2016 IL App (5th) 130178-U

NO. 5-13-0178

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Marion County.
	)	
v.	)	No. 08-CF-258
	)	
CHARLES S. COOK,	)	Honorable
	)	Sherri L. E. Tungate,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: First-stage dismissal of the defendant's postconviction petition was not proper where the petition set forth the gist of a constitutional claim and supporting affidavits or other documentation was not required due to the fact that the petition alleged ineffective assistance of counsel.

¶ 2 The defendant, Charles S. Cook, appeals the first-stage dismissal of his *pro se* postconviction petition. He alleged in his petition that he received ineffective assistance of counsel. The court dismissed the petition on the grounds that the defendant did not attach affidavits or other supporting documentation. On appeal, the defendant argues that (1) supporting documentation was not required due to an exception for claims of ineffective assistance of counsel; (2) the petition set forth the gist of a constitutional

claim sufficient to survive first-stage dismissal; (3) he is entitled to a $5-per-day credit against the Child Advocacy Center assessment imposed on him because this charge has been held to be a fine; and (4) the Violent Crime Victims Assistance Fund assessment must be reduced to $4 because it was not the only fine imposed on him. We reverse and remand for further proceedings with directions.

¶ 3 The defendant was found guilty after a trial on one charge of participating in methamphetamine manufacturing (720 ILCS 646/15(a)(2)(C) (West 2008)). The defendant filed a *pro se* posttrial motion raising several claims of ineffective assistance of counsel. The trial court allowed counsel to withdraw and appointed a public defender to represent the defendant. Newly appointed counsel filed an amended motion, arguing that trial counsel was ineffective for failure to interview potential witnesses and for eliciting testimony that was harmful to the defendant. After a hearing on the motion, the court rejected these claims. The court subsequently sentenced the defendant to a prison term of 16 years. In addition, the court ordered the defendant to pay a Child Advocacy Center assessment of $30 and a Violent Crime Victims Assistance Fund assessment of $20.

¶ 4 The defendant then filed a direct appeal, arguing that the evidence was insufficient to prove him guilty beyond a reasonable doubt and that the court erred in admitting evidence that he smoked methamphetamine. This court affirmed the defendant's conviction on May 4, 2012. *People v. Cook*, 2012 IL App (5th) 090303-U.

¶ 5 On March 1, 2013, the defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)). In the petition itself, he alleged that he was denied the effective assistance of counsel "at the pre-trial stage,"

during trial, and on appeal. He alleged that trial counsel was not prepared for trial and that "numerous mistakes were made."

¶ 6 Attached to the petition was a memorandum of law. Under the heading "Mis-Advice About Plea Bargain," the defendant alleged that "a plea bargain was offered by the State's Attorney's office of 12 years in prison in exchange for a guilty plea." He further alleged that "[i]t was communicated to the defendant that he would have to do six years on this sentence"; however, due to a recent change in the law regarding good-time sentence credit, the defendant would have to serve at least 75% of any eventual sentence imposed. The defendant argued that "[t]his lack of communicating the higher penalties involved in this case was a serious error." He asserted that if he "would have known of the change in penalties, he may have taken the plea deal offered by the State."

¶ 7 The defendant alleged that this offer was made twice. The first time the State made the offer, the defendant was represented by an appointed public defender. The defendant alleged that, after he retained private counsel, the State offered the same plea deal, "and again, no one informed defendant of the higher penalties involved with the new class X drug sentencing law now in effect." He alleged that this error was compounded because his new attorney "never told Defendant the possible sentencing he was facing." He asserted that counsel informed him before trial that the possible sentencing range was 9 to 14 years when in fact it was 9 to 40 years. In addition, the defendant alleged that the evidence was insufficient to prove him guilty beyond a reasonable doubt, and he raised several additional claims of ineffective assistance of counsel. The defendant attached an affidavit in which he averred that the statements in

his petition were true to the best of his knowledge and belief. He did not attach any other affidavits or documentation.

¶ 8 On March 20, 2013, the court entered an order dismissing the defendant's petition. The court found that most of the issues raised in the petition had already been adjudicated. The court explained that this court resolved the defendant's sufficiency-of-the-evidence argument in his direct appeal, and the trial court resolved all of the ineffective assistance claims at the hearing on the defendant's posttrial motion. The court then addressed the defendant's argument that both of his attorneys were ineffective for failing to properly advise him when the State offered a plea agreement. The court found that the defendant's failure to attach affidavits, records, or other evidence in support of his contentions, as required by section 122-2 of the Post-Conviction Hearing Act (725 ILCS 5/122-2 (West 2012)), or to explain the absence of such documentation "is fatal to a post-conviction petition and by itself justifies the petition's dismissal." The court also rejected the defendant's assertion of ineffective assistance of appellate counsel, explaining that appellate counsel was not ineffective for failing to raise issues that had no merit. This appeal followed.

