2015 IL App (5th) 130165-U

NO. 5-13-0165

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 07-CF-1784
	)	
TONY L. HUFFMAN,	)	Honorable
	)	Richard L. Tognarelli,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Goldenhersh and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in dismissing the defendant's petition for postconviction relief at the first stage where his petition stated the gist of a constitutional claim of ineffective assistance of counsel and did not lack an arguable basis in either law or fact.

¶ 2 The defendant, Tony Huffman, appeals the summary dismissal of his postconviction petition. For the following reasons we reverse and remand.

¶ 3 BACKGROUND

¶ 4 On August 10, 2007, the defendant was charged with two counts of predatory criminal sexual assault of a child. On March 4, 2008, he entered a negotiated plea of guilty to one count of predatory criminal sexual assault of a child. He agreed to plead

guilty to count I of the information in exchange for the State's dismissal of count II and an agreed term of 10 years' imprisonment followed by 3 years of mandatory supervised release.

¶ 5 At the plea hearing, the defendant's attorney described the agreement as follows: "In exchange for the State dismissing Count II, we have agreed to plead guilty to Count I for a term of imprisonment in−of ten years in the Department of Corrections." The court asked the defendant whether this was his understanding of the plea deal, and he responded in the affirmative. The court then stated, "Ten years Illinois Department of Corrections. Upon release there will be a three year parole term."

¶ 6 In admonishing the defendant as to his possible sentence upon conviction, the trial court informed him that "[u]pon release from prison there is a three year Mandatory Supervised Release period−parole." The defendant pleaded guilty, and the trial court accepted the terms of the negotiated plea and sentenced him to 10 years' imprisonment with credit for one day in presentencing custody. The court added that "[t]here is upon release a three year parole term." The judge asked whether the defendant understood the sentence, and he indicated that he did. The following colloquy then occurred:

"THE COURT: Do you understand the sentence imposed?

THE DEFENDANT: Yes, Sir.

THE COURT: Is that the sentence you negotiated for?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about that sentence?

THE DEFENDANT: That's at 85 percent, Your Honor?

THE COURT: Yes, sir.

THE DEFENDANT: Three years of parole?

THE COURT: Three year parole term when you're released.

THE DEFENDANT: Okay.

THE COURT: Any other questions?

THE DEFENDANT: No, sir."

The court then informed the defendant of his appeal rights.

¶ 7 On March 5, 2008, the court entered its written judgment and sentence, which reflected the negotiated plea of 10 years' imprisonment followed by 3 years of mandatory supervised release.

¶ 8 On January 6, 2012, the defendant filed a petition for relief from judgment under section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2012)). He alleged that the court did not admonish him that the mandatory supervised release term for a person convicted of predatory criminal sexual assault of a child was three years minimum up to natural life, pursuant to section 5-8-1(d)(4) of the Unified Code of Corrections (730 ILCS 5/5-8-1(d)(4) (West 2008)), and that this possible maximum mandatory supervised release term should have been included in the written order and stated in the plea agreement. He asserted that, because of this error, the judgment and sentence were void. He alleged that, had he been informed in a written sentence/judgment that his mandatory supervised release term would have been a minimum of three years to natural life, he would not have entered the negotiated plea.

¶ 9 On July 18, 2012, the State filed a motion to dismiss the defendant's petition for relief from judgment, arguing that it was filed more than two years after the entry of the judgment and thus was untimely. On July 23, 2012, the trial court granted the State's motion and dismissed the defendant's petition for relief from judgment as untimely, finding that the judgment and sentence were not void because the court had personal and subject matter jurisdiction.

¶ 10 A September 7, 2012, letter to the trial court from the record supervisor at Taylorville Correctional Center was filed on November 7, 2012. The letter requested clarification regarding the defendant's sentence, noting that section 5-8-1(d)(4) of the Unified Code of Corrections required a mandatory supervised release period of three years to natural life for the offense of predatory criminal sexual assault of a child. The supervisor asked the court to "review the case to determine if an amended order indicating a [mandatory supervised release] term of 3 [years] to life is necessary or if it was the [court's] intention for the offender to serve a 3 year [mandatory supervised release] term." On that day, the court entered an amended sentencing order, changing the defendant's mandatory supervised release period to three years to natural life.

