2016 IL App (4th) 140550-U

NO. 4-14-0550

FILED
March 29, 2016
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.	)	McLean County
NORMAN A. SIMPSON, SR.,	)	No. 10CF1222
Defendant-Appellant.	)	
	)	Honorable
	)	John Casey Costigan,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The trial court did not err in summarily dismissing defendant's *pro se* postconviction petition.

¶ 2 Defendant, Norman A. Simpson, Sr., appeals the trial court's first-stage dismissal of his postconviction petition, arguing he raised the gist of a meritorious claim of ineffective assistance of trial counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In November 2010, defendant was charged as follows: (1) driving while license revoked—subsequent offense (count I) (625 ILCS 5/6-303(a) (West 2010)), which was aggravated because the revocation was due to a prior conviction for leaving the scene of an accident involving personal injury or death (625 ILCS 5/11-401 (West 2010)) and defendant had six prior driving-while-license-revoked violations (625 ILCS 5/6-303(d-3) (West 2010)); and (2)

two counts of obstructing identification (counts II and III) (720 ILCS 5/31-4.5(a) (West 2010)). (Driving while license revoked is normally a Class A misdemeanor (625 ILCS 5/6-303(a) (West 2010)); however, it becomes a Class 4 felony for any person convicted of a fourth, fifth, sixth, seventh, eighth, or ninth violation and requires a minimum term of 180 days' imprisonment (625 ILCS 5/6-303(d-3) (West 2010)).) In January 2011, the informations were superseded by indictments.

¶ 5 At a February 2011 pretrial hearing, defense counsel, Kelly Harms, asked for a continuance, advising the trial court, "[Defendant's] license is suspended because of a case that happened in 1995 where he was a juvenile. He has an attorney in [W]ill County trying to clear that up. I don't know if that's going to make much difference in this case or not, but we're going to certainly try."

¶ 6 At an April 2011 pretrial hearing, Harms advised the trial court as follows:

> "Your Honor, [defendant] is still trying to get his suspension cleared up. He is working with another attorney out of Joliet in an attempt to do this. He has shown me the steps he has taken; for instance, he has taken his written test and is in the process of trying to get his restricted driver's permit at this time. He's going to court sometime hopefully in the next month to get the suspension lifted. It may or may not affect this case, but he's requesting a two-month period of time to allow him to do that."

The State advised the court, "Even if [defendant] were able to get his license back through other efforts, a conviction on this case we would revoke him."

¶ 7 At the August 2011 final pretrial hearing, Harms asked for a September 2011 trial

date and advised the trial court as follows:

> "[Defendant] has been steadily trying to get the revocation, which is the basis to make that felony offense, he has been attempting to get that revocation lifted for approximately the last six months. He has recently come up with the funds to hire an attorney in Will County. *** They are working on it to do that. He believes they will have it settled within the next month based on what his Will County attorney is telling him. I'm not sure what [*sic*] is going to make a difference in this case, but there is a chance, given what the Secretary of State is telling him, and that's the reason why he's asking for a continuance."

The State objected to the continuance and advised the court, "We do not believe that it is possible for the defendant to clear up matters with the Secretary of State to the extent it would eliminate his guilt on the offense. Even if the revocation were taken away, it would not be retroactive to the state [*sic*] of defense [*sic*]." Given the number of times the case had been reset, the court advised defendant he would be going to trial in September.

¶ 8 In September 2011, a warrant was issued for defendant's arrest. In a motion to recall the warrant, Harms explained defendant had failed to appear at the final pretrial hearing because he was in custody in Springfield, Illinois. In October 2011, defendant's bond was forfeited.

¶ 9 In February 2013, defendant was arrested on the outstanding 2011 warrant. At a status hearing, defense counsel, Jennifer McCoskey, asked for a continuance so she could speak with defendant and familiarize herself with his file.

¶ 10 At a March 2013 status hearing, McCoskey asked for another continuance and advised the trial court, "my client has another issue in Will County. I've attempted to get ahold of his attorney up there to attempt to wrap these cases up, and he is gone on vacation."

