trial court ordered that a notice of appeal, although untimely, be filed. Defendant later dismissed the appeal on his own motion.

¶ 7 Defendant filed a petition for postconviction relief. The petition claimed that defendant's trial counsel provided ineffective assistance because counsel caused defendant to enter into an involuntary plea agreement. The petition argued that counsel failed to address the impropriety of a threat allegedly made by the State to prosecute defendant's mother for witness tampering if defendant refused to plead guilty. Instead of raising the improper nature of the State's threat, counsel encouraged defendant to plead guilty so as to protect his mother from prosecution. In addition, the petition argued that counsel provided ineffective assistance by settling for a plea agreement without first pursuing an effective trial defense.

¶ 8 In his petition, defendant also claimed that his plea was involuntary because "I was under

further stress due to the treatment I was receiving in the Will County Jail. On said date, (10.2.2008), I walked into court with a black eye." Finally, the petition challenged defendant's sentence as excessive.

¶ 9 Attached to the petition were notarized affidavits of defendant's sister, Amber Rubio, and defendant's mother, Sally Valenzuela. Amber's affidavit alleged that counsel forced defendant to enter into a plea agreement because the State was threatening to prosecute Valenzuela for witness tampering. Valenzuela's affidavit stated that she had written a letter to the victim requesting mercy for defendant. As a result, the State's Attorney informed Valenzuela that "they could and would throw me in jail for tampering with a case and that it would be in the best interest of my son to just take the plea deal." Valenzuela's affidavit also stated that defendant was beaten while in pretrial custody and that fear for his safety caused defendant to be distressed and unable to understand the plea colloquy proceedings. Valenzuela argued that based on those factors, defendant was forced to enter an involuntary guilty plea.

¶ 10 Notably absent from the petition was a sworn affidavit of defendant verifying the truth of defendant's statements made in the petition, as required by section 122-1(b) of the Post-Conviction Hearing Act (the Act). 725 ILCS 5/122-1(b) (West 2010). The circuit court summarily dismissed the petition as patently without merit, making no mention of the petition's lack of a sworn verification. Defendant now appeals the summary dismissal of his petition.

¶ 11 ANALYSIS

¶ 12 The Act allows criminal defendants to challenge convictions resulting from a substantial denial of their constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2010). The Act provides a three-stage process for adjudicating postconviction petitions. At the first stage, a judge may

summarily dismiss a petition if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition is considered frivolous or patently without merit if the allegations in the petition, taken as true and liberally construed, fail to state even the gist of a constitutional claim. *People v. Collins*, 202 Ill. 2d 59 (2002). The first-stage summary dismissal of a postconviction petition is reviewed *de novo*. *People v. Delton*, 227 Ill. 2d 247 (2008).

¶ 13 As framed on appeal, defendant's petition claimed that his guilty plea was involuntary, in violation of his constitutional right to due process, because he entered his guilty plea: (1) under duress because of violence he suffered while in pretrial detention; and (2) in response to the State's threat to prosecute his mother for witness tampering if he refused to plead guilty. These claims must clear several hurdles to avoid a first-stage summary dismissal.

¶ 14 A. Waiver

¶ 15 Generally, a defendant waives postconviction review of those issues that could have been raised on direct appeal but were not. *People v. Henderson*, 171 Ill. 2d 124 (1996).

¶ 16 Defendant's claim that violence in the jail caused him to enter an involuntary plea has been waived because defendant failed to raise that claim on direct appeal. That claim is founded on statements defendant made at the plea colloquy; therefore it could have been raised on direct appeal. See *Id.* During the colloquy, the trial court asked defendant about his black eye.

Defendant said that he got into a fight in jail, but that his eye no longer hurt. That exchange provided the facts necessary for the claim to be cognizable on direct appeal. Because defendant did not raise this claim on direct appeal, it is waived for purposes of postconviction proceedings. However, even if defendant had not waived that claim, he has failed to establish the gist of a constitutional claim because defendant has not established a nexus between the fight in the jail

and the alleged involuntariness of his guilty plea. See *People v. St. Pierre*, 146 Ill. 2d 494 (1992). In addition, defendant stated at the plea colloquy that the fight in the jail had no effect on his decision to plead guilty, a statement which defendant had no logical reason to falsify.