¶ 11 On February 25, 2013, the defendant filed a *pro se* "Petition for Postconviction Relief Pursuant to 725 ILCS 5/122-c." He alleged that he received ineffective assistance of counsel in violation of the sixth amendment because his attorney failed to advise him that if he pleaded guilty to predatory criminal sexual assault of a child he would be sentenced to a mandatory supervised release term of three years to natural life. He argued that counsel's assistance is ineffective if he fails to ensure that the defendant

entered a knowing and voluntary plea. He contended that, had counsel advised him of the actual mandatory supervised release term, he would not have pleaded guilty and would have proceeded to trial. He further alleged that he was not culpably negligent for failing to file his petition within three years of his conviction and sentence because he did not learn of the actual mandatory supervised release period until more than three years had passed. On the same day, he filed a motion for appointment of counsel, an application to sue as a poor person, and a motion for a hearing on the petition.

¶ 12 On March 7, 2013, the trial court entered an order on the defendant's petition. The court referred to the petition as a *pro se* "Motion for Relief from Judgment pursuant to 735 ILCS 5/2-1401." The court found that the defendant's motion did "not fall within any category of collateral remedies that would be available to Defendant" and that the motion "was not filed within two years of judgment." The court also referenced the denial of the defendant's prior section 2-1401 motion on July 23, 2012. The court denied the defendant's "Motion for Relief from Judgment" and dismissed it with prejudice. The defendant filed a timely notice of appeal.

¶ 13 ANALYSIS

¶ 14 The defendant argues that the trial court's order dismissing his petition for postconviction relief at the first stage must be reversed because it did not enter an order making any findings that his petition was frivolous or patently without merit within 90 days of its filing.

¶ 15 Section 122-2.1(a) of the Post-Conviction Hearing Act (the Act) requires that "[w]ithin 90 days after the filing and docketing of each petition, the court shall examine

such petition and enter an order thereon pursuant to this Section." 725 ILCS 5/122-2.1(a) (West 2012). It then directs that if "the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision." 725 ILCS 5/122-2.1(a)(2) (West 2012).

¶ 16 The defendant's petition was clearly labeled "Petition for Postconviction Relief Pursuant to 725 ILCS 5/122-c." In its March 7, 2013, order, which was entered within 90 days of the date the defendant filed his postconviction petition, the trial court referred to the defendant's petition as a "Motion for Relief from Judgment Pursuant to 735 ILCS 5/2-1401" and dismissed it. In its order, the trial court makes no reference to the petition being frivolous or patently without merit, nor does it specify any findings of fact or conclusions of law the court made in reaching its decision. The defendant argues that because the trial court failed to file an order meeting the requirements of section 122-2.1(a) within the required 90 days, the summary dismissal should be reversed and remanded.

¶ 17 While it is advisable that the trial court state its reasons for a first stage dismissal of a postconviction petition, it is not mandatory. *People v. Porter*, 122 Ill. 2d 64, 81 (1988). Section 122-2.1 contains no expression that the proceedings should be held void if the trial court fails to specify its findings, nor does such a failure injure the defendant's rights since the dismissal of a postconviction petition is subject to review. *Id*. at 82. The failure to specify the findings of fact and conclusions of law in the written order does not require the reversal of the dismissal order. *Id*.

¶ 18 The defendant also argues that the trial court erred in dismissing his postconviction petition at the first stage because he stated the gist of a constitutional claim of ineffective assistance of counsel.

¶ 19 The State argues that the defendant waived the ineffective assistance of counsel argument by failing to comply with Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). Supreme Court Rule 341(h)(7) provides that the argument portion of the brief shall contain the appellant's contentions and the reasons therefor, with citation of the authorities and the pages of the record relied on. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Rule 341(h)(7) further provides that points not argued are waived. We note that the defendant's contention regarding ineffective assistance of counsel is very brief with a citation to only one case and the pages in the record relied on. The waiver doctrine is an admonition to the parties and not a limitation on the jurisdiction of this court. *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 623 (2007). A court of review may exercise its discretion to disregard considerations of waiver. *Id.* In this case, we will address the merits of the defendant's claim.