¶ 11 In a March 2013 letter to the trial court, defendant requested, among other things, permission "to furnish the courts [*sic*] with [his] copies of my Department of Juvenile Justice (Master Record file) and a court docket from the Will County Circuit Court pertaining to the traffic offense of leaving the scene of a motor vehicle accident involving personal injury or death (625 ILCS 5/11-401)." The documents referenced in defendant's letter are not a part of the record on appeal.

¶ 12 During an April 2013 status hearing, the trial court advised defendant it had read his letter and provided a copy to McCoskey. McCoskey advised the court of defendant's desire to have a jury trial.

¶ 13 On May 10, 2013, defendant entered into a negotiated plea agreement wherein he pleaded guilty to count I, "driving while license revoked, a subsequent offense, a fourth through ninth offense, a class four felony" for which defendant was eligible for extended-term sentencing of up to six years in the Illinois Department of Corrections (DOC). Defendant also agreed to (1) pay a $300 fine plus court costs, (2) a sentence of 180 days in the county jail with 99 days' sentence credit, and (3) a period of 30 months' conditional discharge. In exchange for his guilty plea, the State agreed to dismiss counts II and III.

¶ 14 The trial court admonished defendant of the rights he was giving up and defendant indicated his understanding. The factual basis for the plea was given as follows:

> "Officers conducted a traffic stop, made contact with the driver[,]
> this defendant, defendant's license was revoked for leaving the

scene of an accident causing personal injury, he has six prior driving during his suspension revocations."

McCoskey stipulated to the factual basis. The court found a factual basis existed for the plea, defendant understood the nature of the charges, the possible penalties, and his legal rights, and defendant voluntarily entered into the plea agreement. The court advised defendant of his appellate rights and the fact he must file a motion to withdraw the plea prior to filing any notice of appeal. Defendant indicated he understood.

¶ 15 On May 22, 2013, defendant filed a *pro se* motion to reconsider the sentence. Defendant argued (1) he was entitled to day-for-day good-time credit; (2) although the statute (625 ILCS 5/6-303(d)(3) (West 2010)) states any person convicted of a fourth, fifth, sixth, seventh, eighth, or ninth violation is guilty of a Class 4 felony and must serve a minimum of 180 days in jail, the statute does not use the words "mandatory sentence"; and (3) his counsel refused to file a motion to vacate his bond forfeiture, subjecting him to double jeopardy. Defendant asked the court to amend his sentence to allow him good-time credit.

¶ 16 On May 31, 2013, defendant filed a *pro se* motion to reduce his sentence, again seeking good-time credit.

¶ 17 The trial court set the matter for hearing on August 21, 2013. On July 18, 2013, defendant wrote the court, advising he would be unable to attend the August 21, 2013, hearing "due to other pending legal matters" in Will County, unless a writ was issued for Will County to bring him to McLean County.

¶ 18 At the August 21, 2013, hearing on the motion to reconsider, defendant did not appear because he was in the Will County jail. The trial court noted Rachel Roth appeared from the public defender's office. That office had administratively closed defendant's file because a

sentence had been issued and defendant had not requested the public defender's office be reappointed on any type of supplemental proceedings. On August 27, 2013, the court entered an order of *habeas corpus* directing Will County to transport defendant to McLean County for a hearing on October 22, 2013.

¶ 19 On October 22, 2013, defendant appeared *pro se* at a hearing on his postplea motions. Defendant advised the trial court the reason he filed the motions was "because I found out that several other defendants received day[-]for[-]day credit for the same offense that I received no day[-]for[-]day credit for." He further explained he did not understand why he "was told that due to statute and the statute that I was sentenced under does not state a mandatory minimum of [180] days, it states that must serve [180] days but it don't state mandatory." The State argued defendant was not entitled to good-time credit because he pleaded guilty to an offense with six prior convictions and the statute triggers the mandatory minimum after four prior convictions. The State further noted defendant's sentence was almost finished. Moreover, defendant was being held on other matters and the State was not sure what relief the court could give defendant because he could not be released even if given good-time credit. The court denied the motion.

¶ 20 On November 15, 2013, a notice of appeal was filed. The case was docketed in this court as case No. 4-13-1010 and the office of the State Appellate Defender was appointed to represent defendant. (On defendant's motion, the appeal was dismissed on January 29, 2014 (*People v. Simpson*, No. 4-13-1010 (Jan. 29, 2014).)

