2015 IL App (4th) 130601-U

NO. 4-13-0601

FILED
March 10, 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
DAMIEN G. TERRY,	)	No. 97CF79
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas E. Griffith, Jr.,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's summary dismissal of defendant's postconviction petition, concluding it failed to state the gist of a meritorious constitutional claim.

¶ 2 In June 1997, defendant, Damien G. Terry, pleaded guilty to two counts of predatory criminal sexual assault of a child, a Class X felony (720 ILCS 5/12-14.1 (West 1996)), and the trial court sentenced him to two consecutive terms of 6 years' imprisonment. While imprisoned, defendant was convicted of additional felonies, thereby extending his period of imprisonment. In May 2013, defendant filed a *pro se* postconviction petition regarding his 1997 plea, which was summarily dismissed. On appeal, defendant argues his petition (1) is not moot, and (2) alleges the gist of a meritorious constitutional claim. We affirm the trial court's summary dismissal, concluding defendant's postconviction petition failed to state the gist of a meritorious

constitutional claim.

¶ 3 I. BACKGROUND

¶ 4 In January 1997, the State charged defendant by information with two counts of predatory criminal sexual assault of a child, a Class X felony (720 ILCS 5/12-14.1 (West 1996)). It was alleged defendant, while residing with his sister, sexually assaulted her eight-year-old and seven-year-old daughters.

¶ 5 After defendant was charged, defendant signed and dated a form titled "DEFENDANTS RIGHTS." One of the rights listed included the right "[t]o appeal any finding of guilt or sentence given."

¶ 6 In February 1997, defendant's attorney filed a petition to determine fitness to stand trial. In April 1997, a psychological evaluation was conducted. The evaluation indicated defendant had "sufficient knowledge of the criminal court process to understand the nature of the charges against him." The doctor evaluating defendant opined defendant was fit to stand trial. At the fitness hearing, the parties stipulated to these findings and defendant was found fit to stand trial.

¶ 7 The State filed notice it intended to offer statements made by the minor children pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 1996)). The State also intended to offer evidence of an oral statement made by defendant regarding the crimes charged.

¶ 8 In June 1997, defendant pleaded guilty to both counts and the trial court sentenced him to 6 years' imprisonment on each count, to be served consecutively. The court also awarded credit for 150 days served in custody. The record on appeal does not contain a transcript or

bystander's report of the hearing on the plea. However, the docket sheet entry indicates defendant was admonished of his right to a trial by jury, representation by counsel, and the consequences of his plea. The trial court found defendant knowingly and intelligently waived his rights and filed a written waiver of a trial by jury. It also found a factual basis for the plea. Defendant was admonished of his appellate rights pursuant to Illinois Supreme Court Rule 605(b) (eff. Aug. 1, 1992). Defendant did not appeal his judgment or sentence entered on his plea of guilty.

¶ 9 In October 1999, defendant sent a letter to the clerk of the court requesting copies of court transcripts and all information regarding his case. In the letter, defendant listed the names of the prosecuting attorney, the trial judge, the victims, the mother of the victims, and defendant's attorney. He also listed the charges filed, the conviction and sentence, the crime-scene address, the date of the offense, and the date and time of his arrest. No further action was taken by defendant regarding this case until 2013.

¶ 10 While imprisoned, defendant was convicted of one count of unlawful use or possession of a weapon by a felon in the custody of the Department of Corrections Facilities (720 ILCS 5/24-1.1 (West 2000)), and the trial court sentenced him to a consecutive term of eight years' imprisonment. Defendant was also convicted of four counts of aggravated battery (720 ILCS 5/12-4(b)(b) (West 2002, 2004)), and the court sentenced him to 2 years' imprisonment on each count, to run consecutive to the term he was serving. These additional felonies extended defendant's period of imprisonment. (The Illinois Department of Corrections' website indicates defendant continues to be imprisoned and neither sentence from the 1997 plea has been discharged.)

