2016 IL App (4th) 140641-U

NO. 4-14-0641

FILED
July 28, 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.	)	Champaign County
THOMAS O. KARMATZIS,	)	No. 09CF464
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Turner and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing defendant's postconviction petition at the first stage where he failed to set forth the gist of a constitutional claim he was provided insufficient Rule 402 admonishments at the time he entered his guilty plea. Any fees and assessments entered by the circuit clerk are vacated and the case is remanded with directions.

¶ 2 Defendant, Thomas O. Karmatzis, appeals the trial court's first-stage dismissal of his postconviction petition, arguing the court erred in finding the petition frivolous and patently without merit where he raised the gist of a meritorious claim he did not knowingly and voluntarily plead guilty because the court failed to provide sufficient Illinois Supreme Court Rule 402 (eff. July 1, 1997) admonishments. We affirm in part, vacate in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 On March 12, 2009, the State charged defendant in Champaign County case No. 09-CF-464 with one count of burglary (720 ILCS 5/19-1(a) (West 2008)). Because of defendant's criminal history, he was eligible for Class X sentencing.

¶ 5 On November 30, 2010, defendant agreed to plead guilty to burglary, and the State agreed to cap its sentencing recommendation at 12 years' imprisonment. During that hearing, the trial court admonished defendant pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997) regarding the nature of the charge, the sentencing range, and the period of mandatory supervised release. The court also ascertained defendant understood he was giving up his right to a jury or bench trial. Finally, the court confirmed defendant's guilty plea was voluntary. Defendant was released on bond pending sentencing.

¶ 6 On December 18, 2010, while out on bond, defendant was arrested and charged with four additional counts of burglary in Champaign County case No. 10-CF-2126.

¶ 7 On January 3, 2011, defendant filed a letter with the trial court asking to withdraw his guilty plea.

¶ 8 During the January 18, 2011, sentencing hearing, the trial court reiterated the details of the plea agreement and noted the terms of the agreement had changed as a result of the additional charges. Under the terms of the modified deal, defendant would agree to a sentence of 18 years' imprisonment, with one day of sentence credit. In exchange, the State agreed to dismiss the new burglary charges.

¶ 9 The trial court then addressed defendant's letter asking to withdraw his guilty plea. The court asked defendant if he wanted his guilty plea back and defendant indicated he did not.

When the court asked defendant if he "want[ed] to go along with the agreement now," defendant indicated he did.

¶ 10 The trial court went on to confirm no one forced or threatened defendant to accept the terms of the agreement. The court then concurred with the agreement, sentenced defendant to 18 years, and admonished him of his appeal rights. The court also ordered defendant to pay all fines, fees, and costs as authorized by statute, including "a fine in the amount of $0," a Violent Crime Victims Assistance Fund assessment, and a $200 genetic marker grouping analysis fee unless defendant had previously been assessed that fee.

¶ 11 On February 16, 2011, defendant again moved to withdraw his guilty plea. However, at the hearing on the motion, defendant withdrew his request to withdraw his guilty plea.

¶ 12 On August 19, 2011, defendant filed a *pro se* motion for additional sentence credit, which the trial court denied. Thereafter, defendant appealed the court's denial of his motion.

¶ 13 On September 3, 2013, this court dismissed defendant's appeal for lack of appellate jurisdiction where the trial court lacked jurisdiction to hear defendant's motion for additional sentence credit because that motion was filed more than 30 days after sentencing. See *People v. Karmatzis*, 2013 IL App (4th) 120010-U, ¶ 21 (petition for leave to appeal denied at No. 116785, 3 N.E.3d 799 (table) (Jan. 29, 2014)).

¶ 14 On June 11, 2014, defendant *pro se* filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)), arguing the trial court violated Illinois Supreme Court Rule 402 (eff. July 1, 1997). According to defendant, although he was so admonished at the November 2010 plea hearing, the court should

have readmonished him during the January 18, 2011, hearing because his plea agreement had changed.

