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2015 IL App (3d) 130718-U

Order filed September 11, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14th Judicial Circuit, Whiteside County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0718
MARTIN S. COX,)	Circuit No. 12-CF-163
Defendant-Appellant.)	Honorable Stanley B. Steines, Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice McDade and Justice O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* The court erred in summarily dismissing defendant's postconviction petition, where the petition established the gist of a claim that trial counsel was ineffective for failing to move to suppress defendant's inculpatory statements.
- ¶ 2 Defendant, Martin S. Cox, appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)). On appeal, defendant asserts that his guilty plea was involuntary as the result of ineffective assistance of counsel. Upon rehearing, we reverse and remand for further second-stage

postconviction proceedings, finding that the petition established the gist of a claim of ineffective assistance of counsel.

¶ 3

FACTS

¶ 4

Pursuant to a plea agreement that was open as to sentencing, defendant pled guilty to unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(1) (West 2012)) and unlawful possession of a controlled substance (720 ILCS 570/402(a)(2)(A) (West 2012)). The trial court imposed two concurrent sentences of 20 years' imprisonment. Defendant did not file a motion to reconsider, nor did he pursue a direct appeal.

¶ 5

Defendant filed a *pro se* petition for postconviction relief. The petition alleged several theories that defendant's guilty plea was involuntary and resulted from ineffective assistance of counsel. The trial court summarily dismissed the petition, finding that defendant's claims were belied by the facts in the record and by the applicable case law.

¶ 6

Defendant appealed, arguing that his petition raised the gist of a constitutional violation, and, as a result, the trial court should have advanced the petition to the second stage of postconviction proceedings. Specifically, defendant argued that trial counsel was ineffective because he: (1) failed to file a motion to suppress statements that defendant made to police; (2) erroneously advised defendant that his present sentences would run concurrently to any sentence he received from a pending criminal charge in Indiana; and (3) failed to file a motion to substitute judge despite counsel's statements to defendant that defendant could not receive a fair trial before the judge because of his racial bias.

¶ 7

On June 4, 2015, this court issued an order under Illinois Supreme Court Rule 23 (eff. July 1, 2011) affirming the summary dismissal of the petition. Defendant then filed a petition for rehearing, arguing this court erroneously rejected defendant's claims of ineffective assistance of

counsel. Specifically, defendant argued that his *Miranda* rights were violated when police reinterrogated defendant after invoking his right to silence. The petition for rehearing also argues that counsel was ineffective by failing to substitute judges despite telling defendant that the trial judge was potentially biased against defendant.

¶ 8

ANALYSIS

¶ 9

On rehearing, we reconsider defendant's claim on appeal that his first-stage postconviction petition establishes the gist of a constitutional claim of ineffective assistance of counsel. Upon further review, we find that defendant's allegation that counsel was ineffective by failing to file a motion to suppress established the gist of a constitutional violation. Specifically, we find that: (1) a motion to suppress statements defendant made to police was arguably meritorious; and (2) defendant would have insisted on going to trial if his statements had been suppressed. As a result, we do not reach defendant's other allegations of ineffective assistance. See *People v. Rivera*, 198 Ill. 2d 364 (2001) (a postconviction petition in which defendant alleges a single nonfrivolous issue must be docketed in its entirety for further postconviction proceedings).

¶ 10

Defendant's petition alleged that after being arrested and taken into custody at the Sterling police department, defendant twice asserted his right to remain silent and his right to counsel. Despite the assertion of his rights, police interrogated defendant and elicited inculpatory statements from him. On appeal, defendant claims that counsel was ineffective for failing to file a motion to suppress those statements and instead advising defendant to plead guilty.

¶ 11

In order to establish a claim of ineffective assistance in the context of an unfiled motion to suppress, a defendant must show: (1) that the motion to suppress would have been

meritorious; and (2) a reasonable probability that the outcome of the proceeding would have been different had the evidence been suppressed. *People v. Henderson*, 2013 IL 114040, ¶ 15. To survive summary dismissal in first-stage postconviction proceedings, defendant's allegations need only establish the gist of a constitutional violation and that it is *arguable* each prong is met. See *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). At the first stage of postconviction proceedings, the circuit court must take the petition's factual allegations as true, unless those allegations are contradicted by the record. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998).

