2015 IL App (4th) 130311-U

NO. 4-13-0311

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 19, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
KEVEN J. McINTOSH,	)	No. 10CF1831
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Pope and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed, concluding the trial court erred in summarily dismissing defendant's postconviction petition as frivolous and patently without merit.

¶ 2 In July 2011, defendant, Keven J. McIntosh, pleaded guilty to one count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)). In August 2011, the trial court sentenced defendant to 25 years' imprisonment followed by a natural-life term of mandatory supervised release (MSR). In April 2013, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). In the petition, defendant alleged, *inter alia*, his retained counsel was ineffective for failing to file a motion to withdraw his guilty plea. Later that month, the trial court dismissed defendant's postconviction petition at the first stage of the postconviction

proceedings as frivolous and patently without merit. Defendant appeals, arguing the trial court erred in summarily dismissing his petition. We reverse and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 In November 2010, the State charged defendant by information with two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)). Sexual-assault kits containing deoxyribonucleic acid (DNA) samples of the victims named in each count and buccal swabs of defendant were obtained by the Champaign police department and were submitted to the Illinois State Police Springfield Forensic Science Laboratory. Throughout the course of the proceedings, the State filed six motions for continuances on the basis of pending DNA results. Each motion, with the exception of the first, was granted over trial counsel's objection.

¶ 5 In July 2011, defendant entered into a partially negotiated guilty plea whereby he pleaded guilty to count II of the information in exchange for the State dismissing count I and capping its sentence recommendation at 25 years' imprisonment. On August 4, 2011, prior to sentencing, defendant filed a *pro se* motion to withdraw his guilty plea. Defendant's motion alleged he was innocent but his lawyer (assistant public defender Scott Schmidt) wanted him to plead guilty. Following the filing of the motion, defendant dismissed attorney Schmidt and hired private counsel, attorney Daniel C. Jackson, to represent him.

¶ 6 On August 24, 2011, attorney Jackson filed a motion in arrest of judgment, alleging the State failed to bring defendant to trial within the time permitted by the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5 (West 2010)). The trial court denied the motion, stating some of the delay was attributable to defendant. On August 31, 2011, the trial court sentenced defendant to 25 years' imprisonment followed by a natural-life term of MSR.

¶ 7 In January 2012, defendant sent a letter to the Champaign County circuit clerk. In the letter, defendant wrote: "I don't see anything about a motion to withdraw guilty plea within the dates August 31, 2011 to now. My question is, is there such motion turned in by my lawyer, Dani[e]l C. Jackson entered in within?"

¶ 8 In April 2012, the trial court received a second letter written by defendant. The letter stated:

> "I received my stamped file-motion, to withdraw guilty plea dated Aug. 4th 2011. Approx Aug 24th 2011 I retained Daniel C. Jackson to represent myself in the pending … 'Motion to Withdraw Guilty Plea Hearing.' As of 'today' I have 'yet received' a hearing date for my motion to withdraw guilty plea. My attorney was to file a 'new' motion to withdraw guilty plea, on Aug. 24th, 2011. But as of today I have not received a copy nor does he respond to any letters or phone calls I've made in the past 7 months. Could you please update me on the status? *** Please set a hearing date."

Later that month, the trial court reviewed defendant's letters and appointed attorney Edwin K. Piraino to represent defendant.

¶ 9 In May 2012, Piraino appeared in court and stated he did not believe the trial court had jurisdiction to hear a motion to withdraw defendant's guilty plea because the 30-day deadline had passed. The trial court stated, "Well, I think he was communicating, so I am going to consider it as a timely filed motion." In June 2012, attorney Piraino filed a motion to withdraw defendant's guilty plea. In August 2012, the trial court held a hearing on the motion, and both defendant and attorney Schmidt testified. At the conclusion of the hearing, the trial

court denied defendant's motion to withdraw his guilty plea, finding defendant's testimony was not credible and his plea was knowing and voluntary. Later that month, defendant filed a direct appeal and the office of the State Appellate Defender (OSAD) was appointed to represent him. OSAD thereafter filed a motion to dismiss the appeal for noncompliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), and on November 5, 2012, this court dismissed defendant's appeal (*People v. McIntosh*, No. 4-12-0772 (Nov. 5, 2012)).

¶ 10 In April 2013, defendant filed a *pro se* petition for postconviction relief pursuant to the Act (725 ILCS 5/122-1 to 122-7 (West 2012)), a motion to proceed as a poor person, and a motion for appointment of counsel. In his postconviction petition, defendant made several allegations, including, *inter alia*, an allegation of ineffective assistance of his retained counsel (attorney Jackson). In support of this argument, defendant asserted:

> "Attorney Dan C. Jackson had a following conversation with the Petitioner. We talked about the sentencing hearing we had early that day. I told him I would like to have a motion to withdraw submitted in as soon as possible. He explained that he would. The following day (September 1, 2011) the Petitioner was transferred to the Department of Corrections, STATEVILLE CC.
>
> The Petitioner raises these Constitutional claims not shown by the record, such as ineffective assistance of his *** retained (Dan C. Jackson) counsel.
>
> ***
>
> In the course of the Petitioner incarcerated in [the Illinois Department of Corrections], the Petitioner wrote many letters to

> his retained counsel (Dan C. Jackson). In those letters he asked for updates, any information regarding the motion of withdrawal of the guilty plea. His counsel never responded. The Petitioner then contacted the Circuit Court on (January 17, 2012), requesting a status on the motion to withdraw his guilty plea that retained counsel was to submit to the courts within the time frame. The circuit court did not respond.
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> ***
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> On April 2, 2012, Petitioner wrote a second time to the circuit court about his concerns of his retained counsel and if any information of the motion to withdraw guilty plea his counsel filed."