¶ 9 The defendant argues that the court erred in dismissing his petition on the basis that he did not attach affidavits or other records to support his claim. He argues that (1) because he alleged ineffective assistance of counsel, he could not be expected to obtain an affidavit from counsel to support his claim; and (2) his petition made out the gist of a constitutional claim. We agree.

¶ 10 The Post-Conviction Hearing Act provides a procedure through which a prisoner can challenge his conviction on the basis that it resulted from a substantial deprivation of constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Postconviction proceedings have three distinct stages. *Id*. at 10. This appeal involves first-stage proceedings. At the first stage, the postconviction court reviews the petition to determine whether it is frivolous or patently without merit. *Id*. In order to survive a first-stage dismissal, the petition need only set forth the gist of a constitutional claim. *Id*. at 9. Because most postconviction petitions are drafted by *pro se* defendants with little or no legal training, the threshold for meeting this standard is low. *Id*. Our supreme court has held that a petition is frivolous or patently without merit if it has "no arguable basis either in law or in fact." *Id*. at 17. To meet this standard, a *pro se* defendant "need only present a limited amount of detail in the petition." *Id*. at 9. However, the defendant must allege enough facts to show that he has an arguable constitutional claim. *Id*.

¶ 11 In addition, the petition must be verified by a sworn affidavit, such as the one the defendant provided here. *People v. Collins*, 202 Ill. 2d 59, 65 (2002) (citing 725 ILCS 5/122-1(b) (West 2000)). The petition must also be "supported by 'affidavits, records, or other evidence.' " *Id*. (quoting 725 ILCS 5/122-2 (West 2000)). If supporting affidavits or other documents are not available, the petition must explain why they are unavailable. *Id*. Failure to provide supporting affidavits or other documents or to explain their absence is a sufficient basis on which to dismiss a postconviction petition at the first stage. *Id*. at 66.

¶ 12 Our supreme court has carved out a narrow exception to this requirement for cases involving allegations of ineffective assistance of counsel where it is apparent from the allegations in the petition that the only affidavit the defendant could supply would be that of his attorney. *People v. Williams*, 47 Ill. 2d 1, 4 (1970). In such cases, "[t]he difficulty or impossibility of obtaining such an affidavit is self-apparent." *Id.* Thus, the explanation for the absence of affidavits or other supporting documentation can be readily inferred from the allegations of the petition. *People v. Hall*, 217 Ill. 2d 324, 333 (2005); *Collins*, 202 Ill. 2d at 68. We review *de novo* the court's decision to dismiss the defendant's petition. *Collins*, 202 Ill. 2d at 66.

¶ 13 The State acknowledges that petitioners claiming ineffective assistance of counsel cannot be expected to obtain an affidavit from the attorney whose assistance is being challenged. The State argues, however, that here, unlike in *Williams*, the affidavits of the defendant's trial attorneys were not the only affidavits other than his own that the defendant could have supplied because he could have obtained affidavits from the State's attorneys who offered the plea deal. We are not persuaded.

¶ 14 The State calls our attention to two cases in which defendants did provide such affidavits–*People v. Whitfield*, 40 Ill. 2d 308 (1968), and *People v. Ferguson*, 90 Ill. App. 3d 416 (1980). The State contends that the defendants in *Whitfield* and *Ferguson* "obtained affidavits from prosecutors in circumstances similar to those alleged to exist here." Implicit in this assertion is a contention that it is reasonable to require such affidavits from *pro se* postconviction petitioners raising similar claims. Neither *Whitfield* nor *Ferguson* supports such a contention.

¶ 15 In *Whitfield*, the question before the court was "whether a defendant has the constitutional right to be advised by his counsel of the State's offer" of a plea agreement. *Whitfield*, 40 Ill. 2d at 309. There, an affidavit from the prosecuting attorney was attached to the petition. *Id*. The prosecutor stated in his affidavit that he offered to reduce the charge against the defendant from murder to manslaughter in exchange for the defendant's plea. *Id*. at 309-10. He stated that he presented this offer to defense counsel. *Id*. at 310. Defense counsel testified at a hearing on the petition. He admitted that he did not discuss the plea offer with the defendant, stating that he believed he would win the case at trial. *Id*. The postconviction court denied relief. The court held that, as a matter of law, counsel's failure to communicate the offer to the defendant did not violate his constitutional rights. *Id*. at 309. The supreme court reversed, explaining that a defendant has the right to decide how to plead. *Id*. at 311.

