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2014 IL App (3d) 120415-U

Order filed January 22, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
Plaintiff-Appellee,)	Rock Island County, Illinois,
)	
v.)	Appeal No. 3-12-0415
)	Circuit No. 07-CF-1134
)	
OSBALDO JOSE-NICOLAS,)	Honorable
)	Walter D. Braud,
Defendant-Appellant.)	Judge, Presiding.

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

ORDER

- ¶ 1 *Held:* The defendant's postconviction petition raised the gist of a claim of ineffective assistance of counsel. The petition is remanded to the trial court for further proceedings.
- ¶ 2 The defendant, Osbaldo Jose-Nicolas, appeals the summary dismissal of his *pro se* postconviction petition. On appeal, the defendant argues that his petition set forth an arguable claim that his defense attorney provided ineffective assistance by disregarding his request to file a motion to withdraw the guilty plea, thereby depriving him of his right to an appeal. We reverse

and remand for further postconviction proceedings.

¶ 3

FACTS

¶ 4 On March 24, 2008, the defendant pled guilty to first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)) and concealment of a homicidal death (720 ILCS 5/9-3.1(a) (West 2006)). On June 19, 2008, the trial court sentenced defendant to consecutive terms of 40 years' imprisonment for first degree murder and 5 years' imprisonment for concealment of a homicidal death.

¶ 5 On December 8, 2008, the defendant filed a motion to reconsider sentence. At the hearing, the trial court noted that the motion was four months late. Defense counsel explained that when the defendant was transported after the sentencing hearing, he told the defendant to contact him within 30 days to advise "how he wanted to proceed on the motion to reconsider." Defense counsel next heard from the defendant in November 2008 and filed the motion to reconsider sentence thereafter. The trial court denied the motion on timeliness and substantive grounds.

¶ 6 On March 6, 2012, the defendant filed a *pro se* postconviction petition. The defendant's petition alleged that his right to the effective assistance of counsel had been violated. Specifically, the defendant alleged that on June 19, 2008, he "signed papers for a plea of guilty." The court advised the defendant that he had 30 days to reconsider his sentence. The defendant then told defense counsel that he wanted to file a motion to withdraw his guilty plea. Defense counsel advised the defendant not to withdraw the plea because he would possibly receive a greater sentence. Nevertheless, the defendant told defense counsel to file a motion to withdraw the guilty plea. The defendant also alleged that counsel did not tell him of the charges and

pressured him into pleading guilty. The defendant felt that defense counsel was looking out for the defendant's best interest until the defendant did some independent research and decided that he wanted to take his case to trial.

¶ 7 The trial court summarily dismissed the petition, finding that it failed to present the gist of a claim.

¶ 8 ANALYSIS

¶ 9 The defendant argues that his *pro se* postconviction petition established an arguable claim of ineffective assistance of counsel because defense counsel disregarded his request to file a motion to withdraw the guilty plea, thereby depriving him of his right to appeal. The State responds that the defendant's petition did not allege when he asked defense counsel to file a posttrial motion, and the record does not show that the defendant contacted defense counsel regarding a posttrial motion until several months after sentencing.

¶ 10 The Post-Conviction Hearing Act provides a three-stage process for the adjudication of postconviction petitions. *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). A petition may be summarily dismissed at this stage if it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record, or a fanciful factual allegation. *Hodges*, 234 Ill. 2d 1. 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). "The 'gist' standard is 'a low threshold,' " and a petition need only present a limited amount of detail to meet this threshold. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). To set forth the gist

of a claim, the petition does not need to include legal arguments or citations to legal authority. *Edwards*, 197 Ill. 2d 239. We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 11 At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is at least arguable that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) the defendant was prejudiced. *People v. Wright*, 2013 IL App (4th) 110822.

¶ 12 In the present case, it was at least arguable that the defendant received ineffective assistance of counsel when defense counsel did not file a motion to withdraw the guilty plea. See *Edwards*, 197 Ill. 2d 239 (postconviction petition alleged the gist of a claim for ineffective assistance of counsel where counsel did not preserve the defendant's right to an appeal by filing a motion to withdraw the guilty plea). The State first contends that the defendant's petition did not allege when the defendant asked counsel to file a posttrial motion. However, a liberal reading of the defendant's postconviction petition indicates that he asked defense counsel to file a motion to withdraw his plea on June 19, 2008, the date on which he was sentenced and apprised of his appeal rights. See *People v. Coleman*, 183 Ill. 2d 366 (1998) (at the first stage of proceedings, a postconviction petition is to be liberally construed in favor of the defendant). Therefore, we find that the defendant's petition alleged that he made a timely request of defense counsel to file a motion to withdraw his guilty plea.

¶ 13 Alternatively, the State argues that the record refutes the defendant's allegation of a timely request. The State's argument relies on defense counsel's statement at the hearing on the motion to reconsider sentence that counsel had not heard from the defendant until November 2008,

several months after sentencing. However, defense counsel's statement referenced the defendant's motion to reconsider sentence and not a motion to withdraw the guilty plea. Therefore, the record does not refute the defendant's allegation in his postconviction petition that he asked counsel to file a motion to withdraw his guilty plea at the June 19, 2008, sentencing hearing. As a result, we hold that the defendant's postconviction petition presented the gist of a claim of ineffective assistance of counsel, and we remand the cause to the trial court for further postconviction proceedings.

¶ 14

CONCLUSION

¶ 15 For the foregoing reasons, the judgment of the circuit court of Rock Island County is reversed, and the cause is remanded for further postconviction proceedings.

¶ 16 Reversed and remanded with directions.