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2013 IL App (3d) 110811-U

Order filed June 19, 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 13th Judicial Circuit,
Plaintiff-Appellee,)	La Salle County, Illinois,
)	
v.)	Appeal No. 3-11-0811
)	Circuit No. 09-CF-367
)	
ERNEST MONROE,)	Honorable
)	H. Chris Ryan,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Wright and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred when it dismissed defendant's *pro se* postconviction petition as frivolous and patently without merit.

¶ 2 Defendant, Ernest Monroe, pled guilty to unlawful delivery of a controlled substance (720 ILCS 570/401(a)(1)(A) (West 2008)) and was sentenced to 14 years in prison. Thereafter, he filed a *pro se* postconviction petition alleging that counsel was ineffective for failing to follow through on his request that he file a motion to withdraw his guilty plea. The trial court dismissed

defendant's petition as frivolous and patently without merit. Defendant appeals, arguing that the trial court erred when it dismissed his petition. We reverse and remand.

¶ 3

FACTS

¶ 4 Defendant was charged with unlawful delivery of a controlled substance (720 ILCS 570/401(a)(1)(A) (West 2008)). He pled guilty to the charge and, in exchange, the State agreed to cap its sentencing recommendation at 16 years. The trial court accepted the plea and sentenced defendant to a term of 14 years in prison. Defense counsel filed a motion to reconsider sentence which was denied by the trial court. A motion to withdraw defendant's plea deal was never filed.

¶ 5 Thereafter, defendant filed a *pro se* postconviction petition alleging, among other things, that trial counsel was ineffective for failing to follow through on his request to file a motion to withdraw guilty plea. Defendant attached an affidavit to his petition. The affidavit stated:

"I, Ernest Monroe, being first duly sworn upon oath do hereby depose and state that the following statements are true and correct. I further state as follows:

Grand jury transcripts are not attach [*sic*] to this petition because the State's

Attorney office refuses to provide them under the law. See Report C pages 1-20. (FOIA)"

The trial court determined that defendant's claims were not supported by competent evidence or affidavits. Therefore, it summarily dismissed defendant's petition as frivolous and patently without merit. Defendant appeals.

¶ 6

ANALYSIS

¶ 7 Defendant argues that it was error for the trial court to dismiss his *pro se* postconviction petition as frivolous and patently without merit because it stated the gist of a claim of ineffective

assistance of counsel. A postconviction petition is a collateral attack on a prior conviction and sentence. *People v. Rissley*, 206 Ill. 2d 403 (2003). The Post-Conviction Hearing Act provides a three-step procedure for the adjudication of petitions for postconviction relief. 725 ILCS 5/122-1 *et seq.* (West 2010). At the first stage, the trial court must independently determine whether the petition is frivolous or patently without merit. *People v. Morris*, 236 Ill. 2d 345 (2010). A petition is frivolous or patently without merit if its allegations, when taken as true, fail to present the gist of a constitutional claim. *People v. Brooks*, 233 Ill. 2d 146 (2009). A trial court's dismissal of a postconviction petition as frivolous or patently without merit is reviewed *de novo*. *Morris*, 236 Ill. 2d 345.

¶ 8 Generally, to survive dismissal at the first stage, a postconviction petition must be supported by the record or contain an affidavit or other evidence in support of the petition. See *People v. Rogers*, 372 Ill. App. 3d 859 (2007). Where an affidavit is provided, the court is to take its declarations as true. *People v. Hunter*, 2011 IL App (1st) 093023. Here, the trial court dismissed defendant's petition after finding that none of his claims were supported by competent evidence or affidavits. However, defendant did provide a properly notarized affidavit whereby he declared that the "following statements" were true and correct. Although the affidavit was placed at the end of the petition, it is clear from its context that defendant meant it to apply to the claims within the petition, including his claim that counsel was ineffective for not filing a motion to withdraw guilty plea. Therefore, we conclude that a proper affidavit was attached to the petition.

¶ 9 The State does not contest that defendant's allegation of counsel's failure to move to withdraw the plea was sufficient to state a claim of ineffective assistance of counsel at the first

stage of proceedings. See *People v. Edwards*, 197 Ill. 2d 239 (2001) (postconviction petition alleging ineffective assistance for failure to move to withdraw guilty plea stated a gist of constitutional claim). Therefore, having found a proper affidavit asserting the truth of his claims, we conclude that defendant has provided enough support for his claim that counsel was ineffective to survive summary dismissal at the first stage. We reverse the trial court's dismissal and remand the cause so that it can proceed to the second stage.

¶ 10

CONCLUSION

¶ 11 The judgment of the circuit court of La Salle County is reversed, and the cause is remanded for further proceedings.

¶ 12 Reversed and remanded.