2015 IL App (2d) 121378-U
No. 2-12-1378
Order filed February 24, 2015



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Lake County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 08-CF-3501 |
| ANDREW J. PFEIFER, | ) | Honorable Fred L. Foreman, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE HUDSON delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court erred in dismissing defendant's postconviction petition where it set forth an arguable claim of ineffective assistance of counsel in connection with defendant's guilty plea.

¶ 2 Defendant, Andrew J. Pfeifer, appeals an order of the circuit court of Lake County dismissing his postconviction petition (725 ILCS 5/125-1 (West 2012)) after the first stage of postconviction proceedings. On appeal, defendant contends that he stated the gist of a claim that he received ineffective assistance of counsel in connection with a plea of guilty he entered and

that a portion of his sentence is void (the State agrees with the latter point). For the reasons that follow, we reverse and remand for further proceedings.

¶ 3 The Postconviction Hearing Act (Act) (725 ILCS 5/125-1 *et seq.* (West 2012)) establishes a three-stage procedure pursuant to which a criminal defendant may seek redress for violations of their constitutional rights at trial. *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). A proceeding under the Act is collateral attack upon the defendant's conviction. *People v. Reyes*, 369 Ill. App. 3d 1, 12 (2006). Hence, issues raised on direct appeal are *res judicata*, and issues that could have been raised are deemed forfeited. *Id*.

¶ 4 The instant case was dismissed during first-stage proceedings. At this stage, the trial court independently reviews the petition and determines whether it is frivolous or patently without merit. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). If so, the trial court must dismiss the petition. *Reyes*, 369 Ill. App. 3d at 12. A petition is frivolous or patently without merit if it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). The State does not participate at this stage, and the trial court " 'acts strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit.' " *People v. Tate*, 2012 IL 112214, ¶ 12 (quoting *People v. Rivera*, 198 Ill. 2d 364, 373 (2001)).

¶ 5 To prevail at this stage, a defendant need only set forth the gist of a constitutional claim. *Gaultney*, 174 Ill. 2d at 418. This is a low threshold. *Id*. Only limited detail is required, and a defendant is not required to present legal argument or cite legal authority. *Id*. Regarding a claim of ineffective assistance of counsel, a petition will survive the first stage if "(i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable*

that the defendant was prejudiced." (Emphasis added.) *Hodges*, 234 Ill. App. 3d at 17. Defendant has met this standard.

¶ 6 Defendant contends that his attorney misinformed him that he would be able to challenge his sentence following his partially negotiated guilty plea. Defendant pleaded guilty to two counts of predatory criminal sexual assault in exchange for a sentencing cap of 20 years on each count. Defendant was sentenced to 12 years on each count. Through his attorney, a special assistant public defender, defendant moved the trial court to reconsider sentence. However, when a defendant enters a partially negotiated guilty plea, he or she must first move to withdraw the plea prior to challenging the sentence. *People v. Linder*, 186 Ill. 2d 67, 74 (1999). Thus, his challenge to his sentence was barred by the plea, contrary to what counsel allegedly advised him.

¶ 7 Defendant points out that the record indicates that his attorney did, in fact, believe that defendant could challenge the trial court's sentencing decision without withdrawing his guilty plea. Defense counsel actually filed a motion to reconsider sentence without filing a motion to withdraw defendant's plea. The trial court denied the motion, and defendant appealed. We remanded the case for compliance with Illinois Supreme Court Rule 604(d) (eff. February 6, 2003) and Illinois Supreme Court Rule 605(c) (eff. October 1, 2001). We noted that the trial court had also incorrectly admonished defendant that he could challenge his sentence without withdrawing his plea. *People v. Pfeifer*, No. 2-10-0494 (2010) (unpublished order under Supreme Court Rule 23). On remand, counsel stated, "It does seem to be the state of the law that the defendant cannot challenge[,] at first glance," his sentence without withdrawing his plea. Thus, the record clearly establishes that counsel was operating under such a belief at the time defendant entered his guilty plea. Since counsel's role includes advising defendant regarding the relevant law, it is plainly inferable that he communicated this belief to defendant. This belief

was, in turn, reinforced by the trial court's admonishments. Such representation *arguably* falls below an objective standard of reasonableness.

¶ 8 Defendant has also established *arguable* prejudice. To show prejudice in the present context, a defendant must show that but for counsel's errors, he or she would not have entered the guilty plea. *People v. Edmonson*, 408 Ill. App. 3d 880, 884 (2011). Here, the record shows that defendant asked his attorney to file a motion to withdraw his plea after it became clear that he could not simply challenge his sentence. This allows an inference that the ability to challenge the plea was sufficiently important to defendant that he would not have entered into such an agreement had he known that pleading guilty precluded such a challenge.