¶ 11 On May 16, 2013, defendant filed a *pro se* postconviction petition regarding his 1997 plea. Defendant's petition initially notes he did not appeal his conviction because his trial counsel did not explain the appeal process and he did not know how to file an appeal. It also alleges defendant's reason for not filing his petition within the "3 year time frame" is (1) he had no knowledge of the law and it took 16 years to gain enough knowledge to adequately file such petition, and (2) the medications he was taking affected his thought process. Defendant's petition then proceeds to allege how his constitutional rights were violated. It asserts his fifth-, sixth-, and eighth-amendment rights (U.S. Const., amends. V, VI, VIII) were violated when, after stating he wished to remain silent and requesting an attorney, (1) the investigating officer threatened defendant with taking his sister's children and placing them in a mental institution if he did not give a written statement confessing to the crimes of which he was accused, (2) the investigating officer had four "jail security officers" attack defendant and beat him until he was willing to give a signed confession, (3) the jail security officers threatened to kill defendant if he told anyone about the attack, (4) his trial counsel had "jail officers" attack and beat defendant until he agreed to take a plea agreement in open court, (5) the jail officers threatened to kill defendant if he did not take the plea agreement, and (6) his trial counsel and jail officers threatened to kill defendant if he told anyone about the threats or attack. Defendant contends he brought these acts to his trial counsel's attention and counsel stated, "If I were you I would keep my mouth shut, unless you want to die." Defendant's petition further alleges he received ineffective assistance of counsel due to trial counsel's failure to file a motion (1) to suppress evidence illegally obtained, "like the written and signed statement against himself"; (2) for a protective order; and (3) to dismiss based on the doctor's examination report of the victims,

which indicated defendant did not commit the crimes and demonstrated his written statement was fabricated. (We note the record before us contains neither the alleged written confession or the doctor's examination report.)

¶ 12 On May 29, 2013, the trial court summarily dismissed defendant's petition. In its written order, the court found defendant's (1) petition was moot as his sentence had already run; (2) claims were mere conclusions and were not supported by facts, records, or other evidence; and (3) claim of ineffective assistance of trial counsel for failing to file a motion to suppress does not form an arguable basis in which counsel's performance fell below an objective standard of reasonableness or demonstrated prejudice.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues his petition (1) is not moot, and (2) alleges the gist of a meritorious constitutional claim by alleging trial counsel did not explain the appeal process. In response, the State contends (1) the trial court properly dismissed the petition as defendant did not have standing to raise the claim; (2) defendant forfeited his constitutional claims raised in his petition as he failed to argue these claims on appeal; (3) defendant's argument trial counsel was ineffective for failing to explain the appeal process is forfeited as it was not initially raised as a constitutional violation in defendant's petition; and (4) even if the court addresses defendant's claim, he fails to state the gist of a meritorious constitutional claim.

¶ 16 Our review of a first-stage dismissal of a postconviction petition is *de novo*. *People v. Swamynathan*, 236 Ill. 2d 103, 113, 923 N.E.2d 276, 282 (2010). Therefore, we may

affirm the trial court's dismissal on any grounds substantiated by the record, regardless of the trial court's reasoning. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 17, 964 N.E.2d 1139.

¶ 17 A. Postconviction Petition

¶ 18 The Post-Conviction Hearing Act (Act) (see 725 ILCS 5/122-1 to 122-7 (West 2012)) grants criminal defendants a means by which they can assert their convictions resulted from a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909. Proceedings under the Act are commenced by filing a petition in the trial court in which the original proceeding took place. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009).

¶ 19 Section 122-2 of the Act mandates a petition must, among other things, "clearly set forth the respects in which petitioner's constitutional rights were violated." 722 ILCS 5/122-2 (West 2012). However, the threshold for survival under this section is low as most petitions are drafted by defendants with little legal knowledge or training. *Hodges*, 234 Ill. 2d at 9, 912 N.E.2d at 1208. Therefore, the petitioner must only plead a "gist" of a constitutional claim, or, in other words, "[S]ection 122-2 pleading requirements are met, even if the petition lacks formal legal arguments or citations to legal authority." *Hodges*, 234 Ill. 2d at 9, 912 N.E.2d at 1208. Although this threshold is low, this "does not mean that a *pro se* petitioner is excused from providing any factual detail at all surrounding the alleged constitutional violation." *Hodges*, 234 Ill. 2d at 10, 912 N.E.2d at 1208. The petition must also "have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). The purpose of this requirement is to allow the trial court to corroborate a petition's allegations with independent and objective facts. *Hodges*, 234 Ill. 2d at