¶ 16 In *Ferguson*, the defendant likewise claimed that counsel failed to inform him of a plea agreement offered by the State. *Ferguson*, 90 Ill. App. 3d at 418. There, the defendant filed a *pro se* postconviction petition. He then retained an attorney, who filed a supplemental petition on his behalf. *Id*. at 417. The supplemental petition was supported by five affidavits (*id.*), including an affidavit from the prosecuting attorney (*id*. at 418) and an affidavit from defense counsel (*id*. at 418). The prosecutor averred that he asked defense counsel if the defendant would accept a specific sentence in exchange for a plea to voluntary manslaughter. However, he could not recall what sentence he had offered. *Id*. Defense counsel averred that the State did not offer to reduce the charge from murder to manslaughter. *Id*. The postconviction court resolved this discrepancy by finding that

the communication described by the prosecutor did in fact take place and was not relayed to the defendant. *Id*. at 419.

¶ 17 The issue in *Ferguson* was whether the prosecutor's communication "can be deemed an offer in any contractual sense which should have been conveyed to defendant which he could have accepted." *Id*. at 420. The postconviction court denied relief, emphasizing the lack of a specific sentence in the terms of the offer described in the prosecutor's affidavit. *Id*. at 419. The appellate court reversed, finding that (1) the fact that the prosecutor could not recall the specific sentence he offered does not mean that he did not offer a specific sentence (*id*. at 421), and (2) even if the prosecutor's question to defense counsel is deemed a plea discussion rather than an offer, counsel had an obligation to inform the defendant (*id*. at 422).

¶ 18 Thus, the courts in *Whitfield* and *Ferguson* were called upon to resolve legal questions involving the substance of the defendants' claims; neither court was called upon to consider the sufficiency of a petition to survive a first-stage dismissal. As noted previously, the State argues only that these cases are illustrative of the availability of affidavits from prosecutors in circumstances it contends are similar to the circumstances of this case. We reject this contention for two reasons. First, the defendants in both *Whitfield* and *Ferguson* had the assistance of counsel before their petitions were dismissed or denied. It is obviously more reasonable to expect an attorney to obtain affidavits from prosecutors than it is to expect a *pro se* petitioner to do so. Second, those cases were resolved at the second and third stages of postconviction proceedings. At both the second and third stages, "the defendant bears the burden of making a substantial

showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Thus, we disagree with the State's assertion that the cases involve circumstances similar to those involved here. We find no support in either case for the State's position.

¶ 19 The State also calls our attention to *People v. Jackson*, 213 Ill. App. 3d 806 (1991). Unlike *Whitfield* and *Ferguson*, the *Jackson* court did address the requirement of supporting affidavits or other documentation. As the State correctly contends, the *Jackson* court specifically distinguished the case before it from both *Whitfield* and *Ferguson* on the basis that in those cases, the petitions were supported by affidavits, including those of prosecutors. *Jackson*, 213 Ill. App. 3d at 811. However, the State's argument that a similar result is warranted here overlooks a critical distinction–*Jackson* did not involve the first-stage dismissal of a *pro se* petition.

¶ 20 In *Jackson*, the defendant alleged that his trial attorney was ineffective for failing to advise him of the possibility of an extended-term sentence. *Id*. at 807-08. The court appointed an attorney to represent the defendant. Through counsel, the defendant filed two amended petitions. *Id*. In the second amended petition, the defendant alleged that because he was unaware that he could receive an extended-term sentence, he turned down the State's offer of a plea deal pursuant to which the State would have recommended a sentence of four years in exchange for his plea. *Id*. at 808. The amended petition did not include any supporting affidavits or other evidence. *Id*. at 811. The postconviction court granted the State's motion to dismiss (*id*. at 809), and the appellate court affirmed that ruling (*id*. at 812). The court explained that the defendant failed to meet his burden of

making a substantial showing of a deprivation of constitutional rights because the petition was not supported by any affidavits. *Id*. at 811.

¶ 21 The fact that *Jackson* involved the dismissal of a petition at the second stage of postconviction proceedings is a critical distinction for two reasons. First, as we have already emphasized, the defendant there had the assistance of counsel in presenting his case to the court. See *Pendleton*, 223 Ill. 2d at 473 (noting that at the second stage, postconviction petitioners are afforded "the advantages of appointed counsel"). As our discussion of *Whitfield* and *Ferguson* demonstrates, this made it much more reasonable to expect the defendant to supply this type of documentation. Perhaps more importantly, as we have just noted, at the second stage of postconviction proceedings, the defendant must make a substantial showing of a deprivation of constitutional rights in order to be entitled to have his petition advance to the third stage–an evidentiary hearing. *Pendleton*, 223 Ill. 2d at 473; *Jackson*, 213 Ill. App. 3d at 810-11. This is a much higher standard than simply setting forth the gist of a constitutional claim. Thus, we find no support for the State's position in *Jackson*. We conclude that the explanation for the unavailability of supporting affidavits may be inferred from the allegations in the petition. Thus, we find that the court erred in dismissing it on this basis.