¶ 15 On June 23, 2014, the trial court summarily dismissed defendant's petition, finding it was frivolous and patently without merit. According to the court, defendant "was properly admonished at each step" of the case.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant argues the trial court erred in dismissing his postconviction petition at the first stage of the postconviction proceedings where he sufficiently set forth the gist of a constitutional claim he did not knowingly and voluntarily enter his plea where the court failed to provide Rule 402 admonishments at the time the plea was taken. Defendant also contends the circuit clerk (1) improperly imposed fines, (2) erroneously assessed a $200 genetic marker grouping analysis fee, and (3) failed to apply defendant's *per diem* credit to his eligible fines.

¶ 19 A. First-Stage Dismissal

¶ 20 The Act establishes a three-stage process for adjudicating a postconviction petition. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). "[A] *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A

petition lacks an arguable basis either in law or in fact where it "is based on an indisputably meritless legal theory" "which is completely contradicted by the record." *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212.

¶ 21 In the first stage of a postconviction proceeding, the allegations of the petition, liberally construed and taken to be true, need only state "the gist of a constitutional claim." (Internal quotation marks omitted.) *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). The term "gist" means the essence, the main point or part (Merriam-Webster's Collegiate Dictionary 492 (10th ed. 2000)), as opposed to a factually complete statement of the claim (*Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445). Allegations of fact are treated as true so long as those allegations are not affirmatively rebutted by the record. *People v. Bethel*, 2012 IL App (5th) 100330, ¶ 10, 975 N.E.2d 616. "We review *de novo* a trial court's first-stage dismissal of a postconviction petition." *People v. Shipp*, 2015 IL App (2d) 131309, ¶ 7.

¶ 22 B. Sufficiency of Rule 402 Admonitions

¶ 23 Rule 402 provides "every defendant who enters a plea of guilty has a due process right to be properly and fully admonished." *People v. Whitfield*, 217 Ill. 2d 177, 188, 840 N.E.2d 658, 665 (2005). The purpose of Rule 402 is to guarantee the defendant understands the plea, the rights he is waiving by pleading guilty, and the consequences thereto. *People v. Louderback*, 137 Ill. App. 3d 432, 435, 484 N.E.2d 503, 505 (1985). "Before a trial court can accept a guilty plea, Rule 402(a) requires that the defendant be admonished concerning the nature of the charge, the minimum and maximum sentences, the right to plead guilty or not guilty, and the rights that are waived by pleading guilty." *People v. Sharifpour*, 402 Ill. App. 3d 100, 114, 930 N.E.2d 529, 543 (2010); Ill. S. Ct. R. 402(a) (eff. July 1, 1997). If the guilty plea is the result of a plea

agreement, Rule 402(b) further requires the court to "determine whether any force or threats or any promises, apart from [the] plea agreement, were used to obtain the plea." Ill. S. Ct. R. 402(b) (eff. July 1, 1997).

¶ 24 "In order to satisfy due process, a guilty plea must be affirmatively shown to have been made voluntarily and intelligently." *People v. Fuller*, 205 Ill. 2d 308, 322, 793 N.E.2d 526, 537 (2002). "Rule 402 [citation] was adopted to ensure compliance with these due process requirements." *Fuller*, 205 Ill. 2d at 322, 793 N.E.2d at 537. However, it is well settled Rule 402 requires substantial, not strict, compliance with its provisions. *People v. Dougherty*, 394 Ill. App. 3d 134, 138, 915 N.E.2d 442, 446 (2009) (citing *People v. Burt*, 168 Ill. 2d 49, 64, 658 N.E.2d 375, 382 (1995) (substantial compliance satisfies due process)).

