2015 IL App (1st) 131506-U

SIXTH DIVISION
May 22, 2015

Nos. 1-13-1506 & 1-13-2377, consolidated

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 21913
	)	
DERRICK BROWN,	)	Honorable
	)	John J. Hynes,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

¶ 1 *Held:* In appeal number 1-13-2377 we affirmed the order dismissing, at the first-stage, defendant's postconviction petition which alleged that his plea was involuntary due to ineffective assistance of counsel and the order denying rehearing on the dismissal; we dismissed appeal number 1-13-1506 which was filed while the timely motion for rehearing was pending and, therefore, under Rule 606(b), had no effect.

¶ 2 Defendant Derrick Brown appeals from orders of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)), and denying his motion for rehearing on the dismissal (appeal number 1-13-2377). Defendant maintains that he set forth an arguable claim that his guilty plea was involuntary due to ineffective assistance of counsel, which resulted in his involuntary plea of guilty, requiring second-stage proceedings. We affirm these orders and

dismiss appeal number 1-13-1506 which sought review of the dismissal of the postconviction petition while defendant's motion for rehearing was pending.

¶ 3 In October 2009, defendant was charged with the June 3, 2009, armed robbery of Jose Ramirez. In December of that year, an amended indictment was filed charging defendant with two counts of armed robbery, two counts of aggravated robbery and one count of robbery. Defendant retained private counsel to represent him, who later withdrew.

¶ 4 In January 2011, the circuit court appointed the Cook County Public Defender to represent defendant pursuant to 53 ILCS 5/3-4006 (West 2009). Assistant Public Defender's (APD's) Camille Calabrese, Maria Barrido, and Michelle Thomas assisted with his representation and each appeared at various times on his behalf during lengthy pretrial proceedings.

¶ 5 APD Calabrese began her court representation of defendant at a status date of January 28, 2011. She, subsequently, made several appearances on behalf of defendant. APD Calabrese filed multiple pretrial motions on defendant's behalf, including motions to suppress identification testimony, *in limine*, to bar use of evidence of defendant's prior convictions to impeach his credibility, and for continuances. APD Barrido also made various court appearances beginning, at least as early as September 26, 2011, when a hearing on the motion to suppress identification was held and the motion denied. APD Thomas of the forensic science division of the office of the Cook County Public Defender first appeared in court on behalf of defendant after the State had tendered certain discovery relating to DNA evidence. APD Thomas assisted in the review of the forensic DNA evidence, hiring a DNA defense expert, and preparation of a report relating to the DNA evidence.

¶ 6 At a status date of April 16, 2012, defendant was in court with APD Calabrese. Defendant told the court that APD Calabrese wanted him "to take a 402 conference," but he

wished to go to trial. Defendant said APD Calabrese was "mad" at him "because I won't cop out." APD Calabrese responded in this manner:

> "I was nothing but kind and polite to [defendant] who has been seen many, numerous times, more times than I can count, at the jail.
>
> I didn't even bring up a 402 this morning. I got a call at 6:00 in the morning from one of his family members on my cell phone making it quite clear to me that he doesn't want a 402.
>
> It never came up, Judge, and we're more than happy to do the trial; we're ready for the trial. That's what we've been discussing all along. And at this point, as far as I know, there hasn't even been a request for a 402, Judge."

The court explained to defendant that APD Calabrese was "under an ethical obligation" to tell him that there were "options short of trial." The court also told defendant he was "free to reject those options."

¶ 7 On April 17, 2012, defendant was represented by APD's Calabrese and Barrido. On that date, the court continued to consider the parties' pretrial motions. APD Calabrese presented arguments on behalf of defendant. After a recess, defendant requested a Supreme Court Rule 402 (Ill. S. Ct. R. 402 (eff. July 1, 2012)), conference. After admonishing defendant pursuant to Rule 402, a conference was held. The circuit court reminded defendant that on the previous day, he had been "adamant" about going to trial, but defendant then stated "yes" when asked if he wished a Rule 402 conference. After the Rule 402 conference, the following statements were made by the court:

> "THE COURT: We have had a conference in this matter, and I was informed [of] a couple of things.

