2015 IL App (2d) 130941-U
No. 2-13-0941
Order filed March 23, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. REGINALD R. MOORE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 10-CF-1368 Honorable Daniel B. Shanes, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly summarily dismissed defendant's postconviction petition, which alleged that appellate counsel was ineffective for failing to raise an alleged *Krankel* violation, as defendant did not show that he was arguably prejudiced in the relevant sense; even had we found such a violation, we would not have reversed defendant's conviction but would have merely remanded for an inquiry into defendant's bare allegations that trial counsel was ineffective.

¶ 2 At issue in this appeal is whether the summary dismissal of the postconviction petition filed by defendant, Reginald R. Moore, was proper. For the reasons that follow, we determine that it was. Accordingly, we affirm.

¶ 3 The following facts are relevant to resolving the issue raised. Defendant was charged with theft (720 ILCS 5/16-1(a)(1)(A) (West 2010)) and unlawful possession of a stolen motor vehicle (UPSMV) (625 ILCS 5/4-103(a)(1) (West 2010)). A jury found defendant guilty of both offenses, and the court entered a conviction on only the UPSMV charge.

¶ 4 Thereafter, Kevin Malia, defendant's trial counsel, filed a posttrial motion, and defendant sent a *pro se* "Motion For Ineffective Counsel" to the court. In his *pro se* motion, which consisted of three paragraphs and spanned only half of a page, defendant claimed that Malia had "insufficient communication" with him and "denied [him] the rights [*sic*] to pick [his] jury." The court asked defendant if he wrote and filed this motion, and, after defendant said that he had, the court indicated that it was going to read it. At that point, defendant interjected, "Your Honor, I will be coming in today asking for a continuance for 30 days because my family is going to hire me a private attorney." The court granted defendant a continuance.

¶ 5 On the five court dates that followed, the court asked defendant about any developments in obtaining a new attorney. Defendant advised the court that his family was working to obtain new counsel. On the fourth date, the court expressed its concern that defendant had been in jail a long time, noting that "[a]t some point we have got to move on your case." After defendant agreed, the court asked defendant when he would know who was going to represent him, "[b]ecause if [defendant was not] going to hire an attorney of [his] own choice and [he does] want a lawyer, Mr. Malia is the guy."

¶ 6 On the next court date, Malia advised the court that defendant still had not obtained new counsel. In doing so, Malia suggested that, "after discussing the issue with [defendant]," if new counsel were not obtained, he would continue to represent defendant. Defendant assured the court that this was true. The court granted defendant another continuance, and, at the next court

date, where defendant appeared with Malia, the court asked whether the parties were ready to proceed with the posttrial motion. After Malia and the assistant State's Attorney responded affirmatively, the court asked, "All right. Mr. Moore, you are good?" Defendant replied, "Yes, sir."

¶ 7 The court subsequently denied the posttrial motion that Malia had filed and it sentenced defendant to 10 years' imprisonment on the UPSMV conviction. Defendant appealed, arguing that the jury should have been instructed on criminal trespass to a vehicle, the court should have removed the "or converted" verbiage from the UPSMV instruction or defined that term, and his term of mandatory supervised release should be reduced. This court affirmed. See *People v. Moore*, 2012 IL App (2d) 110337-U.

¶ 8 Four months later, defendant petitioned *pro se* for postconviction relief, claiming, among other things, that the court should have inquired further into the basis of defendant's claim of ineffective assistance of counsel (see *People v. Krankel*, 102 Ill. 2d 181 (1984)). Defendant also contended that his appellate counsel was ineffective for failing to raise that issue on direct appeal. The trial court summarily dismissed the petition, finding it frivolous and patently without merit. In doing so, the court ruled that defendant failed to show that he was prejudiced by appellate counsel's failure to raise the issue. This timely appeal followed.

¶ 9 On appeal, we are asked to consider whether the dismissal of defendant's petition was proper. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) "provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Tate*, 2012 IL 112214, ¶ 8. A petition brought under the Act is a collateral attack on the trial court proceedings rather than an

appeal from the judgment of conviction. *Id.* Thus, "issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited." *Id.* However, when the defendant, like defendant here, alleges the ineffective assistance of appellate counsel, the forfeiture rule is relaxed. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010).

