2015 IL App (4th) 130501-U

NO. 4-13-0501

FILED
December 8, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
DAVID A. RILEY,	)	No. 00CF1247
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's guilty plea was knowing and voluntary, trial counsel was not ineffective for failing to withdraw defendant's guilty plea, and any timeliness claim is forfeited on appeal.

¶ 2 In July 2000, defendant, David Riley was charged with attempt (first degree murder) (count I) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2000)), armed violence (count II) (720 ILCS 5/33A-2 (West 2000), and aggravated battery (count III) (720 ILCS 5/12-4(b)(1) (West 2000)). In exchange for the defendant's guilty plea, the State dropped counts II and III and the trial court sentenced him to 18 years in the Illinois Department of Corrections.

¶ 3 On June 29, 2012, defendant filed a postconviction petition alleging ineffective assistance of counsel for counsel's failing to withdraw the defendant's guilty plea. The trial court appointed counsel to assist with the petition. Counsel filed an amended postconviction petition. The State moved to dismiss the petition, which the court granted. This appeal followed.

¶ 4 I. BACKGROUND

¶ 5 On July 6, 2000, the State charged defendant with attempt (first degree murder), armed violence, and aggravated battery for stabbing Daniel Woodward. At the time, defendant was a juvenile. The trial court granted a motion for drug, alcohol, and psychological evaluation. The psychological evaluation revealed defendant had substance abuse problems and sufficient intelligence to understand the nature of the charges against him. The evaluation recommended transfer to the adult criminal court. A motion for presumptive transfer was brought. After a hearing on the motion and the results of the psychological evaluation, the case was transferred to adult criminal court.

¶ 6 In criminal court, defendant waived his right to a preliminary hearing. On November 30, 2000, defendant pled guilty to count I, attempt (first degree murder), with a recommended sentence of 18 years in prison. Count II and III were dropped. The court asked defendant if he was pleading guilty by threat or force and defendant responded, "No." The court asked defendant if he was under the influence of any drugs, including prescription medication, that would impair his free will. Again, defendant responded, "No." When asked if defendant was pleading guilty of his own free will, he replied, "Yeah." The court approved the guilty plea and sentenced defendant to 18 years in prison. The trial court informed defendant he had to withdraw his guilty plea within 30 days if he wished to appeal. Defendant confirmed he understood the trial court's admonishments.

¶ 7 In June 2002, defendant filed a subpoena for the common-law record and trial transcript to prepare a postconviction petition. In September 2006, defendant again filed a motion for the common-law record and trial transcripts. In October 2006, the trial court denied both motions because there was no pending petition before the court.

¶ 8 In September 2011, defendant filed a *pro se* petition. In it, he requested a withdrawal of his guilty plea. He claimed he was assaulted by a corrections officer in the weeks leading up to his guilty plea and underwent surgery as a result. The assault and surgery, he alleged, caused him duress that prevented him from willfully pleading guilty. He also claimed he was taking prescription medication that impaired his judgment. Based on these factors, defendant asked his counsel to withdraw his guilty plea and counsel failed to do so.

¶ 9 The exhibits attached to the petition detailed defendant's medical history. On October 13, 2000, He broke his right proximal humerus, a bone in the upper arm, which required implanted pins to heal. On October 16, 2000, A follow-up surgery was performed to shorten the pins. He was discharged on October 20, 2000. After the surgeries, defendant was prescribed one week of Keflex, an antibiotic, and Vicodin for pain. On December 15, 2000, he underwent surgery again to remove the pins because they were causing him pain.

¶ 10 The trial court dismissed the petition for lacking jurisdiction. Defendant appealed. The office of the State Appellate Defender was appointed and dismissed the appeal because defendant never filed a timely motion to withdraw his guilty plea. Defendant then filed a petition for postconviction relief, using the same facts as above, alleging ineffective assistance of counsel for failing to withdraw defendant's guilty plea at his request and allowing him to plead under duress and the influence of prescription medication. The trial court held the petition met the requirements of the first stage of the Post-Conviction Hearing Act and proceeded to the next stage.

