2015 IL App (4th) 130572-U

NO. 4-13-0572

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 2, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
ANTHONY W. BURROWS,	)	No. 09CF1081
Defendant-Appellant.	)	
	)	Honorable
	)	Peter C. Cavanagh,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: We grant the office of the State Appellate Defender's motion to withdraw as appellate counsel and affirm the trial court's summary dismissal of defendant's petition for postconviction relief from judgment.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground that no meritorious issues can be raised in this case. For the following reasons, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In December 2009, a Sangamon County grand jury indicted defendant on one count of manufacture/delivery of a controlled substance (720 ILCS 570/401(d) (West 2008)). In September 2011, defendant, through counsel, indicated his desire to plead open to the charge with the option of contesting his eligibility for Class X sentencing at his sentencing hearing. Defense counsel explained defendant did not want to plead to the Class X because the

presentence investigation report (PSI) had not yet been prepared, nor had the State produced certified copies of defendant's prior convictions. The following exchange then occurred:

> "THE COURT: All right, so, sir, you're charged again with a Class 2 felony. I talked to you about this before. For appeal, we are talking about three to seven years in the Department of Corrections. You're extended term eligible, so we are talking about three to 14 years in the Department of Corrections. Also, it's the State's position that you should be sentenced as a Class X offender, which is a potential term of six to 30 years. You understand that's what the State's position is?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right, and you understand that if the Court is convinced that the State's position is correct, that I would sentence you anywhere from six to 30? You understand that if the State turns out to be correct, your sentence will be anywhere from six to 30 years in the Department of Corrections, non-probationable?
>
> THE DEFENDANT: Well, I had—I had thought that they said if I get found guilty, I'm looking at extended term. That's what they kept saying to me. If I get found guilty, not are you pleading guilty. I shouldn't be extended term.
>
> THE COURT: Well, there's the issue. Your attorney says it's three to 14. The State says it is six to 30, and we are going to

take that up. It sounds like once your attorney has the PSI and looks it over, and he may bring an argument to the Court that it may only be three to 14.

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THE COURT: In the end, I'll have to accept one or the other. It's going to be three to 14 or six to 30. Potentially, it's anywhere from three to 30, and you have to accept that, and you have to go into this plea knowing those are all potentials, and that's what I want you to know.

THE DEFENDANT: All right."

The trial court gave further admonishments, the State recited the factual basis, and defendant tendered his open guilty plea to the manufacture/delivery charge.

¶ 5 At sentencing, the State argued defendant was subject to mandatory Class X sentencing pursuant to section 5-5-3(c)(8) of the Unified Code of Corrections (725 ILCS 5/5-5-3(c)(8) (West 2008) (text of section eff. until Dec. 1, 2009)) because defendant had at least two prior Class 2 felony convictions. In support of this argument, the State presented four certified reports of conviction. The State explained:

"Your Honor, I would submit that this Defendant, pursuant to that statute, is to be sentenced as a Class X offender. The relevant prior convictions of this Defendant, which I will submit to the Court in support of that are 1982-CF-118, and the offense then, a Class 2 Burglary and which the elements still remain today a Class 2 felony; that the Defendant was sentenced and released

prior to conviction of 1987-CF-203, again, the offense of Burglary, a Class 2 felony, then and now.

There are two additional Class 2s, 1999-CF-767, a Class 2 felony, Manufacture and Delivery of Controlled Substance, in that the Defendant delivered less than 15 grams of a substance containing cocaine to Officer B. Ritter.

Finally, 2002-CF-750, and again, the Defendant was sentenced and released from that sentence prior to committing 02-CF-750, the offense, a Class 1 felony; that the Defendant knowingly delivered to Officer Davidsmeyer less than one gram of a substance containing cocaine, within 1,000 feet of Feitshans-Edison school.

Any two of these convictions would support a Class X sentencing. The Defendant has four. The Defendant's sentencing range is therefore a minimum of six years and a maximum of 30 years under Class X sentencing with three years['] mandatory supervised release."

Defendant was thereafter sentenced to 15 years' imprisonment in the Illinois Department of Corrections.