¶ 10 Here, defendant's petition was dismissed at the first stage of postconviction proceedings. At this stage, the trial court independently reviews the petition, taking the allegations as true (*Tate*, 2012 IL 112214, ¶ 9), and determines whether the petition is "frivolous or is patently without merit" (725 ILCS 5/122-2.1(a)(2) (West 2012)). The trial court may summarily dismiss the petition as frivolous or patently without merit only if it has "no arguable basis either in law or in fact." *Tate*, 2012 IL 112214, ¶ 9. While the petition must "clearly set forth the respects in which [the defendant's] constitutional rights were violated" (725 ILCS 5/122-2 (West 2012)), the threshold for survival at the first stage is low (*People v. Hodges*, 234 Ill. 2d 1, 9 (2009)). Specifically, the defendant must set forth only the "gist" of a constitutional claim, meaning that the petition must contain "enough facts to make out a claim that is arguably constitutional." *Id.* We review *de novo* the trial court's first-stage dismissal of a petition. *Id.*

¶ 11 Defendant argues that the trial court erred in summarily dismissing his petition, because one of his claims alleged the gist of a constitutional violation. That is, defendant claims that, because the trial court violated *Krankel* by refusing to consider defendant's *pro se* posttrial motion alleging ineffective assistance of counsel, his appellate counsel was ineffective for not raising that issue on direct appeal.

¶ 12 Initially, we observe that a *Krankel* violation, by itself is not a violation cognizable under the Act. As noted, the Act requires a defendant to assert that there was a constitutional violation committed during the underlying proceedings. 725 ILCS 5/122-1(a)(1) (West 2012). To do this,

a defendant is required to "clearly set forth the respects in which [his] constitutional rights were violated." 725 ILCS 5/122-2 (West 2012). Our supreme court has determined that, while there is a constitutional right to the assistance of counsel, there is no constitutional right to a *Krankel* inquiry. See *People v. Patrick*, 2011 IL 111666, ¶ 41. Rather, as our supreme court has found, "*Krankel* serves the narrow purpose of allowing the trial court to decide whether to appoint independent counsel to argue a defendant's *pro se* posttrial ineffective assistance claims." *Id.* ¶ 39. Accordingly, defendant is not entitled to relief under the Act unless he articulated the gist of a claim that his appellate counsel was ineffective.

¶ 13 A claim that counsel was ineffective is governed by the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Brown*, 236 Ill. 2d 175, 185 (2010). As relevant here, this means that the trial court may not summarily dismiss a petition alleging ineffective assistance if (1) counsel's performance arguably fell below an objective standard of reasonableness, and (2) the defendant was arguably prejudiced as a result. *Id.* Because both prongs of *Strickland* are needed to state a claim of ineffective assistance, we may dispose of a defendant's ineffective-assistance argument if the defendant has failed to establish that he was arguably prejudiced. See *People v. Sharp*, 2015 IL App (1st) 130438, ¶ 100.

¶ 14 Defendant insists that, had appellate counsel raised the *Krankel* issue on direct appeal, the result of the appeal would have been different in that he would have been granted a remand, and, on remand, defendant "would have had the opportunity to substantiate his allegations against his trial attorney, very possibly with the assistance of new counsel." Under *Strickland*, more than that is necessary to establish prejudice. Specifically, prejudice means that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In the context of a claim of ineffective assistance of

appellate counsel, prejudice means that "but for counsel's errors, there is a reasonable probability that the appeal would have been successful." *Petrenko*, 237 Ill. 2d at 497. Or, put another way, absent counsel's error, the defendant's " 'sentence or conviction would have been reversed.' " *People v. Mack*, 167 Ill. 2d 525, 532 (1995) (quoting *People v. Caballero*, 126 Ill.2d 248, 270 (1989)). Here, even if defendant's appellate counsel had raised the issue on direct appeal, and even if we had found that there was a *Krankel* violation, defendant's conviction would not have been reversed. Rather, at best, we would have remanded for the "limited purpose" of giving the trial court the opportunity to inquire into defendant's *pro se* claims of ineffective assistance. *People v. Moore*, 207 Ill. 2d 68, 79 (2003).

¶ 15 Simply put, to conclude that defendant has arguably suffered prejudice from his appellate counsel's failure to raise the *Krankel* issue on appeal would require us to speculate that a *Krankel* inquiry into defendant's bare allegations of ineffective assistance would have uncovered a valid claim of ineffective assistance of trial counsel. Such speculation would be particularly inappropriate in this case, where defendant has not, either in the underlying proceedings or in his postconviction action, identified precisely what his attorney failed to communicate to him and how he was allegedly precluded from assisting in impaneling a jury.

¶ 16 Based on all of the above, we simply cannot conclude that defendant has presented the gist of a constitutional violation. Thus, we must affirm the summary dismissal of defendant's postconviction petition.

¶ 17 Affirmed.