* * *

*** [T]he defendant would not be eligible for natural life, that the sentencing range on aggravated robbery would be again generally for a Class 1 offense, which is four to fifteen years in the penitentiary, with a maximum of thirty years.

***

THE COURT: Therefore, I know the State had come in with a offer of thirty years, the defense asked for a period of twenty years, and I told the defense attorney that I was at a higher number here, but they indicated that their client, they had spoken to their client, Mr. Brown, and he would accept the twenty years.

I told both [APD] Barrido and [APD] Calabrese that I would go along with that, but today only, and the reason I'm doing that is because I cannot have any further delays on this case. We're going to pick a jury on Monday."

However, because defendant was not prepared to plead guilty that day and wished to talk with his family, the case was continued to the previously set jury trial date of April 23, 2012.

¶ 8 On April 23, 2012, APD Thomas, as well as APD's Calabrese and Barrido were in court. When the case was called, APD Thomas informed the court that defendant wished to enter a negotiated plea agreement to aggravated robbery in exchange for the previously recommended sentence of 20 years' imprisonment. In open court, defendant signed a jury waiver form and informed the court that he understood he was giving up his rights to a jury trial by entering his plea of guilty. The court, after making the required admonishments, accepted defendant's plea as freely and voluntarily made. Before entering the sentence, defendant stated:

> "Okay. You know this has been a long time up in this courtroom going back and forth to the cell and there was no secret that I was going to push your hand and take you to trial. And you know I was going to do that."

The court then sentenced defendant to 20 years' imprisonment with a credit of 942 days for time served. Defendant did not file a postplea motion, or otherwise attempt to perfect an appeal from the judgment entered on his plea.

¶ 9 On February 13, 2013, however, defendant filed a *pro se* postconviction petition, alleging that APD's Calabrese and Barrido refused to defend him at trial, and that APD Thomas stepped in as his counsel. He asserted that APD Thomas had no criminal law experience, was unlicensed, and had no knowledge of his case except for the forensic evidence. He also claimed that APD Thomas told him that she "can't try this case alone," and that he would be found guilty, so he should accept the plea offer. Defendant asserted that based on this pressure, he told APD Thomas he would "take the plea bargaining," but needed credit for time served in another case. APD Thomas left, came back, and stated "let's get this over and agree to everything in regards of do I understand." In support of his petition, defendant attached the business card of APD Thomas. Defendant, by affidavit, verified the allegations of his *pro se* postconviction petition.

¶ 10 On April 19, 2013, the court entered a written order dismissing defendant's petition as frivolous and patently without merit. In doing so, the court, which had presided over defendant's case from the start, found that the record demonstrated that the plea was entered knowingly and voluntarily. The court considered that APD's Thomas, Calabrese and Barrido were present at the time of the plea, had represented defendant over a long time period prior to his plea, and all were licensed attorneys. The court found defendant understood "he would be sentenced to 20 years to be served at 50%" and received 942 days credit for time served.

¶ 11 On May 7, 2013, defendant filed a notice of appeal from the dismissal order (appeal number 1-13-1506),

¶ 12 On that date, defendant also filed a "motion for a rehearing on post-conviction judgment," in which he alleged that the court failed to review all of his allegations regarding the denial of his right to effective assistance of counsel. He claimed that the court appointed APD Calabrese as his lead counsel, APD Barrido as her assistant counsel, and APD Thomas to handle the forensic evidence portion of the case. He claimed that on April 23, 2012, APD's Calabrese and Barrido were in "direct conflict" with his decision to proceed to trial and "blatantly refused to represent [him] in trial proceedings." APD Thomas was then appointed by the court as lead counsel, despite her limited knowledge of his case and, thus, contrary to his firm decision to proceed to trial, he was forced to plead guilty. He now admitted that APD Thomas was licensed as a lawyer. The circuit court denied defendant's petition on May 10, 2013.

¶ 13 This court subsequently granted defendant's motion to file a late notice of appeal (appeal number 1-13-2377) from that order, and to consolidate it with his prior appeal (appeal number 1-13-1506).

