2015 IL App (4th) 130600-U

NO. 4-13-0600

FILED
April 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
CHARLES OVERLA,	)	No. 11CF23
Defendant-Appellant.	)	
	)	Honorable
	)	James R. Coryell,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court's denial of defendant's postconviction petition following a third-stage evidentiary hearing was not manifestly erroneous.

¶ 2 Defendant, Charles Overla, appeals from the third-stage denial of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)). He asserts the trial court's denial of his postconviction petition was manifestly erroneous because defense counsel rendered ineffective assistance of counsel when he failed to honor defendant's timely request to file a motion to withdraw his guilty plea. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In January 2011, the State charged defendant by information with one count of aggravated robbery. 720 ILCS 5/18-5(a) (West 2010). Later that month, defendant entered into a fully negotiated plea of guilty. On the record, defense counsel stated, "Judge, he's going to

plead guilty to the charges filed aggravated robbery. Because of his prior record, he's not eligible for probation and must be sentenced within the range fixed for a Class X crime. His plea is a sentence to the Department of Corrections for ten years."

¶ 5 The trial judge admonished defendant, who acknowledged he understood: (1) it was his choice to plead guilty; (2) his sentence would be for 10 years' imprisonment followed by 3 years' "parole"; and (3) in order to appeal, he would first have to file a motion to withdraw his guilty plea within 30 days of sentencing. The State recited its factual basis, and the trial court announced, "Defendant is sentenced to six years in the Illinois Department of Corrections, three years[']parole, credit time served 1/5/11 through 1/1." The following exchanged then occurred.

> "[DEFENSE COUNSEL]: Actually he—
>
> DEFENDANT OVERLA: He just said six.
>
> [DEFENSE COUNSEL]: No, the bargain is ten.
>
> THE COURT: Ten, I thought I said.
>
> [DEFENSE COUNSEL]: No. It's a ten-year bargain.
>
> THE COURT: What did I say, six?
>
> [THE STATE]: You said six.
>
> THE COURT: Big error in your favor. It's ten years. I'm sorry."

¶ 6 On September 29, 2011, defendant filed a *pro se* petition for postconviction relief. In his petition, defendant alleged he was denied his constitutional right to effective assistance of counsel because his appointed counsel failed to timely move for withdrawal of his guilty plea. In support of this claim, defendant alleged he prepared a *pro se* motion to withdraw his guilty plea and promptly mailed the motion to defense counsel "along with a brief letter that informed him

that [defendant] would follow-up the motion with an appeal." He claimed counsel failed to file the motion for no discernible, lawful, or strategic reason.

¶ 7 Defendant further alleged his guilty plea was "the result of an involuntary, and non-negotiated plea agreement *** which was entered into without the effective assistance of counsel and competent advice of defense [c]ounsel." In addition, he claimed the trial court (1) failed to admonish him that by pleading guilty, he was subject to a three-year mandatory supervised release (MSR) term, and (2) failed to ascertain whether his plea was voluntary pursuant to Illinois Supreme Court Rule 402(b) (eff. July 1, 1997). Attached to defendant's petition was a portion of the trial transcript and a notarized copy of his *pro se* motion to withdraw his guilty plea, dated January 21, 2011.

¶ 8 The trial court docketed defendant's petition for further consideration and appointed postconviction counsel to represent him. In the second stage of postconviction proceedings, postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) and amended defendant's petition, thereby incorporating the claims made in defendant's original *pro se* petition. The State filed a motion to dismiss, alleging defendant's claims were insufficient as a matter of law. At a hearing on the State's motion, postconviction counsel stated defendant was entitled to an evidentiary hearing because he was never asked, pursuant to Illinois Supreme Court Rule 402(b) (eff. July 1, 1997), whether any force, threats, or promises were used to obtain his plea. The trial court agreed and denied the State's motion to dismiss.

¶ 9 On July 12, 2013, defendant's amended postconviction petition proceeded to an evidentiary hearing. At the hearing, defendant explained defense counsel told him he would be sentenced to between 6 and 10 years if he pleaded guilty. He further explained the reason he

agreed with the judge when he said 10 years during the admonishments is because he thought the judge had decided to sentence him to 10 years, but he always believed the options were in the 6 to 10 range. He stated the reason he drafted his *pro se* motion to withdraw his guilty plea is because the judge sentenced him to six years and he wanted the six-year sentence reimposed.

¶ 10 Defendant then testified he drafted his motion to withdraw his guilty plea within 30 days and "handed it to [defense counsel] because [he] was sick at the time." He stated this exchange occurred when defense counsel was at the jail visiting someone else, about a week after defendant pleaded guilty. He explained defense counsel told him he would file it, but the motion was apparently never filed.

¶ 11 With regard to the substance of his motion to withdraw his guilty plea, defendant stated he felt his plea was involuntary. He explained, "I came with the understanding that I was going to get between six and ten. Then when I did get sentenced to six years, then nobody objected—the [S]tate's [A]ttorney didn't object, didn't nobody object. I was over with. I was walking out of the courtroom and then [defense counsel] for some reason said I was supposed to get ten. I feel like, that I was bamboozled." On cross-examination, the State asked defendant:

> "Q. And do you agree that the only reason you wanted to withdraw your guilty plea was because you wanted six years instead of ten?
>
> A. Well, I was sentenced to six.
>
> Q. The six years is [the] only reason that you wrote this notice that you wanted to withdraw your guilty plea?
>
> A. Ye[a]h.