¶ 21 On December 12, 2013, while defendant's direct appeal was pending, he filed a *pro se* petition for postconviction relief, which is the subject of this appeal, pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). Defendant alleged the

charge for driving while his license was revoked was incorrectly enhanced to a Class 4 felony based on a 1995 Will County traffic violation for leaving the scene of an accident involving personal injury or death because in November 1997, he pleaded guilty to leaving the scene of an accident involving property damage. Therefore, he argued, his counsel was ineffective because she "[w]ould, [c]ould, and[/]or [s]hould of file [*sic*] a Motion to Dismiss Indictment pursuant to Illinois statute 725 ILCS 5/114-1(a) (West 2010)." Defendant further argued his counsel (1) never researched the grounds for the enhancement, forcing defendant to sustain a felony conviction and sentence; (2) forced him to file a *pro se* motion to reduce his sentence; and (3) failed to investigate the enhancement factors or aid him with filing motions. Defendant stated he had tried on numerous occasions to obtain a copy of the original plea agreement for the underlying Will County case but the circuit clerk had not responded to his requests. Defendant asked the trial court to vacate the judgment.

¶ 22 On February 3, 2014, defendant filed an amended postconviction petition, in which he additionally argued his counsel should have filed a motion to suppress evidence and quash his arrest because the arresting officer had no grounds for making the initial traffic stop. Defendant again asked the trial court to vacate the judgment.

¶ 23 On February 17, 2014, the trial court denied the postconviction petition, finding defendant's (1) voluntary guilty plea waived all nonjurisdictional errors or irregularities, including constitutional errors, because the claims he raised related to the alleged deprivation of constitutional rights occurring prior to the entry of the guilty plea and (2) claims were barred by *res judicata*.

¶ 24 On March 7, 2014, defendant filed a *pro se* motion to reconsider the denial of his postconviction petition. Defendant alleged, *inter alia*, on August 22, 2013, he became aware

"the 1995 traffic offense of leaving the scene of a [*sic*] accident with personal injury/death being amended on 11/19/1997 to the offense of leaving the scene of property damage, due to the courts in Will County granting the states [*sic*] leave to amend by interlineations the charge information on the face of the Bill of Indictment in Will County Case No. 10CF1507 (driving on revoke enhanced Class '4' Felony)."

¶ 25 On June 2, 2014, the trial court denied defendant's motion to reconsider.

¶ 26 This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 On appeal, defendant argues the trial court erred when it summarily dismissed his postconviction petition where he presented the gist of a meritorious claim his counsel was ineffective for failing to investigate the Will County offense underlying his plea, which resulted in his being charged with a Class 4 felony rather than a Class A misdemeanor. The State argues the court properly dismissed the petition where defendant (1) forfeited his claims because he failed to previously raise them; (2) waived his claims by voluntarily pleading guilty; and, alternatively, (3) failed to present the gist of a meritorious claim he received ineffective assistance of counsel. We affirm.

¶ 29 The Act provides a means for a defendant to challenge a conviction or sentence based on an alleged violation of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). At the first stage of postconviction proceedings, the trial court independently reviews the petition to determine whether it is "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). To avoid dismissal at this stage, the petitioner need only present the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). Additionally, at this point in the proceedings, all

well-pleaded allegations in the petition are taken as true and liberally construed in favor of the petitioner. *People v. Brooks*, 233 Ill. 2d 146, 153, 908 N.E.2d 32, 36 (2009). The summary dismissal of a postconviction petition at the first stage is reviewed *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010).

¶ 30 A petition may be dismissed at the first stage if it has no arguable basis either in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition has no arguable basis in law or fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Id*. at 16, 912 N.E.2d at 1212. A postconviction proceeding is limited to constitutional issues that have not been, or could not have been, previously adjudicated. *People v. Harris*, 224 Ill. 2d 115, 124, 862 N.E.2d 960, 966 (2007).

¶ 31 "It is well established that a voluntary guilty plea waives all nonjurisdictional errors or irregularities, including constitutional ones." *People v. Townsell*, 209 Ill. 2d 543, 545, 809 N.E.2d 103, 104 (2004).