¶ 25 In this case, the allegations in defendant's postconviction petition are affirmatively rebutted by the record. Defendant pleaded guilty to burglary at the November 30, 2010, guilty plea hearing. It is undisputed the trial court properly admonished defendant pursuant to Rule 402 at that time. As such, the plea was fully informed. Thereafter, the matter was set for sentencing. At the January 18, 2011, hearing, defendant was provided an opportunity to withdraw his guilty plea, which he declined. (We note defendant also later withdrew a second motion to withdraw his guilty plea.) A review of the transcript further reveals defendant never repleaded guilty on January 18, 2011, *i.e.*, his plea of November 30, 2010, stood as the plea in this case. Defendant did not plead to any of the new charges. As such, no Rule 402 readmonishment was necessary.

¶ 26 Defendant argues "Illinois courts have consistently held that there is questionable compliance with Rule 402 when the admonishments are provided at proceedings prior to the guilty plea proceedings." However, the prior proceedings in the cases cited by defendant were

not themselves guilty plea hearings. See *Louderback*, 137 Ill. App. 3d at 435-36, 484 N.E.2d at 505 (finding Rule 402 admonishments given at an arraignment could not be relied upon to remedy the lack of admonishments at the plea hearing); *People v. Culbertson*, 162 Ill. App. 3d 319, 322, 515 N.E.2d 465, 467 (1987) (refusing to consider the fact the defendant was told at his arraignment he was entitled to a jury trial in determining whether he was properly admonished at his guilty plea hearing of that right); *People v. Johns*, 229 Ill. App. 3d 740, 744, 593 N.E.2d 594, 597 (1992) (admonishment at the arraignment as to the minimum and maximum sentences was insufficient for Rule 402 purposes). Here, the earlier proceeding at issue was defendant's guilty plea hearing. In other words, the admonishments were given in the context of a plea hearing. As a result, we find defendant's reliance on those cases unpersuasive. See *Sharifpour*, 402 Ill. App. 3d at 115, 930 N.E.2d at 543.

¶ 27 At the January hearing, the trial court ensured defendant understood the agreement was now for 18 years and no one threatened or promised him anything. Those admonishments, coupled with the complete Rule 402 admonishments provided at the time of the plea hearing, were sufficient. See *Sharifpour*, 402 Ill. App. 3d at 115, 930 N.E.2d at 543 ("If the record shows that a guilty plea was voluntary and not the result of any force, threats, or promises, then any failure to strictly comply with Rule 402 is deemed harmless."). Defendant did not plead to any additional charges. Accordingly, we affirm the trial court's first-stage dismissal of defendant's postconviction petition.

¶ 28 C. Fines and Fees

¶ 29 The trial court ordered defendant to pay all fines, fees, and costs as authorized by statute, including "a fine in the amount of $0," a Violent Crime Victims Assistance Fund

assessment, and a $200 genetic marker grouping analysis fee unless defendant had previously paid that fee. The court also credited defendant $5 credit for time spent in custody toward all fines.

¶ 30 Thereafter, the circuit clerk imposed the following assessments: (1) a $50 court-finance assessment; (2) a $10 arrestee's medical assessment; (3) a $20 Violent Crime Victims Assistance Fund assessment; (4) a $200 genetic marker grouping analysis fee; (5) a $30 juvenile-expungement-fund assessment; (6) a $5 drug-court assessment; (7) a $10 State Police operations assessment; (8) a $170.78 collection fee; and (9) a $74.25 late fee.

¶ 31 Defendant argues the circuit clerk (1) improperly imposed certain fines, (2) erroneously assessed a $200 genetic marker grouping analysis fee where he had already paid that fee, and (3) failed to apply a $5 credit to his eligible fines. Defendant also requests a recalculation of the Violent Crime Victims Assistance Fund assessment as well as vacatur of the late and collection fees, which were based on improper assessments. Defendant acknowledges he is raising these issues for the first time on appeal, but he urges this court to address his claims where the assessments imposed by the circuit clerk are void for lack of jurisdiction.