¶ 11 Counsel was appointed and filed an amended petition for post-conviction relief. In it, counsel reasserted all of defendant's constitutional claims of ineffective assistance and a claim for trial counsel failing to suppress statements made to police in violation of *Miranda*.

Counsel noted that the petition was not timely but also not due to defendant's culpable negligence. The State moved to dismiss the petition, which was granted. This appeal immediately followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, the defendant raises two claims: (1) trial counsel was ineffective for allowing defendant to involuntarily plead guilty, and (2) failing to withdraw defendant's guilty plea at his request. His *Miranda* argument was not raised on appeal. The timeliness of his petition is also disputed.

¶ 14 The sixth amendment to the United States Constitution provides defendants the right to counsel, which is interpreted to mean the right to effective assistance of counsel. U.S. Const., amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish that counsel was ineffective, the defendant must show (1) counsel's performance was not objectively reasonable and (2) "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *People v. Enis*, 194 Ill. 2d 361, 376 (2000) (citing *Strickland*, 466 U.S. at 687, 694). An ineffective assistance claim is brought under the Post-Conviction Hearing Act.

¶ 15 The Post-Conviction Hearing Act (725 ILCS 5/122-1 to122-7 (West 2000)) enables a defendant to petition the trial court to review the denial of a constitutional right. The statutory scheme proceeds in three stages. In the first stage, the trial court decides if the petition is "frivolous or patently without merit." *People v. Coleman*, 183 Ill. 2d 366, 379 (1998) (quoting 725 ILCS 5/122-2.1(a)(2) (West 1994)). If it is deemed meritorious, counsel may be appointed for the second stage. *People v. Boclair*, 202 Ill. 2d 89, 100 (2002). The State can file a motion to dismiss the claim in the second stage. *Boclair*, 202 Ill. 2d at 100.

¶ 16 In the second stage of postconviction proceedings, the defendant has the "burden of making a substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). "All well-pleaded facts that are not positively rebutted by the trial record are to be taken as true[.]" *Id*. at 473. A dismissal at the second stage is reviewed *de novo*. *Id*.

¶ 17 A. Allowing Defendant's Guilty Plea

¶ 18 Defendant claims his trial counsel was ineffective for failing to ensure that defendant understood his rights and allowing him to involuntarily plead guilty. In *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), the United States Supreme Court required a guilty plea to be knowing and voluntary to be constitutional. A knowing and voluntary plea means the defendant is " 'fully aware of the *direct* consequences' " of pleading guilty. *People v. Williams*, 188 Ill. 2d 365, 371 (1999) (quoting *Brady v. United States*, 397 U.S. 742, 755 (1970)). It also depends, in part, on the effective assistance of counsel. *People v. Manning*, 227 Ill. 2d 403, 412 (2008) (describing counsel as ineffective where he makes inaccurate representations to his client).

¶ 19 Illinois Supreme Court Rule 402 acts as a safeguard to ensure pleas are knowing and voluntary. It requires a court to admonish the defendant of his rights when pleading guilty and determine if the plea is voluntary. Ill. S. Ct. R. 402(a, b) (eff. Jul. 1, 2012). Proper admonishments to the defendant and ensuring that the defendant understands those admonishments are evidence of a voluntary plea. *People v. Ramirez*, 162 Ill. 2d 235, 246 (1994). In support of defendant's involuntary plea agreement, he claims he was under duress and prescription medication at the time of his guilty plea which prevented him from pleading knowingly and voluntarily.

¶ 20 With respect to duress, defendant claims he was assaulted and kept in solitary confinement prior to pleading guilty. Prison conditions are a valid basis for an involuntary plea,

but do not automatically render a plea involuntary. *People v. St. Pierre*, 146 Ill. 2d 494, 500 (1992); *People v. Urr*, 321 Ill. App. 3d 544, 547 (2001). Here, the defendant's claim of assault and solitary confinement are supported by defendant's own affidavit and his hospital records.