¶ 9 That defendant sought to raise this issue in a motion to withdraw his plea suggests another issue: *res judicata* and forfeiture. Generally, an issue that could have been raised is deemed forfeited for the purpose of a postconviction petition while an issue that was actually raised is *res judicata*. Here, defendant asserted the claim but then decided to withdraw his motion to withdraw his plea. However, during the hearing in which defendant withdrew that motion, the trial court advised defendant as follows:

> "Now, then, I would at this time allow you to withdraw your motion on the matter. [Your attorney] can give you further advice in the future if you decided that you wanted to come back to court with regard to any kind of post-conviction relief. *** *So you have other options other than proceeding*." (Emphasis added.)

The trial court's admonitions clearly implied that defendant could assert the issues raised in his motion in ways "other than proceeding" on the motion. Where a court expressly reserves an issue for a future proceeding constitutes an exception to *res judicata*. *Cabrera v. First National Bank of Wheaton*, 324 Ill. App. 3d 85, 100 (2001). The trial court's admonition arguably

constitutes such a reservation. Moreover, if we were to deem defendant's failure to raise the issue a forfeiture of the issue in the face of this reservation, we would destroy this well-established exception to *res judicata*. In any case where the exception applies, the issue necessarily was not raised in the earlier proceeding, as it was reserved for the later proceeding. In short, on the record before us, it is arguable that neither *res judicata* nor forfeiture precludes defendant from raising this issue in the instant proceeding. The State asserts that defendant's withdrawal of the motion constituted a voluntary and knowing relinquishment of his right to challenge his plea. However, given that the trial court arguably told defendant that he would be able to raise these issues in the future, it is difficult to characterize defendant's actions as knowing.

¶ 10 It is true that defendant did not attach a supporting affidavit to his petition (see 725 ILCS 5/122-2 (West 2012)), which under some circumstances would warrant its dismissal. See *People v. Smith*, 352 Ill. App. 3d 1095, 1105 (2004). However, where a claim is based on matters appearing in the record, such an affidavit is not necessary. See *People v. Hanks*, 335 Ill. App. 3d 894, 899 (2002). As explained above, defendant's claims are adequately supported by the record in this case.

¶ 11 The State also contends that defendant has not demonstrated that he arguably suffered prejudice. Generally, to show prejudice from erroneous advice that leads to a guilty plea, a defendant must establish that a reasonable probability exists that he would not have pleaded guilty and instead chose to go to trial. *People v. Rissley*, 206 Ill. 2d 403, 458 (2003). Such a claim must be accompanied by a claim of innocence or the articulation of a plausible defense. *People v. Ramirez*, 402 Ill. App. 3d 638, 643 (2010). However, as Justice Holdridge observed in *People v. Guzman*, 2014 IL App (3d) 090464, ¶ 78, in the context of advice about sentencing,

requiring a defendant to make a showing relating to the merits of his or her case at trial seems out of place.

¶ 12 Instead, we look to our recent decision in *People v. Presley*, 2012 IL App (2d) 100617, ¶ 41, for guidance. There, discussing our earlier decision in *People v. Edmonson*, 408 Ill. App. 3d 880 (2011), we observed:

> "The prejudice became evident when the defendant did in fact attack his sentence by arguing that the trial court had ignored various mitigating factors, only to find out that his guilty plea foreclosed him from doing so. Therefore, the defendant did more than make the bare assertion that, but for his attorney's deficiency, he would not have pled guilty; he showed prejudice in the lost opportunity to challenge his sentence." *Pressley*, 2012 IL App (2d), 100617, ¶ 41.

Such is the case here; defendant has established an *arguable* case of prejudice. Moreover, it is also *arguable* that defendant need not make a showing entailing a claim of innocence or the articulation of a plausible defense in the context of this sentencing error.

¶ 13 The State also asserts that defendant's withdrawal of his motion to withdraw his plea shows he would have entered the plea in the first place regardless of counsel's advice. In light of the trial court's admonition that defendant could raise issues regarding his plea at a later time, we cannot equate the withdrawal of the motion with an acceptance of the terms of the plea agreement.

¶ 14 Finally, defendant argues, and the State agrees, that the term of mandatory supervised release imposed upon him was improper in light of the controlling statute at the time of the occurrence of the alleged offenses. As we are remanding this cause on other grounds, we leave it to the trial court to address this issue.

¶ 15 In light of the forgoing, the order of the trial court dismissing defendant's postconviction petition is reversed and this cause is remanded for further proceedings.

¶ 16 Reversed and remanded.