¶ 17 Defendant's second claim—that his guilty plea was involuntary because the State threatened his mother with prosecution—is not waived. There was no mention of the threat at the plea colloquy. The claim is not based on facts contained in the trial record, and therefore could not have been raised on direct appeal. The claim is properly raised for the first time in postconviction proceedings.

¶ 18 B. Failure to File a Section 122-1(b) Affidavit Verifying the Petition

¶ 19 The State argues that summary dismissal was proper because defendant failed to file a sworn verification affidavit, as required by section 122-1(b). 725 ILCS 5/122-1(b) (West 2010). The State is not involved in the first stage of postconviction proceedings; it may therefore raise this issue for the first time on appeal because it is the State's earliest opportunity to do so. *People v. Turner*, 2012 IL App (2d) 100819.

¶ 20 Section 122-1(b) states that a postconviction "proceeding shall be commenced by filing with the clerk of the court *** a petition (together with a copy thereof) verified by affidavit." 725 ILCS 5/122-1(b) (West 2010). However, failure to comply with that requirement of section 122-1 is the kind of administrative error that does not justify a first-stage summary dismissal. *Cf. Turner*, 2012 IL App (2d) 100819, ¶ 46 ("an invalid [verification] affidavit is not a basis for a first-stage dismissal"); *People v. Boclair*, 202 Ill. 2d 89, 99 (2002) ("the Act does not authorize the dismissal of a post-conviction petition during the initial stage based on untimeliness"); but *cf. People v. McCoy*, 2011 IL App (2d) 100424, ¶ 10 ("The lack of notarization of defendant's

verification is a basis to affirm the petition's [first-stage] dismissal").

¶ 21 The determinative issue at the first stage of postconviction proceedings is a substantive one: whether the defendant's petition is frivolous or patently without merit. A petition's lack of a sworn affidavit of verification, standing alone, cannot cause the petition to become frivolous or patently without merit. See *Turner*, 2012 IL App (2d) 100819, ¶ 46 ("Just as a petition can have merit despite its untimeliness [citation], so can a petition that is merely unverified"). At the first stage, "the court does not measure the petition's procedural compliance but, rather, its substantive virtue." *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 20. Most procedural defects are better addressed at the second stage, after appointed counsel has had the opportunity to amend the petition. See *Henderson*, 2011 IL App (1st) 090923. At such time, the State may move to dismiss the petition based on any remaining procedural defects.

¶ 22 In support of its argument that this court should affirm the trial court's summary dismissal, the State cites the supreme court case of *People v. Collins*, 202 Ill. 2d 59 (2002). The State reads *Collins* to hold that a failure to comply with section 122-1(b), like a failure to comply with section 122-2, is a pleading error that justifies a first-stage summary dismissal. Section 122-2 requires that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations." 725 ILCS 5/122-2 (West 2010).

¶ 23 However, as stated in *Collins*, "the Act itself clearly distinguishes between the sworn verification [of section 122-1(b)] *** and the supporting 'affidavits, records, or other evidence' " (*Collins*, 202 Ill. 2d at 66) of section 122-2, as the sworn verification "serves a purpose wholly distinct." *Id.* at 67. Although the *Collins* court described the section 122-1 requirements as "pleading verifications," nothing in *Collins* suggests that a failure to comply with section 122-1

justifies the summary dismissal of a petition for postconviction relief. *Collins*, 202 Ill. 2d at 67.

We find that section 122-1 involves a matter of procedural compliance better-suited for second-stage proceedings (see *Henderson*, 2011 IL App (1st) 090923), while compliance with section 122-2 involves a matter of substantive evidence that may support a first-stage summary dismissal (see *Collins*, 202 Ill. 2d 59). *Collins* provides no help to the State's position in the present case.

¶ 24 C. Does Defendant's Petition State the "Gist" of a Constitutional Claim?

¶ 25 Summary dismissal is appropriate only where the "petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). To survive summary dismissal, the petition must state merely the "gist" of a constitutional claim. *Collins*, 202 Ill. 2d at 66.