¶ 21 Defendant cites *Urr*, 321 Ill. App. 3d 544, and *People v. Dunn*, 13 Ill. App. 3d 72 (1973) to support his argument. Neither is persuasive. In *Urr*, the defendant claimed prison violence as the basis for his involuntary plea. *Urr*, 321 Ill. App. 3d. at 546. However, *Urr* is distinguishable from this case because the defendant in *Urr* maintained his innocence throughout the case and asserted threats of physical and sexual violence as the reason for his plea during admonishment and throughout the trial proceedings. *Urr*, 321 Ill. App. 3d at 548. Urr's conditional and reluctant responses when pleading guilty supported his involuntariness claim. Similarly, in *Dunn*, the defendant was interrupted during the court's admonishments and never confirmed that his plea was voluntary and not the result of threats or force. *Dunn*, 13 Ill. App. 3d at 73.

¶ 22 Defendant in the present case has not maintained his innocence or ever made any suggestion that his plea was involuntary until his postconviction petition. The first time the alleged assault and solitary confinement is raised is in his *pro se* petition, over 10 years later. The only support for the claim, besides defendant's own affidavit, are hospital records detailing the treatment of a broken bone. However, these records are silent as to the cause of the injury. They do not directly support or refute his claim.

¶ 23 Moreover, his assertions were positively rebutted by the trial court's admonishments. *Pendleton*, 223 Ill. 2d at 473. When being admonished of his guilty plea, the court asked, "Is anybody forcing you or threatening you to plead guilty"? The defendant responded, "No." The court asked if defendant was pleading of his own free will. He responded,

"Yeah." *Ramirez*, 162 Ill. 2d at 245 (1994) (discussing thorough admonishments as evidence of a voluntary plea). Under the facts in the record on appeal, defendant's plea is deemed voluntary and trial counsel's actions were not unreasonable or prejudicial for not raising the issue of an involuntary plea.

¶ 24 Similarly, counsel was not ineffective for allowing defendant to plead guilty while taking prescription medication. Defendant suggests he is entitled to a hearing because he was prescribed a psychotropic drug, but that assertion is based on a case that predates a change in the law that applies to this case. *People v. Eubanks*, 283 Ill. App. 3d 12 (1996) (First District). The law at the time this case was brought stated a defendant taking "psychotropic drug" is not presumed unfit to stand trial simply because he takes that drug. 725 ILCS 5/104-21(a) (West 2000). In *Mitchell*, the court discussed this change and overruled the requirement that a defendant be given an automatic fitness hearing while taking psychotropic medication. *People v. Mitchell*, 189 Ill. 2d 312, 329 (2000).

¶ 25 With respect to ineffective assistance, the defendant must show that counsel's failure to raise this issue was objectively unreasonable and there is a reasonable probability that he would have been declared unfit if a hearing were held. *Mitchell*, 189 Ill. 2d at 330, 333-34. A defendant is declared unfit if he is unable to understand the nature of the proceedings against him. *Mitchell*, 189 Ill. 2d at 334, 727 N.E.2d 268 (citing 725 ILCS 5/104-10 (West 2000)). Here, defendant failed to establish he was unfit. Vicodin was prescribed to defendant for pain management. Pain medication is not one of the categories of "psychotropic medications" defined under the statute (405 ILCS 5/1-121.1 (West 2000)).

¶ 26 Even if Vicodin was a psychotropic medication, nothing in the record suggests defendant did not understand the proceedings against him. When being admonished on his

guilty plea, the trial court explicitly asked, "Are you under the influence of *** drugs or anything like that, whether prescription or otherwise, at this time that would take away you ability to understand what you are doing?" Defendant responded, "No." The court repeatedly asked the defendant if he understood the different admonishments given to him and he confirmed he understood them. Based on the record on appeal, nothing suggests a fitness hearing would reveal defendant was unfit to plead guilty. Trial counsel had no reason to suspect defendant's fitness. Counsel's actions, under the circumstances, were reasonable.