¶ 14 Although neither party questions our jurisdiction to hear either appeal, we must independently consider the matter and dismiss an appeal if jurisdiction is lacking. *People v. LaPointe*, 365 Ill. App. 3d 914, 919 (2006). Appeals from postconviction proceedings are governed by the supreme court rules for criminal appeals (Ill. S. Ct. Rule 651(d) (eff. Feb. 6, 2013)), and, thus, defendant must comply with the filing provisions of Supreme Court Rule 606(b) (Ill. S. Ct. R. 606(b) (eff. Dec. 11, 2014)). See also, *LaPointe*, 365 Ill. App. 3d at 919.

¶ 15 Here, the circuit court dismissed defendant's postconviction petition on April 19, 2013, and on May 7, 2013, defendant filed a timely notice of appeal (appeal number 1-13-1506).

However, since defendant also filed a timely postjudgment motion for rehearing, the notice of appeal from the order of dismissal had no effect and must be stricken. Ill. S. Ct. Rule 606(b) (eff. Dec. 11, 2014). We, therefore, must dismiss appeal number 1-13-1506.

¶ 16 Notwithstanding, this court subsequently granted defendant's motion to file a late notice of appeal (Ill. S. Ct. Rule 606(c) (eff. Dec. 11, 2014)), after the denial of his postjudgment motion on May 10, 2013, providing this court with appellate jurisdiction to consider the dismissal of his postconviction petition and the denial of his rehearing of that dismissal in appeal number 1-13-2377.

¶ 17 Defendant maintains that he presented an arguable claim that his guilty plea was involuntary due to ineffectiveness of counsel and, thus, the dismissal of his postconviction petition at the first stage was error.

¶ 18 At the first stage of postconviction proceedings, defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring only that defendant plead sufficient facts to assert an arguable constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Our review of the dismissal of a postconviction petition is *de novo* (*People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998)), and we may affirm on any basis supported by the record. *People v. Rajagopal*, 381 Ill. App. 3d 326, 329 (2008).

¶ 19 The State first argues that under Supreme Court Rule 604(d) (Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014)), defendant has waived the issue of his involuntary plea as he failed to raise it in a motion to withdraw his guilty plea. Defendant responds that his claim of an involuntary plea is

based outside the record; *e.g.*, his private conversations with his counsel, and, therefore, he can raise it for the first time in his postconviction petition.

¶ 20 Rule 604(d) provides, in relevant part:

> "No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days ***, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment." *Id.*

Rule 604(d) also states that "[u]pon appeal any issue not raised by the defendant in the motion to reconsider the sentence or withdraw the plea of guilty and vacate the judgment shall be deemed waived." *Id.* This provision has been referred to as the Rule 604(d) "waiver rule" (*People v. Stewart*, 123 Ill. 2d 368, 374 (1988)), and, thus, we will do so here and refer to the issue as one of waiver rather than forfeiture.

¶ 21 The State cites *Stewart*, and *People v. Vilces*, 321 Ill. App. 3d 937 (2001), in support of its waiver argument. In *Stewart*, the defendant filed a postconviction petition which attacked the voluntariness of his guilty plea for a reason not set forth in his motion to vacate that plea or raised on direct appeal after denial of the motion to withdraw. Our supreme court stated that under Rule 604(d), "issues not preserved in a motion to vacate the guilty plea are waived," and that "this waiver rule applies to post-conviction proceedings as well as to appeals." *Stewart*, 123 Ill. 2d at 374. In reaching that decision, the supreme court noted that Rule 604(d) specifically allows for the introduction of extra-record facts by affidavit (Ill. S. Ct. Rule 604(d) (eff. Dec. 11, 2014)), so that the defendant's " 'off-the-record' " argument in that case was unavailing. *Id.*