10, 912 N.E.2d at 1208. Therefore, the "use of the term 'gist' describes what the defendant must allege at the first stage; it is not the legal standard used by the *** court to evaluate the petition[] under section 122-2.1 of the Act." *Hodges*, 234 Ill. 2d at 11, 912 N.E.2d at 1209.

¶ 20 At the first stage of postconviction proceedings, the legal standard used by the trial court in evaluating the petition is, when taking the allegations as true, whether "the petition is either frivolous or patently without merit." *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). If a court determines a petition "is either frivolous or patently without merit, the court must dismiss the petition in a written order." *Hodges*, 234 Ill. 2d at 10, 912 N.E.2d at 1209. A petition is either frivolous or patently without merit if it has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A fanciful factual allegation is one which is "fantastic or delusional." *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212. In summary, we must determine whether defendant adequately pleaded the "gist" of a constitutional claim and whether that claim can survive the "frivolous or patently without merit" test. *Hodges*, 234 Ill. 2d at 11, 912 N.E.2d at 1209.

¶ 21 B. Ineffective Assistance of Trial Counsel

¶ 22 Defendant argues the trial court erred in summarily dismissing his postconviction petition because his allegation trial counsel did not explain the appeal process presented the gist of a meritorious constitutional claim. Specifically, defendant asserts an ineffective-assistance-of-counsel claim for trial counsel's failure to consult with defendant concerning his appellate rights.

¶ 23 Defendant's petition alleged his constitutional rights were violated when he was attacked, beaten, and threatened by an investigating officer, "jail security officers," trial counsel, and "jail officers." Defendant further alleged he received ineffective assistance of counsel due to trial counsel's failure to file a motion (1) to suppress an alleged written confession, (2) for a protective order, and (3) to dismiss based on an alleged doctor's examination report. On appeal, defendant makes no argument as to these claims, thereby forfeiting them for review. *Snow*, 2012 IL App (4th) 110415, ¶ 11, 964 N.E.2d 1139.

¶ 24 Rather, defendant argues trial counsel's failure to *consult* with him regarding his appellate rights is a basis for an ineffective-assistance-of-counsel claim. The petition itself does not present this as a factual basis for defendant's ineffective-assistance-of-counsel claim. The petition simply notes he did not appeal his conviction because trial counsel did not explain the appeal process and he did not know how to file an appeal. Defendant does not allege he instructed trial counsel to appeal or trial counsel discussed an appeal with defendant. See *People v. Torres*, 228 Ill. 2d 382, 396, 888 N.E.2d 91, 101 (2008). Although the pleading threshold is low—defendant must only plead a "gist" of a constitutional claim—it is questionable whether this threshold has been met. As our supreme court has stated in *People v. Jones*, 213 Ill. 2d 498, 505, 821 N.E.2d 1093, 1097 (2004), "a claim not raised in a petition cannot be argued for the first time on appeal." Defendant's petition did not assert a claim of ineffective assistance of counsel based on trial counsel's alleged failure to consult with defendant regarding his appellate rights.

¶ 25 Nevertheless, even if we find defendant adequately pleaded his claim and consider defendant's argument under the "frivolous or patently without merit" test, dismissal was

appropriate. Claims of ineffective assistance of counsel are governed by the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In applying a variation of this test to first-stage dismissals of postconviction petitions, our supreme court has stated "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." *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212. With regard to the first prong, the United States Supreme Court in *Roe v. Flores-Ortega*, 528 U.S. 470, 479-80 (2000), has rejected a bright-line rule trial counsel must always consult with a defendant regarding an appeal. The Supreme Court found such a rule inconsistent with the rationale of *Strickland* and common sense. It highlighted the following hypothetical to emphasize its point:

> "For example, suppose that a defendant consults with counsel; counsel advises the defendant that a guilty plea probably will lead to a 2 year sentence; the defendant expresses satisfaction and pleads guilty; the court sentences the defendant to 2 years' imprisonment as expected and informs the defendant of his appeal rights; the defendant does not express any interest in appealing, and counsel concludes that there are no nonfrivolous grounds for appeal. Under these circumstances, it would be difficult to say that counsel is 'professionally unreasonable,' [citation], as a constitutional matter, in not consulting with such a defendant regarding an appeal." *Flores-Ortega*, 528 U.S. at 479.