> " '[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.' *Tollett v. Henderson*, 411 U.S. 258, 267 *** (1973), citing *McMann v. Richardson*, 397

U.S. 759, 771 *** (1970) (defendant must show that advice was not 'within the range of competence demanded of attorneys in criminal cases')." *People v. Smith*, 383 Ill. App. 3d 1078, 1085, 892 N.E.2d 55, 63 (2008).

¶ 32 Here, the trial court, relying on *Smith*, dismissed defendant's petition because the claims he raised involved matters that occurred prior to the entry of his guilty plea. The court further found defendant had voluntarily pleaded guilty, thus waiving the issues. We agree.

¶ 33 Defendant was charged in November 2010. At the February 2011 pretrial hearing, defendant asked for a continuance because his "license is suspended because of a case that happened in 1995 where he was a juvenile" and he had an attorney in Will County trying to "clear that up." In April 2011, defendant used the Will County case to seek a continuance and stated his attorney in Joliet was working on it. In August 2011, defendant again asked for a continuance and advised he had "recently come up with the funds to hire an attorney in Will County" to get the "revocation lifted." Nothing further happened in this case until February 2013 because defendant had been incarcerated elsewhere. He was granted another continuance. In March 2013, defendant asked for another continuance because of the Will County case and the fact the attorney there was on vacation. In a March 2013 letter to the court, defendant asked to furnish a copy of his juvenile file and docket from Will County regarding the 1995 case, but those documents do not appear in the record before us.

¶ 34 In May 2013, 2½ years after being charged, defendant entered into a negotiated guilty plea to driving while his license was revoked, as enhanced to a Class 4 felony. Defendant advised the court he understood the rights he was waiving by pleading guilty. He further indicated he had not been forced to sign the plea agreement, had not been forced or threatened to

enter into the plea agreement, and had not been promised anything beyond what was contained in the plea agreement.

¶ 35 Defendant did not seek further assistance from the public defender's office. He filed two *pro se* motions to reduce his sentence. In neither motion did he raise the issue of the underlying Will County case which resulted in the enhancement of the instant offense. Rather, he asked to be awarded day-for-day sentence credit. The only complaint lodged against his defense counsel was her refusal to file a motion to vacate his bond forfeiture. (Counsel did file a motion to recall the warrant, which was denied.)

¶ 36 Defendant's claim of ineffective assistance of trial counsel involves alleged errors that occurred prior to the entry of his guilty plea. Therefore, he voluntarily relinquished the claim when he pleaded guilty and has thus waived it for review.

¶ 37 Defendant, however, argues pleading guilty did not result in waiver of his postconviction claims because he would not have voluntarily entered into the plea if he had the assistance of competent counsel. We apply the *Strickland* test to determine whether trial counsel rendered ineffective assistance. See *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* test, a defendant must show (1) counsel's performance was unreasonable; and (2) but for the error, there is a reasonable probability the outcome would have been different. *Strickland*, 466 U.S. at 688-94. Both prongs of *Strickland* must be met, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107, 735 N.E.2d 616, 626 (2000).

¶ 38 Here, defendant had apparently arranged for an attorney in Will County to "clear up" the 1995 juvenile traffic violation. Throughout the life of this case before the plea agreement, defendant continuously maintained he was working with the Will County attorney.

There was no need for counsel in the case before us to circumvent the Will County attorney's work on the 1995 case. Over two years after defendant had been charged, the Will County matter still had not been resolved and the instant case was languishing in the trial court. (In fact, at the time defendant filed his postconviction petitions, the Will County documents that allegedly would clear up the matter had not been produced by defendant.)

¶ 39 In March 2013, defense counsel in the case *sub judice* advised the trial court she had attempted to communicate with the Will County attorney but the attorney was on vacation. By May 2013, counsel had negotiated a plea agreement with the State. The State agreed to drop two charges and agreed to a sentence of conditional discharge and 180 days' incarceration, despite the fact defendant was eligible for an extended term of up to 6 years in DOC on the remaining count alone. We find defendant cannot meet the first prong of *Strickland* because defense counsel's performance was not unreasonable.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm the trial court's order summarily dismissing defendant's postconviction petition. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 42 Affirmed.