¶ 32 The supreme court recently abolished the "void sentence rule" established in *People v. Arna*, 168 Ill. 2d 107, 113, 658 N.E.2d 445, 448 (1995), which held any judgment failing to conform to a statutory requirement was void and thus could be challenged at any time. *People v. Castleberry*, 2015 IL 116916, ¶ 1, 43 N.E.3d 932. Following *Castleberry*, a sentence is only void if it is entered without personal or subject-matter jurisdiction. *Castleberry*, 2015 IL 116916, ¶¶ 11, 12, 43 N.E.3d 932.

¶ 33 Unlike trial courts, circuit clerks do not have any "jurisdiction." Instead, the clerk is a nonjudicial member of the court and is "purely a ministerial officer." *People v. Tarbill*, 142 Ill. App. 3d 1060, 1061, 492 N.E.2d 942, 942 (1986); *Drury v. County of McLean*, 89 Ill. 2d 417, 424, 433 N.E.2d 666, 669 (1982). Although circuit clerks possess statutory authority to impose certain fees (*People v. Smith*, 2014 IL App (4th) 121118, ¶ 18, 18 N.E.3d 912), they are completely powerless to impose fines. *People v. Larue*, 2014 IL App (4th) 120595, ¶ 56, 10 N.E.3d 959. While the State argues the trial court properly delegated the power to impose fines to the circuit clerk, this court has already found such delegation improper. See *People v. Chester*, 2014 IL App (4th) 120564, ¶ 35, 5 N.E.3d 227 (the task of imposing fines may not be delegated to the clerk).

¶ 34 In sum, fines imposed by the circuit clerk are void for lack of jurisdiction. *Larue*, 2014 IL App (4th) 120595, ¶ 56, 10 N.E.3d 959. Because *Castleberry* has no applicability to unauthorized actions of a circuit clerk, "[f]ines imposed by the circuit clerk are still void" after *Castleberry*. *People v. Hible*, 2016 IL (4th) 131096, ¶ 11. "[A]n attack on a void judgment may be raised at any time" and "does not depend on the [Act] for its viability." *People v. Brown*, 225 Ill. 2d 188, 199, 866 N.E.2d 1163, 1169 (2007) (citing *People v. Thompson*, 209 Ill. 2d 19, 27, 805 N.E.2d 1200, 1205 (2004)). As such, we have jurisdiction to review improper assessments made by the circuit clerk. See *People v. Gutierrez*, 2012 IL 111590, ¶ 14, 962 N.E.2d 437. We will now consider the merits of defendant's argument.

¶ 35 1. *Court-Finance Assessment*

¶ 36 The record shows the circuit clerk imposed a $50 court-finance fee (55 ILCS 5/5-1101(c) (West 2010)). In *Smith*, this court held the court-finance assessment is a fine. *Smith*,

2014 IL App (4th) 121118, ¶ 54, 18 N.E.3d 912. Because the fine was improperly imposed by the clerk, we vacate it.

¶ 37 2. *Arrestee's Medical Assessment*

¶ 38 The circuit clerk also imposed a $10 arrestee's medical assessment (730 ILCS 125/17 (West 2010)). This court has previously held the arrestee's medical fee, despite its label as a "fee," is actually a fine, which could not be imposed by the circuit clerk. *Smith*, 2014 IL App (4th) 121118, ¶ 46, 18 N.E.3d 912 (citing *Larue*, 2014 IL App (4th) 120595, ¶ 57, 10 N.E.3d 959). Because the clerk improperly imposed the arrestee's medical fine, we vacate that assessment.

¶ 39 3. *Drug-Court Assessment*

¶ 40 The record in this case shows the circuit clerk imposed a $5 drug-court assessment (55 ILCS 5/5-1101(f) (West 2010)). Defendant argues the drug-court assessment is a fine improperly imposed by the circuit clerk. We agree.