Rather than adopting a bright-line rule, *Flores-Ortega* held trial counsel has a constitutionally imposed duty to consult with a defendant regarding an appeal "when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Flores-Ortega*, 528 U.S. at 480.

¶ 26 Under the first prong of the *Flores-Ortega* test, defendant has failed to allege any nonfrivolous grounds on which he would appeal. Defendant has abandoned his claims of constitutional violations alleged in his petition. This is likely because they are unsupported by any corroborating or independent facts in the record and can be considered frivolous or patently without merit. See *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212. Our review further does not indicate other nonfrivolous grounds on which defendant could appeal. See, *e.g.*, *Torres*, 228 Ill. 2d at 396-97, 888 N.E.2d at 101-02.

¶ 27 Further, *Flores-Ortega* directs, in making the determination of whether trial counsel should have realized a rational defendant would want to appeal, "a highly relevant factor *** [is] whether the conviction follows *** a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." *Flores-Ortega*, 528 U.S. at 480. It also directs that we consider whether the defendant "received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." *Flores-Ortega*, 528 U.S. at 480. Here, defendant pleaded guilty and received the sentence he bargained for. Defendant was admonished of his right to a trial by jury, representation of counsel, and the consequences of his plea. The trial court found defendant knowingly and intelligently waived

his rights and filed a written waiver of trial by jury. It also found a factual basis for the plea. Defendant was admonished of his appellate rights pursuant to Illinois Supreme Court Rule 605(b) (eff. Aug. 1, 1992). Defendant has failed to establish any grounds which would have given his trial counsel reason to think a rational defendant would want to appeal.

¶ 28 Under the second prong of the *Flores-Ortega* test, defendant's petition and the record on appeal fail to indicate defendant "reasonably demonstrated to counsel that he was interested in appealing." *Flores-Ortega*, 528 U.S. at 480. To make this determination, we consider "all the information counsel knew or should have known." *Flores-Ortega*, 528 U.S. at 480. Trial counsel knew defendant (1) signed and dated a form indicating he understood his right to appeal any finding of guilt or sentence given, (2) pleaded guilty, and (3) was admonished regarding his appellate rights. The record does not indicate defendant notified the trial court or trial counsel he did not understand his appellate rights. Defendant's petition does not allege any conversation occurred with trial counsel wherein he indicated a desire to appeal or expressed displeasure with his sentence. With regard to his sentence, we note defendant received the minimum sentence allowed by law on each count. Further, the fact defendant did not raise any claims for 16 years lends support to the conclusion defendant did not indicate to trial counsel he was interested in appealing. Finally, with regard to the evidence, trial counsel was aware the State intended to offer evidence of (1) an oral statement made by defendant regarding the crimes charged, and (2) statements by the minor children pursuant to section 115-10 of the Code. The alleged written confession and the doctor's examination report are not contained in the record on appeal. Therefore, when considering "all the information counsel knew or should have known,"

the record and defendant's petition do not reasonably demonstrate defendant indicated to trial counsel he was interested in appealing. *Flores-Ortega*, 528 U.S. at 480.

¶ 29 Because defendant has failed present an "arguable [claim] that counsel's performance fell below an objective standard of reasonableness," we need not reach the question of whether it was arguable defendant was prejudiced. See *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212. We further need not reach the other arguments of the parties.

¶ 30 III. CONCLUSION

¶ 31 We affirm the trial court's summary dismissal of defendant's postconviction petition, concluding the petition failed to state the gist of a meritorious constitutional claim. 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 (West 2012).

¶ 32 Affirmed.