Q. Nowhere do you allege that your plea was involuntary, do you?

A. It was involuntary if I didn't agree to the whole ten."

¶ 12 At the conclusion of the hearing, the trial court denied defendant's amended postconviction petition. It stated:

"So the admonition was adequate. The explanation that he would have a ten-year sentence with a three-year parole period is adequate. I don't know if he gave [defense counsel] the motion to withdraw the plea of guilty. There is no indication that there was any coercion used. He's told he doesn't have to plead guilty. It's pretty clear that he understood that. He says, yes, he understood the rights that were explained to him. I'm going to show that the amended post-conviction petition is denied."

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues the trial court's denial of his postconviction petition was manifestly erroneous because defense counsel provided ineffective assistance when he failed to honor his timely request to file a motion to withdraw his guilty plea. Specifically, defendant argues (1) counsel's failure to file a motion to withdraw his guilty plea constituted deficient performance; and (2) that error prejudiced the proceedings. We disagree.

¶ 16 As an initial matter, we note the State argues defendant has forfeited his ineffective assistance of counsel claim by failing to raise it on direct appeal. This argument is without merit. To file a direct appeal, defendant would have first needed to file a motion to

withdraw his guilty plea pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). Because defendant's postconviction petition clearly indicated the reason he believed counsel was ineffective was for failing to file that motion, a postconviction petition was the appropriate remedy. See *People v. Wilk*, 124 Ill. 2d 93, 107, 529 N.E.2d 218, 223 (1988) (holding where a defendant has alleged ineffective assistance of counsel for trial counsel's failure to file a Rule 604(d) motion prior to appealing, the appropriate remedy lies in the Act).

¶ 17 "When a petition is advanced to a third-stage, evidentiary hearing, where fact-finding and credibility determinations are involved, we will not reverse a circuit court's decision unless it is manifestly erroneous." *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006). However, "[i]f no such determinations are necessary at third stage, *i.e.*, no new evidence is presented and the issues presented are pure questions of law, we will apply a *de novo* standard of review, unless the judge presiding over postconviction proceedings has some 'special expertise or familiarity' with the trial or sentencing of the defendant and that 'familiarity' has some bearing upon disposition of the postconviction petition." *Id.*

¶ 18 Ineffective-assistance-of-counsel claims are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "To obtain reversal under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence, and (2) counsel's deficient performance resulted in prejudice to the defendant." *People v. Hughes*, 329 Ill. App. 3d 322, 325, 767 N.E.2d 958, 960-61 (2002).

¶ 19 Under the second prong of *Strickland*, defendant cites *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000), for the proposition that, to show prejudice, "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Defendant asserts the trial court's denial of his

postconviction petition was manifestly erroneous because the court failed to apply this standard. We disagree.

¶ 20 In *Flores-Ortega*, the United States Supreme Court held, to establish the prejudice prong of *Strickland*, a defendant need demonstrate only that, but for counsel's deficient conduct, he would have appealed. *Id.* at 486. However, the Court explained prejudice is presumed in this context because of the unreasonable burden a *pro se* defendant faces without the assistance of counsel. *Id.* The Court explained, "it is unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal." (Emphasis in original.) *Id.*

¶ 21 Following the Supreme Court's decision in *Flores-Ortega*, our own supreme court held prejudice is presumed at the first stage of postconviction proceedings. *People v. Edwards*, 197 Ill. 2d 239, 757 N.E.2d 442 (2001). It reasoned, "Whether *** 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 However, the court in *Edwards* limited its holding to the specific issue before it—whether the trial court erred in dismissing the defendant's postconviction petition at the first stage of the postconviction proceedings. *Id.*, 757 N.E.2d at 453. It explained:

> "To merit an evidentiary hearing on his claim that he told his trial counsel to file a motion to withdraw his guilty plea and that counsel was constitutionally ineffective for failing to do so,

> defendant will have to make a substantial showing to that effect. [Citation.] *Such a showing will necessarily entail some explanation of the grounds that could have been presented in the motion to withdraw the plea.* Since defendant will be at the second stage of the post-conviction proceedings and will be represented by an attorney, rather than proceeding *pro se*, this will not present an unreasonable burden." (Emphasis added.) *Id.* at 257-58, 757 N.E.2d at 453.

¶ 23 We find the present case distinguishable from both *Flores-Ortega* and *Edwards*. Once defendant's petition advanced past the first stage, he was appointed counsel to explore his ineffective-assistance-of-counsel claim. Accordingly, to prove prejudice, defendant was required to prove counsel was constitutionally ineffective for failing to file defendant's motion to withdraw his guilty plea. *Id.*; see also *Wilk*, 124 Ill. 2d at 108, 529 N.E.2d at 223-24 (To satisfy the second prong of *Strickland*, a defendant's postconviction petition "will need to show the merits of [his] grounds to withdraw the plea.").

¶ 24 On appeal, defendant does not argue there was any merit to the claims he would have raised in his motion to withdraw his guilty plea. Accordingly, we need not address the issue. Even if we were the address the issue, the trial court determined there was no legal basis to support defendant's claim his guilty plea was involuntary. A review of the record reveals defendant entered into a knowing and understanding plea after being admonished of his rights and the terms of his plea agreement. Therefore, the trial court's denial of defendant's postconviction petition was not manifestly erroneous.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 27 Affirmed.