¶ 22 Relying on *Stewart*, the Second District in *Vilces* held that under Rule 604(d), the defendant waived the issues raised in his postconviction petition because he did not file a motion

to withdraw the guilty plea. The Second District based its finding of waiver on a conclusion that "the facts that defendant needed to state his claim were entirely within his knowledge at the time a motion to withdraw the plea should have been filed." *Vilces*, 321 Ill. App. 3d at 941. The *Vilces* court rejected defendant's contention that Rule 604(d) does not apply where there has not been a direct appeal. According to *Vilces*, the waiver rule of Rule604(d) would *not* apply to a postconviction petition which raises a claim of involuntariness that is based on facts which were not available to defendant at the time for filing a motion to withdraw the plea, *e.g.*, a claim that counsel was ineffective for not filing the motion to withdraw the plea would not be waived. *Id*. at 942.

¶ 23 The First District reached a different conclusion in *People v. Miranda*, 329 Ill. App. 3d 837 (2002). The State, in *Miranda*, argued that the defendant had waived review of her postconviction claims by failing to file a motion to withdraw the guilty plea in compliance with Rule 604(d). We found the waiver argument misplaced, and determined that the waiver rule of Rule 604(d) did not apply to postconviction proceedings. *Id*. at 841.

¶ 24 Following that decision, the Fourth District in *People v. Brooks*, 371 Ill. App. 3d 482 (2007), found the Rule 604(d) waiver rule inapplicable in postconviction proceedings where the defendant did not file a direct appeal of his conviction. *Id*. at 486. In reaching its decision, the court cited *People v. Rose*, 43 Ill. 2d 273 (1969), where the supreme court held that, while the defendant had waived, by failure to appeal, those rights based on mere error in the trial, he was still entitled to assert those violations of constitutional rights which the Act is designed to protect and preserve. *Id*. at 279. Thus, a party who fails to take a direct appeal is not precluded from seeking postconviction relief on an issue of the deprivation of the defendant's constitutional rights. *Id*. Neither *Miranda* nor *Brooks* considered the holdings of *Stewart* and *Vilces*.

¶ 25 The reasoning in *Vilces*—that postconviction proceedings are available to raise grounds which were not available at the time a motion to withdraw the defendant's plea should have been filed—is compelling. However, because forfeiture is a rule of administrative convenience, not an absolute bar to reviewing procedurally defaulted claims (*People v. Moore*, 177 Ill. 2d 421, 427 (1997)), and this district generally follows *Miranda*, we will consider the merits of defendant's claims.

¶ 26 The two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984), applies to challenges to a guilty plea based on counsel's ineffectiveness assistance. *People v. Hale*, 2013 IL 113140, ¶ 15. Under *Strickland*, a defendant must establish that (1) counsel's performance fell below an objective standard of reasonableness; and (2) the defendant was prejudiced by counsel's substandard performance. *Strickland*, 466 U.S. at 696.

¶ 27 As to ineffectiveness, defendant contends APD's Calabrese and Barrido, refused to represent him on the scheduled trial date, forcing him to choose between pleading guilty and going to trial with APD Thomas who, he claims, was unfamiliar with his case. Defendant believes the record supports his contention that APD's Calabrese and Barrido had abandoned him because only APD Thomas spoke at the guilty plea proceedings. Additionally, defendant says the record shows he had insisted on a jury trial throughout the proceedings, complained of APD Calabrese's urging him to request a Rule 402 conference and, during the guilty plea proceeding, again spoke of his desire for a trial. Therefore, according to defendant, it is clear that he only pled guilty because he was forced to do so in light of his fear of being represented by APD Thomas. We disagree.

¶ 28 Our review of the record shows that APD's Calabrese and Barrido, as well as APD Thomas, were present on the day set for trial when defendant pled guilty. See *People v. Teran*,

376 Ill. App. 3d 1, 7 (2007); *People v. Stein*, 255 Ill. App. 3d 847, 849 (1993). Further, the record refutes his assertion that APD's Calabrese and Barrido were not willing to represent him at trial. APD Calabrese zealously pursued multiple pretrial motions in preparation for trial and had stated on the record that she was prepared and willing to take the matter to trial and had declared that she was aware defendant was insisting on a trial. APD Barrido also appeared on his behalf during the pretrial proceedings and showed no objection to defendant's wish to go to trial. Further, APD Thomas had been significantly involved in trial preparations by preparing to defend against the State's DNA evidence and there is nothing in the record which shows that she lacked sufficient experience to try the case alone or with other APD's.