¶ 6 On the day of sentencing, following the hearing, defendant filed a motion to withdraw his guilty plea. In the motion, defendant argued his trial counsel lied to him by saying he would not be subject to Class X sentencing if he "pled out to the judge for 3 to 14." In January 2012, defendant, through new counsel, filed an amended motion to withdraw his guilty

plea, arguing his guilty plea "was premised upon a fundamental misapprehension of a complicated legal technicality in respect to the sentencing structure applicable to his case." The trial court denied defendant's amended motion to withdraw his guilty plea. On direct appeal, OSAD argued defendant had been improperly admonished by the trial court. This court affirmed, concluding defendant forfeited the argument he was improperly admonished regarding the possibility he would not be subject to Class X sentencing. *People v. Burrows*, 2013 IL App (4th) 120153-U.

¶ 7 On April 17, 2013, defendant filed a *pro se* postconviction petition, alleging violations of his constitutional rights to due process, a fair trial, and effective counsel at both the trial and appellate levels. In support of his petition, defendant argued:

> "Defendant was sentenced as a 'Class X' offender based of [*sic*] two (2) prior convictions alleged to have been class two (2) or greater class felonies where one of those convictions was a misdemeanor offense. Trial counsel failed to object and allowed defendant to plead guilty to the offense. Appellate counsel refused to raise the issues on direct appeal after defendant's motion to withdraw his guilty plea was denied. The State should have been obligated to prove the convictions were 'the same elements of an offense now classified as a Class 1 or Class 2 or greater Class felony.' "

Attached to defendant's petition was (1) the trial court's judgment order in No. 87-CF-203, wherein defendant was convicted of burglary to a motor vehicle, a Class 2 felony; and (2) a

typewritten sheet outlining defendant's 1982 burglary to a motor vehicle charge with a partially handwritten number—No. 82-CM-118.

¶ 8 On June 5, 2013, the trial court summarily dismissed defendant's postconviction petition by written order. The court explained:

> "The issue concerns whether Defendant-Petitioner was properly sentenced as a Class X offender based upon his prior convictions. This issue was raised in a post-trial motion by counsel who represented Defendant-Petitioner at the plea hearing. This Court determined that Defendant-Petitioner was, in fact, eligible for sentencing as a Class X offender. The matter was thoroughly litigated, and counsel's performance cannot be considered ineffective in any way. In reviewing the record; in considering counsel's performance; and in considering the Petition for Post-Conviction Relief, the Petition cannot, even liberally, be construed to state a gist of a constitutional claim for when relief could be granted under the Illinois Post-Conviction Hearing Act."

¶ 9 On July 8, 2013, defendant filed his notice of appeal.

¶ 10 On November 24, 2014, OSAD moved to withdraw as appellate counsel. The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities. Defendant did not do so. After examining the record, we grant OSAD's motion and affirm the trial court's judgment.

¶ 11 II. ANALYSIS

¶ 12 OSAD argues defendant's petition for postconviction relief contains no meritorious issues. Specifically, OSAD asserts defendant was properly sentenced as a Class X offender and was therefore not denied due process, a fair trial, or effective assistance of counsel. We agree.

¶ 13 A. Standard of Review

¶ 14 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2012)) (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).

¶ 15 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). A petition that is based on an indisputably meritless legal theory—such as one that is completely contradicted by the record—or that is based on a fanciful factual allegation lacks an arguable basis either in law or in fact. *Id.* at 16, 912 N.E.2d at 1212.

¶ 16 "At the first stage of postconviction proceedings under the Act, 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.* at 17, 912 N.E.2d at 1212 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

¶ 17 This court reviews the summary dismissal of a postconviction petition *de novo*. *Harris*, 224 Ill. 2d at 123, 862 N.E.2d at 966.

¶ 18 B. OSAD's Motion To Withdraw

¶ 19 In its motion to withdraw, OSAD outlines the following potential issues for review: (1) whether the petition sets forth a meritorious claim that defendant's Class X sentence was improperly imposed; and (2) whether the State established that defendant's prior convictions contained the same elements as an offense now classified as a Class 2 or greater Class felony. We address each claim in turn.