¶ 20 The Act provides a method by which a defendant can assert that his conviction was the result of a substantial denial of his rights under the United States Constitution or the Illinois Constitution or both. *People v. Tate*, 2012 IL 112214, ¶ 8. "In a noncapital case, a postconviction petition contains three stages." *Id.* ¶ 9. At the first stage, the trial court reviews the petition, taking the allegations as true, and determines whether the petition is frivolous or patently without merit. *Id.* The petition advances to the second stage if the trial court does not dismiss the petition as frivolous or patently without merit.

Id. ¶ 10. At this stage, the trial court determines whether the petition and accompanying documentation make a substantial showing of a constitutional violation. *Id*. If such a showing is made, the petition advances to the third stage, and the trial court conducts an evidentiary hearing. *Id*. "The summary dismissal of a postconviction petition is reviewed *de novo*." *Id*.

¶ 21 At the first stage, the defendant need only present the gist of a constitutional claim. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 22. A *pro se* defendant need only allege enough facts to make out a claim that is arguably constitutional. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). "Because most petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low." *Tate*, 2012 IL 112214, ¶ 9.

¶ 22 Section 122-2.1 of the Act provides, in pertinent part: "If the petitioner is sentenced to imprisonment and the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order." 725 ILCS 5/122-2.1(a)(2) (West 2012). The gist of a constitutional claim alleged by a defendant should be viewed within the framework of the frivolous or patently without merit test. *Hodges*, 234 Ill. 2d at 11. Thus, under the Act, a petition that is sufficient to avoid summary dismissal is simply one that is *not* frivolous or patently without merit. *Id*. A *pro se* postconviction petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. *Id*. at 11-12. A petition that lacks an arguable basis either in law or in fact is one that "is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id*. at 16.

¶ 23 We must examine whether the defendant's petition had an arguable basis either in law or in fact. The defendant argues that he received ineffective assistance of counsel in violation of the sixth amendment. To prevail on an ineffective assistance of counsel claim, the defendant must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the defendant must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced him. *Id.* at 687-88. "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." *Hodges*, 234 Ill. 2d at 17. "This 'arguable' *Strickland* test demonstrates that first-stage postconviction petitions alleging ineffective assistance of counsel are judged by a lower pleading standard than are such petitions at the second stage of the proceeding." *Tate*, 2012 IL 112214, ¶ 20.

¶ 24 In this case, the defendant alleged that he was denied his sixth amendment right to effective assistance of counsel when counsel failed to advise him that if he pleaded guilty to predatory criminal sexual assault of a child he would be sentenced to a term of mandatory supervised release ranging from three years to natural life. The defendant stated that, at the time he pleaded guilty, section 5-8-1(d)(4) of the Unified Code of Corrections provided that the term of mandatory supervised release for a defendant who committed the offense of predatory criminal sexual assault of a child after July 2005 shall range from a minimum of three years to a maximum of natural life. He alleged that he

was unaware that he faced the possibility of being subject to mandatory supervised release for his natural life until his sentence was calculated and explained at the Department of Corrections. As corroboration, he attached to his postconviction petition the original judgment and sentence, the amended judgment and sentence, and the transcript of the plea hearing. He asserted that his defense counsel failed to ensure that his guilty plea was voluntary and intelligently made because counsel did not inform him that he faced a mandatory supervised release term of three years to natural life. He further argued that, had defense counsel told him the correct mandatory supervised release term, he would not have pleaded guilty and would have proceeded to trial. It is arguable that, in failing to advise the defendant of the correct mandatory supervised release term he faced, counsel's performance fell below an objective standard of reasonableness. It is also arguable that the defendant was prejudiced by counsel's failure to advise him of the correct mandatory supervised release term he faced. Therefore, the defendant stated the gist of a constitutional claim. The defendant's petition did not lack an arguable basis either in law or in fact, and it should not have been dismissed as frivolous or patently without merit.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, we reverse the trial court's summary dismissal of the defendant's petition for postconviction relief and remand to the trial court with directions that the defendant's request for appointment of counsel be granted and the matter advanced to the second stage of postconviction proceedings.

¶ 27 Reversed and remanded with directions.