¶ 27 2. Failure To Withdraw the Guilty Plea

¶ 28 Defendant's argument that counsel failed to withdraw his guilty plea does not establish a proper basis for withdrawal. Under Supreme Court Rule 605(b), a trial court must admonish a defendant of the requirement to move to withdraw a guilty plea within 30 days before filing an appeal. Ill. S. Ct. R. 605(b) (eff. Oct. 1, 2001). As part of the motion, the defendant must include the grounds for moving to withdraw. *Id.* Rule 604(d) similarly states that a defendant must move to withdraw his guilty plea prior to pursuing an appeal. Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014).

¶ 29 Failure to withdraw a guilty plea prior to filing an appeal can be a basis for ineffective assistance. *People v. Wilk*, 124 Ill. 2d 93, 105 (1988). In *Edwards*, the Illinois Supreme Court found the trial court incorrectly dismissed a case at the first stage based on a request to withdraw a guilty plea. *People v. Edwards*, 197 Ill. 2d 239, 257 (2001). Although *Edwards* only decided the case dismissal at the first stage of a postconviction proceeding, it went on to suggest a second stage postconviction hearing required showing the grounds for withdrawing a guilty plea to establish ineffective assistance. *Edwards*, 197 Ill. 2d at 258.

¶ 30 In this case, defendant's petition was dismissed at stage two of the postconviction

proceedings. The only grounds provided to support withdrawal of defendant's guilty plea were his claims of duress and use of medication. Both of these arguments, as discussed, are unpersuasive. Defendant's claim that he asked counsel to withdraw his plea was only supported by his own affidavit.

¶ 31 The record on appeal, on the other hand, rebuts any valid basis for withdrawal. Throughout the trial, defendant was admonished and affirmed his understanding of his rights, including a thorough explanation of his right to appeal. The record shows no other indication that defendant wanted to withdraw his plea until his *pro se* petition was filed. We find the record on appeal rebuts defendant's claim. *People v. Gomez*, 409 Ill. App. 3d 335, 340-41 (2011) (finding defendant's affidavit insufficient to support a basis for withdrawal of a guilty plea when rebutted by the record). As a result, the trial court properly dismissed defendant's claim and trial counsel was not ineffective for not withdrawing defendant's guilty plea.

¶ 32 B. Timeliness of the Postconviction Petition

¶ 33 Both parties dispute the timeliness of defendant's postconviction petition on appeal. The timeliness of a postconviction petition is treated as an affirmative defense. *Boclair*, 202 Ill. 2d at 101. It is forfeited on appeal if it is not raised in the second-stage motion to dismiss. *Boclair*, 202 Ill. 2d at 98. In the present case, the State filed a motion to dismiss the defendant's amended petition. It did not argue the timeliness of this claim in its motion to dismiss or the hearing on that motion. Failing to raise this issue at the trial court's post-conviction hearing renders the issue forfeited on appeal. See *People v. Cruz*, 2013 IL 113399, ¶ 21 (citing *Boclair*, 202 Ill. 2d at 98, 789 N.E.2d at 739). The trial court's consideration of timeliness in deciding to dismiss does not preserve the issue either. The State bears the burden of raising timeliness in a motion to dismiss and preserving the issue for appeal, which it failed to

do. *Id*. ¶ 23.

¶ 34 III. CONCLUSION

¶ 35 We find the defendant's claims of an involuntary plea are unpersuasive and rebutted by the trial court's thorough admonishments. Based on that finding, we find no basis for withdrawal of defendant's guilty plea that trial counsel should have pursued. We find trial counsel effectively represented defendant in reaching his plea. The issue of timeliness was also forfeited on appeal. The trial court properly dismissed defendant's second-stage postconviction petition. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 36 Affirmed.