¶ 12 Taking defendant's allegations as true, it is reasonably arguable a motion to suppress in the present case would have been meritorious. In *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), the Supreme Court established that after a defendant asserts his right to counsel during custodial interrogation, he may not be subjected to further interrogation until counsel is made available, unless the defendant initiates the communication. Defendant's petition alleged that defendant asserted his right to counsel but was nevertheless subjected to further interrogation, during which defendant made inculpatory statements.

¶ 13 In finding it is arguable a motion to suppress would have been meritorious, we reject the State's argument that defendant's allegations were rebutted by the record. At the plea hearing, the State recited a factual basis for the charges against defendant. The State explained, "the Defendant was mirandized and he gave a statement indicating that he was selling drugs for another individual who he identified by the name of baby." When asked by the court whether he agreed that the factual basis reflected the evidence that would be produced at trial, defendant answered, "Yes, sir." Although the factual basis established that defendant was properly Mirandized, it did not positively rebut defendant's allegation that he asserted his right to counsel and was later interrogated in violation of the principles established in *Edwards*, 451 U.S. at 477.

¶ 14 It is also reasonably arguable that had defendant's confession been suppressed, the outcome of the proceeding would have been different. In the context of a guilty plea, a defendant establishes that the outcome of the proceeding would have been different by showing that, absent counsel's deficient performance, he would have pleaded not guilty and insisted on going to trial. *People v. Hall*, 217 Ill. 2d 324, 335 (2005).

¶ 15 Defendant's confession would have been the key piece of evidence used against defendant at trial. Most of the other evidence against defendant would have been circumstantial, as no controlled substances were found in defendant's immediate possession. Thus, absent defendant's confession, the State would have been required to prove beyond a reasonable doubt that defendant had constructive possession of the controlled substances. *People v. Drake*, 288 Ill. App. 3d 963, 969 (1997).¹ Therefore, accepting defendant's *Miranda* allegation as true, the State's case against defendant would have been weakened without defendant's statements to police.

¶ 16 We reject the State's arguments that the outcome would not be different if defendant insisted on going to trial because the State would potentially use three witnesses and defendant's statements in allocution against defendant. The credibility of the three potential witnesses is a question of fact, and at the first stage a "trial court is not allowed to engage in any fact finding or credibility determinations." *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 22 (citing *People v. Scott*, 2011 IL App (1st) 100122, ¶ 23). Further, we note that the statements made by defendant in allocution would not have been made had defendant's statements to the police been suppressed

¹"Constructive possession exists without actual personal present dominion over a controlled substance, but with an intent and capability to maintain control and dominion." *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992).

and defendant insisted on going to trial. We acknowledge these facts represent potential hurdles for defendant to overcome in later postconviction stages, but they do not negate the clear allegation of a *Miranda* violation and allegation that defendant would have insisted on going to trial had his statements made to police been suppressed.

¶ 17 In coming to this conclusion, we emphasize that at the first stage of postconviction proceedings, defendant need only establish a gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). That is, defendant is only required to allege an *arguable* claim that a motion to suppress would have been meritorious and, if granted, he would have pled not guilty and insisted on going to trial. *Hodges*, 234 Ill. 2d at 11-12. In light of this low threshold, and the holdings that defendant may not be subjected to further interrogation after invoking his right to counsel and that confessions constitute the strongest possible evidence the State may offer against defendant, we conclude defendant's petition alleged the gist of a constitutional violation. *People v. Miller*, 2013 IL App (1st) 110879, ¶ 82.

¶ 18 CONCLUSION

¶ 19 The judgment of the circuit court of Whiteside County is reversed; the cause is remanded for further postconviction proceedings.

¶ 20 Reversed and remanded.