¶ 22 Alternatively, the State argues that we may affirm the court's order dismissing the defendant's petition on the basis that the allegations in the petition fail to set forth the gist of a constitutional claim. We disagree.

¶ 23 Plea counsel provides ineffective assistance when he or she fails to ensure that the defendant enters a plea knowingly and voluntarily. *People v. Kitchell*, 2015 IL App (5th)

120548, ¶ 8. In order for the plea to be knowing and voluntary, the defendant must be advised of the direct consequences of his plea. *People v. Hughes*, 2012 IL 112817, ¶ 35. In evaluating claims of ineffective assistance of counsel involving advice about sentencing at the pleading stage, courts have generally distinguished between direct and collateral consequences of a plea. See *People v. Stewart*, 381 Ill. App. 3d 200, 204 (2008). The amount of good-conduct credit available to a defendant is considered a collateral consequence. Thus, allegations that counsel failed to inform a defendant of the amount of good-time credit available to him do not support a claim of ineffective assistance of counsel. *People v. Frison*, 365 Ill. App. 3d 932, 933-34 (2006). However, allegations that counsel affirmatively misinformed a defendant about collateral consequences of his plea, such as good-conduct credit, can form the basis of a claim of ineffective assistance. *Stewart*, 381 Ill. App. 3d at 206.

¶ 24 The State argues that the defendant's petition does not allege that counsel affirmatively gave him incorrect advice about the amount of good-conduct sentence credit available to him. Instead, according to the State, the petition alleges only that counsel failed to inform him of the correct amount of good-conduct credit available and that some unidentified individual misinformed the defendant. In support of this contention, the State relies largely on the defendant's use of the passive voice. As stated earlier, he alleged that when the State first made the plea offer, "it was communicated" to him that he would have to serve half of his sentence. This occurred while he was represented by a public defender before retaining a private attorney. According to the State, if the person who communicated this information to the defendant was the public

defender, "there is no reason why the defendant could not have supplied this information in the petition." The State goes on to note that the defendant's allegations concerning his second attorney focus on that attorney's "failure to communicate the higher penalties involved with the new class X drug sentencing law."

¶ 25 We reject the State's argument for two reasons. First, the State's argument is a semantic one. Reading the allegations in context, we find that the defendant adequately alleged that he was misinformed about the availability of the credit by his public defender. At the first stage, allegations must be construed liberally in favor of the petitioner. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). In addition, we must recognize that a *pro se* petitioner is unlikely to draft a petition as artfully as an attorney might. *People v. Edwards*, 197 Ill. 2d 239, 259 (2001) (quoting *People v. Baugh*, 132 Ill. App. 3d 713, 717 (1985)). We do not believe the defendant's petition should be dismissed at this stage simply because it was inartfully drafted.

¶ 26 Second, even if we were to agree with the State's interpretation of the language in the petition, the defendant also explicitly alleged that his second attorney advised him that the sentencing range for the offense was 9 to 14 years rather than 9 to 40 years. This clearly constitutes an allegation that counsel misinformed the defendant about a direct consequence of his plea. Thus, we agree with the defendant that his petition sets forth the gist of a constitutional claim. Whether he can make the substantial showing necessary to advance to the third stage of postconviction proceedings is not before us.

¶ 27 Finally, the defendant raises two related arguments concerning the fines imposed upon him. He correctly argues that the Child Advocacy Center assessment, despite being

labeled a fee, has been held to constitute a fine. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 30. Thus, the defendant is entitled to $5-per-day credit against this assessment for time spent in custody prior to sentencing. 725 ILCS 5/110-14(a) (West 2008). He further contends that the Violent Crime Victims Assistance Fund assessment must also be reduced. The statute authorizing this fine provides that, if no other fine is imposed, the Violent Crime Victims Assistance Fund fine to be imposed is $20. If any other fines are imposed, however, the court is to impose a fine in the amount of "$4 for each $40, or fraction thereof" imposed under other fines. 725 ILCS 240/10(b) (West 2008); see also *Millsap*, 2012 IL App (4th) 110668, ¶ 32. The State concedes that the two fines must be reduced in this manner, and we agree. We therefore direct the court to apply the credit and recalculate the fines on remand.

¶ 28 For the foregoing reasons, we reverse the court's order dismissing the defendant's postconviction petition. We remand the matter to be docketed for second-stage proceedings, and we direct the court to recalculate the defendant's fines as discussed.

¶ 29 Reversed and remanded with directions.