Defendant claims that during plea negotiations, the State threatened to charge his mother with witness tampering if he refused to plead guilty. Defendant argues that this threat caused him to enter an involuntary guilty plea, in violation of his constitutional right to due process. At the first stage, the petition's facts are taken as true. *Id.*

¶ 26 Due process requires that a defendant's guilty plea be given voluntarily. *Boykin v. Alabama*, 395 U.S. 238 (1969); *People v. Clark*, 386 Ill. App. 3d 673 (2008). The relevant inquiry in determining voluntariness is whether the prosecutor's actions were so coercive as to risk inducing false guilty pleas. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). Other jurisdictions and federal courts have found that threats to prosecute third parties do not make a guilty plea *per se* involuntary, but "guilty pleas made in consideration of lenient treatment as against third persons pose a greater danger of coercion than purely bilateral plea bargaining[.]" *United States v. Nuckols*, 606 F.2d 566, 569 (5th Cir. 1979). Some federal courts have adopted a rule that the State's threat to prosecute a third party must be made in good faith—*i.e.*, that the State

must have probable cause to support the charge being threatened. See, e.g., *United States v. McElhaney*, 469 F.3d 382 (5th Cir. 2006); *United States v. Vest*, 125 F.3d 676 (8th Cir. 1997); *United States v. Pollard*, 959 F.2d 1011 (D.C. Cir. 1992).

¶ 27 In the present case, defendant has pled facts sufficient to establish the gist of a claim that the threat to charge his mother caused defendant to plead guilty involuntarily. Valenzuela's actions, as described in the affidavits attached to defendant's petition, do not appear to satisfy the elements of witness harassment (720 ILCS 5/32-4a (West 2006)) or communicating with a witness (720 ILCS 5/32-4(b) (West 2006)). Therefore, defendant has alleged facts that could show that the threat was made without probable cause to charge Valenzuela with the threatened crime. Such a "bad faith" threat could create a risk of inducing a false guilty plea. Defendant has therefore presented the facts necessary to establish the gist of a constitutional claim.

¶ 28 Defendant's statements during the plea colloquy that his guilty plea was not the result of any threats or promises are not dispositive of voluntariness. The nature of the alleged threat against defendant – assuming its truth – would have required that he not to disclose the threat at the plea colloquy. Unlike defendant's assertion that the fight in the jail did not influence his guilty plea, defendant's statement that he received no threat was made under conditions that belie the statement's veracity. Therefore, defendant's statements at the colloquy cannot serve as definitive evidence of his plea's voluntariness.

¶ 29 The petition was not frivolous or patently without merit, and the circuit court's summary dismissal was in error. The Act does not permit partial summary dismissals at the first stage of postconviction proceedings. *People v. Rivera*, 198 Ill. 2d 364 (2002). As a result, we reverse and remand to the circuit court to allow the entire petition to proceed to the second stage of

postconviction proceedings.

¶ 30

CONCLUSION

¶ 31 The circuit court's summary dismissal of defendant's postconviction petition is reversed.

Defendant's case is remanded to the circuit court for second-stage postconviction proceedings.

¶ 32 Reversed and remanded.

¶ 33 PRESIDING JUSTICE WRIGHT, dissenting.

¶ 34 The majority concludes defendant's postconviction petition contained the gist of a constitutional claim after applying the assumption that all of defendant's well-pled facts set out in the petition are true. Like the majority, I also assume the allegations are true concerning the State's threat to prosecute defendant's mother and the origin of defendant's injuries and agree both issues are beyond the record. However, I disagree that either the State's communicated threat or defendant's undisputed injury is determinative of the existence of a gist of a constitutional claim in the case at bar.

¶ 35 Instead, I respectfully observe the issue on appeal is not whether the State threatened to prosecute defendant's mother or whether defendant was harmed in the jail. Rather, I submit the pivotal issue for purposes of defendant's postconviction petition is whether defendant felt undue coercion due to the State's threats and defendant's physical injuries, both assumed to be truthful allegations for purposes of my analysis.

¶ 36 In this case, the absence of coercion or undue influence is clearly and positively rebutted by defendant's responses to the court's inquiries as contained in the record itself. See *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998). For example, the judge asked defendant if he "hurt" and defendant responded "no." The judge also asked defendant if he had been threatened or forced into pleading guilty, and defendant clearly indicated, to the court, that he had not.

¶ 37 Focusing on whether the record rebuts defendant's postconviction claim that he was feeling undue influence, coercion, or pain at the time he entered his guilty plea, I respectfully submit the record clearly rebuts defendant's contention that he did not voluntarily enter his guilty plea in this case. For this reason, I respectfully dissent.