¶ 41 We have held "the $5 drug-court assessment imposed by the circuit clerk was a fine, despite its label as a 'fee,' because the assessment is intended to be used 'for the operation and administration of the drug court.' " *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 138 (quoting 55 ILCS 5/5-1101(f) (West 2010)). Here, defendant never participated in drug court. As such, this assessment did not reimburse the state for the costs of prosecuting defendant. *People v. Unander*, 404 Ill. App. 3d 884, 886, 936 N.E.2d 795, 797 (2010); *People v. Rexroad*, 2013 IL App (4th) 110981, ¶ 53, 992 N.E.2d 3. Because the clerk improperly imposed the $5 drug-court fine, we vacate it.

¶ 42 4. *Juvenile-Expungement-Fund Assessment*

¶ 43 A $30 juvenile-expungement-fund assessment (730 ILCS 5/5-9-1.17 (West 2010) (added by Pub Act. 96-707, § 15 (eff. Jan. 1, 2010))) was also imposed by the circuit clerk. Defendant argues this assessment was improperly imposed. We agree.

¶ 44 In *Warren*, we held, because the juvenile-expungement-fund assessment is a fine, the circuit clerk is without power to assess it. *Warren*, 2016 IL App (4th) 120721-B, ¶ 134. As a result, we vacate the $30 juvenile-expungement-fund assessment, which is listed as three separate $10 charges for the Circuit Clerk Operations and Administrative Fund, the State's Attorney's Office Fund, and the State Police Services Fund.

¶ 45 We note defendant also correctly points out the imposition of the juvenile-expungement-fund assessment in this case violates the prohibition against *ex post facto* laws. Indeed, the juvenile-expungement-fund assessment took effect on January 1, 2010, *i.e.*, after the date of defendant's February 18, 2009, burglary offense. As such, imposition of that fine violates the prohibition against *ex post facto* laws. *People v. Devine*, 2012 IL App (4th) 101028, ¶ 10, 976 N.E.2d 624.

¶ 46 5. *State Police Operations Assessment*

¶ 47 The record shows the clerk assessed a $10 State Police operations assessment. This court has held the State Police operations assessment is a fine. *Warren*, 2016 IL App (4th) 120721-B, ¶ 147 (citing *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31, 979 N.E.2d 1030). Because this assessment is a fine, the circuit clerk could not properly impose it. Accordingly, we vacate its imposition. As with the juvenile-expungement-fund assessment, the imposition of the State Police operations assessment also violated *ex post facto* principles as it took effect on July

13, 2010, and the instant offense was committed on February 18, 2009. See 705 ILCS 105/27.3a (1.5) (West 2010)).

¶ 48 6. *Violent Crime Victims Assistance Fund Assessment*

¶ 49 The record reflects the circuit clerk also imposed a $20 Violent Crime Victims Assistance Fund assessment (725 ILCS 240/10(c)(2) (West 2010)). "The [Violent Crime] Victims Assistance Act assessment is a mandatory fine that only the court has authority to impose." *Smith*, 2014 IL App (4th) 121118, ¶ 63, 18 N.E.3d 912 (citing *People v. Evangelista*, 393 Ill. App. 3d 395, 401, 912 N.E.2d 1242, 1247 (2009). However, while the trial court in this case ordered defendant to pay the assessment, it failed to determine the appropriate amount of the fine. "Absent a court order imposing a specific fine, it is well established the clerk of a court, as a nonjudicial member of the court, has no power to levy fines." *Smith*, 2014 IL App (4th) 121118, ¶ 63, 18 N.E.3d 912. Accordingly, we vacate the Violent Crime Victims Assistance Fund assessment imposed by the clerk.

¶ 50 7. *Monetary Credit Against Fines*

¶ 51 Defendant argues the circuit clerk failed to credit him $5 for the day he spent in custody despite the trial court's order to do so. Section 110-14(a) of the Code of Criminal Procedure of 1963 provides: "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant." 725 ILCS 5/110-14(a) (West 2010). The State has no objection to the application of the $5 toward the drug-court assessment. However, as stated above, that fine was improperly applied to defendant by the clerk where he never participated in drug court. On remand, defendant should be credited $5

against any eligible fines. We note such monetary credit is unavailable to offset defendant's Violent Crime Victims Assistance Fund assessment. See 725 ILCS 240/10(c) (West 2010) (Violent Crime Victims Assistance Fund assessment "shall not be subject to the provisions of Section 110-14 of the Code").