¶ 20 1. *Whether the Petition Sets Forth a Meritorious Claim That Defendant's Class X Sentence Was Improperly Imposed*

¶ 21 In his postconviction petition, defendant asserts he was wrongly sentenced as a Class X offender because his 1982 burglary conviction was actually a misdemeanor. To support this argument, defendant attached a typewritten sheet with a partially handwritten number—No. 82-CM-118—outlining the charge of burglary to a motor vehicle.

¶ 22 As an initial matter, we note burglary to a motor vehicle has, in all relevant years, been punishable solely as a Class 2 felony. See Ill. Rev. Stat., 1981, ch. 38, ¶ 19-1; Ill. Rev. Stat., 1987, ch. 38, ¶ 19-1; 720 ILCS 5/19-1 (West 2008). Nonetheless, OSAD asserts even if the disputed 1982 burglary conviction is excluded from consideration, no colorable argument can be made to support defendant's claim he was not subject to Class X sentencing because he had previously been convicted of three other Class 2 or greater Class felonies. We agree.

¶ 23 Section 5-5-3(c)(8) of the Unified Code of Corrections provides, in pertinent part:

> "When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements

> as an offense now [(the date the Class 1 or Class 2 felony was committed)] classified in Illinois as a Class 2 or greater Class felony and such charges are separately brought and tried and arise out of different series of acts, such defendant shall be sentenced as a Class X offender. This paragraph shall not apply unless (1) the first felony was committed after [February 1, 1978 (the effective date of Public Act 80-1099)]; and (2) the second felony was committed after conviction on the first; and (3) the third felony was committed after conviction on the second." 730 ILCS 5/5-5-3(c)(8) (West 2008).

¶ 24 Prior to his commission of the current offense, defendant had been convicted of at least three felonies, making him subject to Class X sentencing. The State presented certified copies of each conviction at defendant's sentencing hearing and outlined each conviction on the record. In 1987, defendant was convicted of burglary to a motor vehicle, a Class 2 felony. In 1999, defendant was convicted of manufacture/delivery of a controlled substance, a Class 2 felony. In 2002, defendant was convicted of manufacture/delivery of a controlled substance within 1,000 feet of a school, a Class 1 felony. Each of these felonies was committed after February 1, 1978, and each felony was committed after conviction of the prior felony. Thus, defendant's claim he was not subject to Class X sentencing is completely contradicted by the record.

¶ 25 We therefore agree with OSAD that no colorable argument can be made to support defendant's claim he was improperly sentenced as a Class X offender. Consequently, we find no arguable legal basis for defendant's claim that counsel's performance fell below an

objective standard of reasonableness or that he was prejudiced in any way. See *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212.

¶ 26 2. *Whether Defendant's Prior Convictions Contained the Same Elements as an Offense Now Classified as a Class 2 or Greater Class Felony*

¶ 27 Defendant's petition next asserts, "The State should have been obligated to prove the convictions were 'the same elements of an offense now classified as a Class 1 or Class 2 or greater Class felony.' " Presumably, defendant is arguing because one of his felony convictions was actually a misdemeanor, the elements of the crime are not the same as the elements of a crime now classified as a Class 2 or greater Class felony. OSAD asserts it can make no colorable argument in support of this claim. We agree.

¶ 28 In requesting defendant be sentenced as a Class X offender, the State correctly stated on the record that the elements of burglary and manufacture/delivery of a controlled substance were the same in all past relevant years as they were on the date defendant committed the current offense. See Ill. Rev. Stat., 1981, ch. 38, ¶ 19-1; Ill. Rev. Stat., 1987, ch. 38, ¶ 19-1; 720 ILCS 5/19-1 (West 2008); 720 ILCS 570/401(d) (West 1998); 720 ILCS 570/401(d), 407(b) (West 2002); 720 ILCS 570/401(d), 407(b) (West 2008). Accordingly, we conclude OSAD can make no colorable argument that the elements of defendant's prior convictions were different than the elements of an offense now classified as a Class 2 or greater Class felony. Defendant's postconviction petition is without merit.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 31 Affirmed.