¶ 29 We also note that it was the Cook County Public Defender who was appointed to represent defendant, and not any particular APD nor, as defendant claimed, was there a court appointment of APD Thomas as his "lead trial counsel" on the date the case was set for trial and defendant entered his plea. The fact that multiple APD's may appear on a defendant's behalf does not "necessarily indicate ineffective representation." *People v. Mitchell*, 33 Ill. 2d 603, 606 (1966). Similarly, the fact that one APD may represent a defendant at trial does not prove ineffectiveness.

¶ 30 Defendant may have wished to go to trial throughout the lengthy pretrial proceedings, but this does not mean his eventual plea of guilty was involuntary. As the trial date neared, defendant showed a willingness to enter a plea by voluntarily requesting a Rule 402 conference. APD's Calabrese and Barrido participated in the conference. After the conference, defendant asked for time to consider the proposed sentence with his family and the matter was continued to the previously set trial date. On the date of trial, when the case was called, defendant accepted

the proposed sentence after the circuit court properly admonished him and found the plea was knowingly and voluntarily made.

¶ 31 During the plea process, defendant said nothing about feeling pressure or about his counsel. Defendant, in open court, waived his right to a jury trial and stated that he understood that by pleading guilty, he was giving up his right to any trial. Plaintiff has not set forth an arguable claim that he was deprived of effective counsel which forced him to plead guilty.

¶ 32 In reaching this conclusion, we find defendant's reliance on *People v. Algee*, 228 Ill. App. 3d 401 (1992) and *People v. Crislip*, 20 Ill. App. 3d 175 (1974), misplaced. In *Algee*, the record showed that counsel admitted that he did not provide the defendant with all of the discovery, was not prepared for trial, admitted to not accepting calls from defendant and hanging up on him, and told the defendant he would be sentenced to 120 years' imprisonment if he did not accept the plea offer. *Id*. at 404-05. Here, unlike *Algee*, the record shows that the APD's fully and effectively represented defendant throughout the pretrial proceedings and zealously prepared for a trial.

¶ 33 In *Crislip*, defendant alleged in his postconviction petition that he was induced to plead guilty by police threats. *Id*. at 177-78. The court concluded that an evidentiary hearing was necessary to determine whether defendant was coerced by police to plead guilty and that his negative answer to the trial court on whether the guilty plea was involuntary did not rebut his allegation. *Id*. at 180. Unlik*e Crislip*, defendant's allegations that the conduct of the APD's pressured him into a plea were completely uncorroborated and rebutted by the record.

¶ 34 In addition, to present an arguable claim that his plea was involuntary due to ineffective assistance, defendant must demonstrate that it was arguable that he was prejudiced, *i.e.*, that there was a reasonable probability that, but for counsel's errors, he would have not pleaded guilty and would have insisted on going to trial. *People v. Ramirez*, 402 Ill. App. 3d 638, 643 (2010). A

bare allegation that defendant would have pleaded guilty and insisted on trial if counsel had not been deficient is insufficient to establish prejudice. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). Defendant's claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial. *People v. Rissley*, 206 Ill. 2d 403, 459-60 (2003); *Ramirez*, 402 Ill. App. 3d at 643. Here, defendant did not raise either in his postconviction petition, and, accordingly, has not presented an arguable claim of prejudice. *Id.* We, therefore, find that defendant failed to present an arguable claim that his guilty plea was involuntary due to ineffective assistance of counsel.

¶ 35 For the reasons stated, we affirm the orders of the circuit court of Cook County orders summarily dismissing defendant's *pro se* postconviction petition and denying rehearing on the dismissal in appeal number 1-13-2377, and dismiss appeal number 1-13-1506.

¶ 36 Appeal number 1-13-2377 affirmed.

¶ 37 Appeal number 1-13-1506 dismissed.