¶ 52 8. *Genetic Marker Grouping Analysis Assessment*

¶ 53 The record reflects the circuit clerk imposed a $200 genetic marker grouping analysis fee (730 ILCS 5/5-4-3(j) (West 2010)). At sentencing, the trial court stated defendant was to pay that fee unless he had already done so. Defendant argues this fee should be vacated because his genetic sample was already in the database.

¶ 54 In *Marshall*, the supreme court vacated the defendant's successive genetic marker grouping analysis fee. *People v. Marshall*, 242 Ill. 2d 285, 303, 950 N.E.2d 668, 679 (2011) (finding the assessment is authorized "only where that defendant is not currently registered in the [deoxyribonucleic acid] database"). *Marshall*, 242 Ill. 2d at 303, 950 N.E.2d at 679. While the defendant raised the issue for the first time on appeal, *i.e.*, he did not include the issue in his motion to reconsider his sentence, the supreme court ruled the claim could be raised at any time. See *People v. Marshall*, 402 Ill. App. 3d 1080, 1082, 931 N.E.2d 1271, 1273 (2010); *Marshall*, 242 Ill. 2d at 302, 950 N.E.2d at 679 (because the successive fee was statutorily unauthorized, it was void).

¶ 55 Following *Marshall*, the supreme court issued *Castleberry*, which, as stated above, abolished the rule a statutorily unauthorized sentence is void. *Castleberry*, 2015 IL 116916, ¶ 11, 43 N.E.3d 932. Pursuant to *Castleberry*, where a sentencing court has jurisdiction, a statutorily unauthorized sentence is merely voidable and not subject to collateral attack.

Castleberry, 2015 IL 116916, ¶ 11, 43 N.E.3d 932. However, as discussed above, we possess jurisdiction to rule on any amount improperly imposed by the circuit clerk. See *Gutierrez*, 2012 IL 111590, ¶ 14, 962 N.E.2d 437. Here, the circuit clerk only had the authority from the court to assess the genetic marker grouping analysis fee if defendant had not previously submitted a sample. The document provided by defendant from the Illinois State Police indexing lab indicates his genetic sample had been in the database since 2005. Accordingly, we vacate this assessment.

¶ 56 9. *Collection and Late Fees*

¶ 57 Finally, the $170.78 collection fee and $74.25 late fee imposed in this case are based on the total amount of assessments imposed by the circuit clerk. See 725 ILCS 5/124A-10 (West 2010); 730 ILCS 5/5-9-3(e) (West 2010). Because the fines in this case were not judicially imposed, and the genetic marker grouping analysis fee was improperly imposed, we direct the circuit clerk to vacate the collection and late fees. *Smith*, 2014 IL App (4th) 121118, ¶ 88, 18 N.E.3d 912.

¶ 58 III. CONCLUSION

¶ 59 For the foregoing reasons, we (1) affirm the trial court's first-stage dismissal of defendant's postconviction petition; (2) vacate the (a) $50 court-finance fee, (b) $10 arrestee's medical assessment, (c) $5 drug-court assessment, (d) $30 juvenile-expungement-fund assessment, (e) $10 State Police operations assessment, (f) $20 Violent Crime Victims Assistance fund assessment, (g) $200 genetic marker grouping analysis fee, (h) $170.78 collection fee and the $74.25 late fee; and (3) remand for the (a) recalculation of the Violent Crime Victims Assistance Fund assessment, (b) application of defendant's $5 credit toward any

eligible fines, and (c) issuance of an amended sentencing 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 (West 2014).

¶ 60 Affirmed in part and vacated in part; cause remanded with directions.