Defendant attached both the January 2012 and April 2012 letters to his petition.

¶ 11 Later that month, the trial court summarily dismissed defendant's postconviction petition as frivolous and patently without merit. With regard to defendant's ineffective-assistance-of-retained-counsel claim, the court explained, "Even ineffective assistance of retained counsel has to show prejudice to the defendant. In this case, all be it [*sic*] well after 30 days had elapsed, a hearing was conducted and his request was denied."

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 A. Standard of Review

¶ 15 The Act sets out three distinct stages for the adjudication of postconviction petitions. *People v. Tate*, 2012 IL 112214, ¶ 9, 980 N.E.2d 1100. At the first stage, the circuit

court must, within 90 days of the petition's filing, independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2012). A petition is frivolous or patently without merit when its allegations fail to present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In other words, a petition is frivolous or patently without merit only where the petition has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 12, 912 N.E.2d 1204, 1209 (2009). This court reviews the summary dismissal of a postconviction petition *de novo*. *Harris*, 224 Ill. 2d at 123, 862 N.E.2d at 966.

¶ 16 B. Defendant's Appeal

¶ 17 On appeal, defendant makes multiple arguments in support of why his postconviction petition should not have been summarily dismissed. In the interest of judicial efficiency, we need only address the allegation regarding ineffective assistance of retained counsel for failing to file a motion to withdraw defendant's guilty plea.

¶ 18 Ineffective-assistance-of-counsel claims are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "To prevail on a claim of ineffective assistance under *Strickland*, a defendant must show both that counsel's performance 'fell below an objective standard of reasonableness' and that the deficient performance prejudiced the defense." *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212 (quoting *Strickland*, 466 U.S. at 687-88)). At the first stage of postconviction proceedings, "a petition alleging ineffective assistance may not be summarily dismissed 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." *Id.*

¶ 19 The State argues defendant is not entitled to relief on his theory that attorney Jackson was ineffective for failing to file a motion to withdraw defendant's guilty plea. The

State concedes attorney Jackson's failure "arguably falls below a reasonable level of assistance." However, it maintains, under the prejudice prong of *Strickland*, defendant was required to show meritorious grounds upon which to withdraw the plea. See *People v. Wilk*, 124 Ill. 2d 93, 108, 529 N.E.2d 218, 223-24 (1988) ("The second prong, whether there is a reasonable probability that, 'but for counsel's unprofessional errors, the result of the proceeding would have been different,' will need to show the merits of defendant's grounds to withdraw the plea."). We disagree.

¶ 20 Following our supreme court's decision in *Wilk*, the United States Supreme Court held that the *Strickland* test applies to ineffective-assistance-of-counsel claims based upon trial counsel's failure to file a notice of appeal. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). However, in so holding, the Court also explained, "[I]t is unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before an advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal." (Emphasis in original.) *Id.* at 486.

¶ 21 Following *Flores-Ortega*, our own supreme court held that, at the first stage of postconviction proceedings, prejudice under *Strickland* is presumed from trial counsel's failure to file a requested motion to withdraw the defendant's guilty plea. *People v. Edwards*, 197 Ill. 2d 239, 253, 757 N.E.2d 442, 450 (2001). Citing *Flores-Ortega*, the court explained, "a *pro se* defendant, even if he pled guilty, cannot be *required* to demonstrate how his appeal would have been successful in order to establish that he was prejudiced by his attorney's failure to pursue a requested appeal." (Emphasis in original.) *Id.* The court continued, "Whether, in the circumstances of this case, defense counsel's decision not to file a motion to withdraw the guilty plea constitutes ineffective assistance of counsel requires the appointment of an attorney who

will be able to consult with defendant regarding his claim and explore in more detail the factual and legal ramifications of defendant's claim." *Id.* at 257, 757 N.E.2d at 452-53.

¶ 22 Here, defendant alleged in his postconviction petition he told retained counsel to file a motion to withdraw his guilty plea immediately following sentencing and retained counsel indicated he would file the motion. In support of this claim, defendant attached two letters he had written to the Champaign County circuit clerk's office wherein he inquired about the status of the motion and claimed attorney Jackson was not responding to any letters or phone calls. Nothing in the record contradicts these allegations.

¶ 23 The State urges there can be no showing of prejudice in this case because the trial court allowed defendant to file a late motion to withdraw his guilty plea and held a full hearing on the matter. However, as OSAD correctly points out, because the trial court had no jurisdiction to entertain the untimely motion, the entire proceeding was a nullity. See *People v. Flowers*, 208 Ill. 2d 291, 303, 802 N.E.2d 1174, 1181 (2003). Defendant attempted to directly appeal his sentence, and this court dismissed defendant's appeal for want of jurisdiction. *McIntosh*, No. 4-12-0772 (Nov. 5, 2012). Thus, the trial court's proceedings did nothing to mitigate any surrender of defendant's appellate rights.

¶ 24 Accordingly, we conclude defendant's petition set forth an arguable legal and factual basis upon which to support his ineffective-assistance-of-counsel claim, and the trial court erred when it summarily dismissed defendant's postconviction petition. In so holding, we in no way express an opinion as to whether defendant will ultimately be able to prevail on his ineffective-assistance-of-counsel claim.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we reverse the trial court's summary dismissal of defendant's *pro se* postconviction petition and remand the cause for second-stage proceedings, at which defendant will be represented by an attorney. Because partial summary dismissals are not permitted under the Act, we need not address the remaining issues briefed by the parties. See *People v. Rivera*, 198 Ill. 2d 364, 374, 763 N.E.2d 306, 311-12 (2001).

¶ 27 Reversed and remanded.